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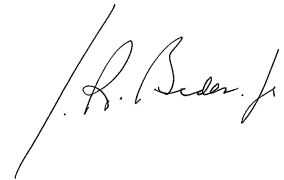
The President

Delegation of Authorities Under Sections 507(d) and 508(a) of the Ukraine Security Supplemental Appropriations Act, 2024

Memorandum for the Secretary of State

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, I hereby delegate to the Secretary of State the authorities under sections 507(d) and 508(a) of the Ukraine Security Supplemental Appropriations Act, 2024 (Division B of Public Law 118–50).

You are authorized and directed to publish this memorandum in the *Federal Register*.



THE WHITE HOUSE,
Washington, November 15, 2024

Presidential Documents

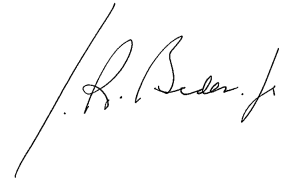
Memorandum of November 20, 2024

Delegation of Authority Under Section 614(a)(1) of the Foreign Assistance Act of 1961

Memorandum for the Secretary of State

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 621 of the Foreign Assistance Act of 1961 (FAA), I hereby delegate to the Secretary of State the authority under section 614(a)(1) of the FAA to determine whether it is important to the security interests of the United States to furnish up to \$35 million in assistance to Ukraine without regard to any provision of law within the purview of section 614(a)(1) of the FAA.

You are authorized and directed to publish this memorandum in the *Federal Register*.



THE WHITE HOUSE,
Washington, November 20, 2024

Presidential Documents

Proclamation 10869 of December 6, 2024

National Pearl Harbor Remembrance Day, 2024

By the President of the United States of America

A Proclamation

On National Pearl Harbor Remembrance Day, we honor the 2,403 service members and civilians who were killed on that tragic December morning 83 years ago. And we recognize the absolute courage of the service members who, in the wake of this painful and unprovoked attack, stood up to defend democracy and stand up to fascism abroad in World War II.

As we reflect on the honors and triumphs of the Greatest Generation, we must remember that they risked all, dared all, and gave all not for a person or a place—but for the idea of America. They recognized that freedom is never guaranteed: Every generation has had to earn and defend it in the battle between autocracy and democracy. This service and sacrifice helped deliver a world grounded in peace and security. And together, these brave women and men proved that no force—not destruction, death, or the darkness of hate—is a match for the flame of liberty that ignites the hearts of free people everywhere.

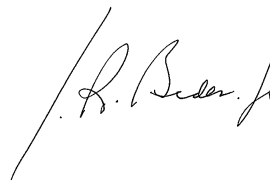
Today, we must be keepers of their mission and bearers of the flame of freedom they kept burning bright. That begins by honoring our sacred obligation to care for our service members and veterans and their families, caregivers, and survivors—especially our World War II veterans whose actions ensured that democracy endured. That is why my Administration began enrolling all World War II veterans, regardless of length of service or financial status, in Veterans Affairs health care services. And we also expanded access to benefits for those who participated in testing and clean-up activities related to World War II weapons programs, helping address radiation related illnesses for veterans and civilians.

During National Pearl Harbor Remembrance Day, may we remember the brave patriots whose lives were cut short on this day 83 years ago. May we honor all the service members who gave their last full measure of devotion to defend democracy in the years that followed. And may we all recommit to fulfilling the future they fought for—one grounded in freedom, democracy, equality, and opportunity for all.

The Congress, by Public Law 103–308, as amended, has designated December 7 of each year as “National Pearl Harbor Remembrance Day.” Today, let us commemorate the patriots who perished and who were wounded on December 7, 1941, and continue to fulfill our sacred obligation to care for our service members; our veterans; and their families, caregivers, and survivors.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, do hereby proclaim December 7, 2024, as National Pearl Harbor Remembrance Day. I encourage all Americans to reflect on the courage shown by our brave service members that day and remember their sacrifices. I ask us all to give sincere thanks and appreciation to the survivors of that unthinkable day. I urge all Federal agencies, interested organizations, groups, and individuals to fly the flag of the United States at half-staff on December 7, 2024, in honor of those American patriots who died as a result of their service at Pearl Harbor.

IN WITNESS WHEREOF, I have hereunto set my hand this sixth day of December, 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 diagonal line that serves as a signature line.

Rules and Regulations

Federal Register

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Wednesday, December 11, 2024

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

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

U.S. AGENCY FOR GLOBAL MEDIA

2 CFR Chapter XIX

22 CFR Part 518

[3112-AA05]

Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards

AGENCY: U.S. Agency for Global Media

ACTION: Final rule.

SUMMARY: In this document, the U.S. Agency for Global Media (USAGM or the Agency) adopts the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance) initially set forth as guidance by the Office of Management and Budget (OMB) and published by OMB on December 26, 2013, and updated on April 4, 2024. This rule is necessary in order to incorporate into regulation and thus bring into effect the Uniform Guidance as required by OMB. Implementation of this guidance will reduce administrative burden and risk of waste, fraud, and abuse related to the Federal financial assistance awarded each year by the Agency. To avoid confusion, we additionally supersede existing agency regulations related to this same subject matter.

DATES: This regulation is effective December 11, 2024.

FOR FURTHER INFORMATION CONTACT: For general information, please contact Trina Mixson, Acting Chief Financial Officer, Office of the Chief Financial Officer, U.S. Agency for Global Media, 330 Independence Ave. SW, Washington, DC 20237; 202-322-9320; tmixson@usagm.gov.

SUPPLEMENTARY INFORMATION:

I. Discussion

USAGM is an independent establishment of the federal government that exercises authority over non-

military United States government broadcasting. USAGM oversees two federal entities—Voice of America and the Office of Cuba Broadcasting—and five grantee non-profit organizations—Radio Free Europe/Radio Liberty, Radio Free Asia, the Middle East Broadcasting Networks, the Open Technology Fund, and the Frontline Media Fund. Its broadcasting networks reach a cumulative weekly worldwide audience of more than 400 million people.

On December 19, 2014, OMB and more than 30 other federal agencies issued an interim final rule that implemented the final guidance on Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance). In that interim final rule, Federal awarding agencies joined together to implement the Uniform Guidance in their respective chapters of title 2 of the CFR, and, where approved by the OMB, implemented any exceptions to the Uniform Guidance by including the relevant language in their regulations. The intent of this effort was to simultaneously reduce administrative burden and the risk of waste, fraud, and abuse while delivering better performance. Implementation of the Uniform Guidance became effective on December 26, 2014 (79 FR 75867, December 19, 2014).

On April 4, 2024, OMB revised that guidance to incorporate recent OMB policy priorities related to Federal financing assistance and to reduce agency and recipient burden. The updated guidance seeks to improve Federal financial assistance management, transparency, and oversight through more accessible and readily comprehensible guidance and clarifies sections of the prior version of the guidance.

Although USAGM's predecessor agency, the Broadcasting Board of Governors, did not implement the guidance when initially codified in 2014, for the past several years USAGM has incorporated the guidance in its Federal financial assistance agreements. USAGM now takes the opportunity of the recent updates to join the more than 30 federal agencies that have already done so. USAGM does so to bring its federal assistance processes in line with best practices suggested by OMB, streamline its financial assistance

processes, and increase transparency. To avoid confusion, the agency additionally supersedes existing agency regulations relating to the same subject matter.

II. Justification To Issue Final Rule

Under the Administrative Procedure Act, a federal agency may issue a final rule without first issuing a notice of proposed rulemaking (NPRM) in several circumstances. Two apply to this rule. First, an agency need not issue a proposed rulemaking to a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts. This rule qualifies as a rule of agency procedure and practice related to the issuance and monitoring of federal awards. The Administrative Procedure Act therefore excepts this rule from traditional notice and comment periods.

Second, an agency must first find that issuing an NPRM would be impractical, unnecessary, or contrary to the public interest. As stated above, this rule incorporates—in full and without change—the Uniform Guidance developed by OMB. OMB initially issued the guidance only after considering public comment received following both an Advanced Notice of Public Guidance (available at www.regulations.gov under docket number OMB-2012-0002) and Notice of Proposed Guidance (available at www.regulations.gov under docket number OMB-2013-0001). Combined, those two dockets received more than 650 total comments. The public enjoyed similar opportunity to comment on the guidance more recently. OMB provided multiple opportunities for public comment when issuing the 2024 revisions to that guidance, including a Request for Information (available at www.regulations.gov under docket number OMB-2023-0007) and Notice of Proposed Guidance (available at www.regulations.gov under docket number OMB-2023-0017). Combined, those two dockets received more than 1150 total comments. Any NPRM issued by USAGM would be redundant of previous efforts by OMB, and is therefore unnecessary.

III. Procedural Matters

a. Paperwork Reduction Act

The Paperwork Reduction Act requires that agencies obtain OMB

approval before conducting a collection of information from the public. Any information collected under the regulations proposed does not to constitute a collection of information for the purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

b. Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and Executive Order 14094 (Modernizing Regulatory Review)

Executive Orders 12866, 13563, and 14094 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). OMB's Office of Information and Regulatory Affairs (OIRA) designated the implementation of the Uniform Guidance by OMB and more than 25 other agencies to be not significant in 2014. USAGM similar concludes that its implementation is not significant and therefore is not subject to mandatory prior review by the OIRA pursuant to Executive Orders 12866, 13563, or 14094.

c. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act requires that agencies prepare a budgetary impact statement before promulgating a rule that may result in the expenditure by State, local, and tribal governments, or by the private sector, of \$100 million or more in any one year. Upon first implementing the Uniform Guidance, OMB determined that its joint interim final rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of \$100 million or more in any one year. USAGM concurs. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532.

d. Regulatory Flexibility Act

The Regulatory Flexibility Act requires an agency issuing a final rule to provide a final regulatory flexibility analysis or to certify that the rule will not have a significant economic impact on a substantial number of small entities. In accordance with the RFA, USAGM certifies that this rule will not have a significant economic impact on a substantial number of small entities, and thus no regulatory flexibility analysis is required under 5 U.S.C. 603.

e. Executive Order 13132 (Federalism Assessment)

Executive Order 13132 limits an agency's ability to promulgate rules that have federalism implications, impose substantial compliance costs on state and local governments, or pre-empt state and local law. This proposed rule will not have sufficient federalism implications to warrant the preparation of a federalism assessment pursuant to Executive Order 13132.

List of Subjects in 2 CFR Part 1900

Accounting, Administrative practice and procedure, Grant programs, Grants administration, Loan programs, Nonprofit organizations, Reporting and recordkeeping requirements.

For the reasons discussed in the preamble, and under the authority of 5 U.S.C. 301 and 2 CFR part 200, the U.S. Agency for Global Media adds chapter XIX to 2 CFR subtitle B, consisting of parts 1900 through 1999, and removes 22 CFR part 518 as follows:

Title 2—Grants and Agreements

Subtitle B—Federal Agency Regulations for Grants and Agreements

CHAPTER XIX—U.S. AGENCY FOR GLOBAL MEDIA

PART 1900—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS

Sec.

1900.1 Adoption of 2 CFR part 200.

1900.2 [Reserved]

Authority: 5 U.S.C. 301; 2 CFR part 200

PART 1900—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS

§ 1900.1 Adoption of 2 CFR Part 200.

The United States Agency for Global Media adopts the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards set forth at 2 CFR part 200. Thus, this part gives regulatory effect to the terms of 2 CFR part 200 (as effective October 1, 2024).

§ 1900.2 [Reserved]

PARTS 1901–1999 [Reserved]

Dated: December 4, 2024.

Amanda Bennett,
Chief Executive Officer, U.S. Agency for Global Media.

[FR Doc. 2024–28864 Filed 12–10–24; 8:45 am]

BILLING CODE 8610–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2024–0228; Project Identifier MCAI–2022–00599–T; Amendment 39–22881; AD 2024–23–02]

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 a determination that new or more restrictive airworthiness limitations for certain brake accumulators are necessary. This AD requires revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. This AD also requires determining the accumulated landings on the affected brake accumulators. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 15, 2025.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of January 15, 2025.

ADDRESSES:

AD Docket: You may examine the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2024–0228; 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 under Docket No. FAA-2024-0228.

FOR FURTHER INFORMATION CONTACT:

Mark Taylor, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; 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 March 4, 2024 (89 FR 15517). The NPRM was prompted by AD CF-2022-25, dated May 17, 2022 (referred to after this as the MCAI), issued by Transport Canada, which is the aviation authority for Canada. The MCAI states that new or more restrictive airworthiness limitations (life limits) for certain brake accumulators have been developed, following in-service failures of brake accumulators on other types of airplanes with similar components. A brake accumulator surpassing a life limit could fail and result in loss of hydraulic pressure on the associated hydraulic system, which services the main and emergency/parking brakes on the main landing gear.

In the NPRM, the FAA proposed to require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations for certain brake accumulators and to determine the accumulated landings on the affected brake accumulators. The FAA is issuing this AD to address brake accumulators that could surpass a life limit and fail, resulting in loss of hydraulic pressure on the associated hydraulic system, which services the main and emergency/parking brakes on the main landing gear. The unsafe condition on these products could result in reduced or total loss of available braking and a possible runway excursion.

You may examine the MCAI in the AD docket at regulations.gov under Docket No. FAA-2024-0228.

Discussion of Final Airworthiness Directive**Comments**

The FAA received comments from three individuals who supported the NPRM without change.

The FAA received an additional comment from an individual who stated that accounting for the accumulated landings is a better method of gauging the necessity of maintenance or inspection on the brake accumulators since the accumulator is used in ground towing operations and to dampen sudden pressure changes in the aircraft's hydraulics during operation. The commenter stated another factor that might be accounted for is a potential difference in temperature during operation, especially if the brake accumulators in the Bombardier airplanes mentioned in the airworthiness directive have air (instead of nitrogen) as the fluid inside the accumulator.

The FAA agrees that the accumulated landings is the appropriate method of establishing the intervals for maintenance or inspection of the brake accumulators, as specified in the TLMCs. Reference to difference in temperature is unnecessary, as the currently stated calendar time requirements and accumulated landing requirements adequately and appropriately define the timing requirements of the needed actions. This methodology is consistent with that used by Transport Canada. The FAA has not changed the AD with regards to this issue.

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, 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 the following Bombardier material. This material specifies new or more restrictive airworthiness limitations for the No. 2 and No. 3 brake accumulators having certain part numbers. These documents are distinct since they apply to different airplane configurations.

- Section 5-10-11, "Life Limits (Systems)," of Part 2, "Airworthiness Limitations," of the Bombardier Global 5000 Featuring Global Vision Flight Deck Time Limits/Maintenance Checks (TLMC), Publication No. GL 5000 GVFD TLMC, Revision 16, dated December 19, 2023, which includes Tasks 32-43-37-01, "Discard the No. 2 Brake Accumulator, Part No. GW415-1250-1" and 32-44-05-101, "Discard the No. 3 Brake Accumulator, Part No. GW415-1200-1/-3." (For obtaining the tasks for Bombardier Global 5000 Featuring GVFD TLMC, Publication No. GL 5000 GVFD TLMC, use Document Identification No. GL 5000 GVFD TLMC.)

- Section 5-10-11, "Life Limits (Systems)," of Part 2, "Airworthiness Limitations," of the Bombardier Global 5000 Time Limits/Maintenance Checks, Publication No. BD-700 TLMC, Revision 26, dated December 19, 2023, which includes Tasks 32-43-37-101, "Discard the No. 2 Brake Accumulator, Part No. GW415-1250-1" and 32-44-05-101, "Discard the No. 3 Brake Accumulator, Part No. GW415-1200-1/-3." (For obtaining the tasks for Bombardier Global 5000 TLMC, Publication No. BD-700 TLMC, use Document Identification No. GL 5000 TLMC.)

- Section 5-10-11, "Life Limits (Systems)," of Part 2, "Airworthiness Limitations," of the Bombardier Global 6000 Time Limits/Maintenance Checks, Publication No. GL 6000 TLMC, Revision 16, dated December 19, 2023, which includes Tasks 32-43-37-101, "Discard the No. 2 Brake Accumulator, Part No. GW415-1250-1" and 32-44-05-101, "Discard the No. 3 Brake Accumulator, Part No. GW415-1200-1/-3." (For obtaining the tasks for Bombardier Global 6000 TLMC, Publication No. GL 6000 TLMC, use Document Identification No. GL 6000 TLMC.)

- Section 5-10-11, "Life Limits (Systems)," of Part 2, "Airworthiness Limitations," of the Bombardier Global Express Time Limits/Maintenance Checks, Publication No. BD-700 TLMC, Revision 35, dated December 19, 2023, which includes Tasks 32-43-37-101, "Discard the No. 2 Brake Accumulator,

Part No. GW415-1250-1” and 32-44-05-101, “Discard the No. 3 Brake Accumulator, Part No. GW415-1200-1/-3.” (For obtaining the tasks for Bombardier Global Express TLMC, Publication No. BD-700 TLMC, use Document Identification No. GL 700 TLMC.)

- Section 5-10-11, “Life Limits (Systems),” of Part 2, “Airworthiness Limitations,” of the Bombardier Global Express XRS Time Limits/Maintenance Checks, Publication No. BD-700 XRS TLMC, Revision 22, dated December 19, 2023, which includes Tasks 32-43-37-101, “Discard the No. 2 Brake Accumulator, Part No. GW415-1250-1” and 32-44-05-101, “Discard the No. 3 Brake Accumulator, Part No. GW415-1200-1/-3.” (For obtaining the tasks for Bombardier Global Express XRS TLMC, Publication No. BD-700 XRS TLMC, use Document Identification No. GL XRS TLMC.)

- Section 5-10-11, “Life Limits (Systems),” of Part 2, “Airworthiness Limitations,” of the Bombardier Global 5500 Time Limits/Maintenance Checks, Publication No. GL 5500 TLMC, Revision 5, dated December 19, 2023, which includes Task 32-44-05-101, “Discard the No. 3 Brake Accumulator, Part No. GW415-1200-3.” (For obtaining the task for Bombardier Global 5500 TLMC, Publication No. GL 5500

TLMC, use Document Identification No. GL 5500 TLMC.)

- Section 5-10-11, “Life Limits (Systems),” of Part 2, “Airworthiness Limitations,” of the Bombardier Global 6500 Time Limits/Maintenance Checks, Publication No. GL 6500 TLMC, Revision 5, dated December 19, 2023, which includes Task 32-44-05-101, “Discard the No. 3 Brake Accumulator, Part No. GW415-1200-3.” (For obtaining the task for Bombardier Global 6500 TLMC, Publication No. GL 6500 TLMC, use Document Identification No. GL 6500 TLMC.)

The FAA also reviewed the following material, which specifies procedures for determining the accumulated landings on the brake accumulators. Knowing the accumulated landings is necessary to comply with the life limit. These documents are distinct because they apply to different airplane configurations.

- Bombardier Service Bulletin 700-1A11-32-030, Revision 02, dated March 2, 2023.

- Bombardier Service Bulletin 700-32-043, Revision 02, dated March 2, 2023.

- Bombardier Service Bulletin 700-32-5020, Revision 02, dated March 2, 2023.

- Bombardier Service Bulletin 700-32-5506, Revision 02, dated March 2, 2023.

- Bombardier Service Bulletin 700-32-6020, Revision 02, dated March 2, 2023.

- Bombardier Service Bulletin 700-32-6506, Revision 02, dated March 2, 2023.

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

The FAA has determined that revising the maintenance or inspection program takes an average of 90 work-hours per operator, although the agency recognizes that this number may vary from operator to operator. Since operators incorporate maintenance or inspection program changes for their affected fleet(s), the FAA has determined that a per-operator estimate is more accurate than a per-airplane estimate. Therefore, the agency estimates the average total cost per operator to be \$7,650 (90 work-hours × \$85 per work-hour).

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
1.5 work-hours × \$85 per hour = \$128	\$0	\$128	\$14,976

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:

2024-23-02 Bombardier, Inc.: Amendment 39-22881; Docket No. FAA-2024-0228; Project Identifier MCAI-2022-00599-T.

(a) Effective Date

This airworthiness directive (AD) is effective January 15, 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 9002 through 9998 inclusive, and 60001 through 60046 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code 05, Time Limits/Maintenance Checks; 32, Landing Gear.

(e) Reason

This AD was prompted by a determination that new or more restrictive airworthiness limitations for certain brake accumulators are necessary. The FAA is issuing this AD to address brake accumulators that could surpass a life limit and fail, resulting in loss of hydraulic pressure on the associated hydraulic system, which services the main and emergency/parking brakes on the main landing gear. The unsafe condition, if not addressed, could result in reduced or total loss of available braking and a possible runway excursion.

(f) Compliance

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

(g) Maintenance or Inspection Program Revision

Within 90 days after the effective date of this AD, revise the existing maintenance or inspection program, as applicable, to incorporate the information in the tasks specified in table 1 to paragraph (g) of this AD of Section 5-10-11, "Life Limits (Systems)," of Part 2, "Airworthiness Limitations," of the applicable Time Limits/Maintenance Checks (TLMC) Manual. The initial compliance time for doing the tasks is at the time specified in the tasks specified in table 1 to paragraph (g) of this AD, or within 90 days after the effective date of this AD, whichever occurs later.

TABLE 1 TO PARAGRAPH (g)—APPLICABLE TLMC MANUALS AND SERVICE BULLETINS

Airplane model and TLMC manual	Task Number 32-43-37-101 (Discard the No. 2 Brake Accumulator, Part No. GW415-1250-1) TLMC Revision	Task Number 32-44-05-101 (Discard the No. 3 Brake Accumulator, Part No. GW415-1200-1/-3) TLMC Revision	Bombardier service bulletin number
BD-700-1A10, Bombardier Global Express TLMC, Publication No. BD-700 TLMC ¹ .	Revision 35, dated December 19, 2023.	Revision 35, dated December 19, 2023.	700-32-043, Revision 02, dated March 2, 2023.
BD-700-1A10, Bombardier Global Express XRS TLMC, Publication No. BD-700 XRS TLMC ² .	Revision 22, dated December 19, 2023.	Revision 22, dated December 19, 2023.	700-32-043, Revision 02, dated March 2, 2023.
BD-700-1A10, Bombardier Global 6000 TLMC, Publication No. GL 6000 TLMC ³ .	Revision 16, dated December 19, 2023.	Revision 16, dated December 19, 2023.	700-32-6020, Revision 02, dated March 2, 2023.
BD-700-1A10, Bombardier Global 6500 Time Limits/Maintenance Checks, Publication No. GL 6500 TLMC ⁴ .	No action required by this AD because all airplanes were delivered with this task in their maintenance or inspection program and must comply with the task as part of the approved type design.	Revision 5, dated December 19, 2023.	700-32-6506, Revision 02, dated March 2, 2023.
BD-700-1A11, Bombardier Global 5000 TLMC, Publication No. BD-700 TLMC ⁵ .	Revision 26, dated December 19, 2023.	Revision 26, dated December 19, 2023.	700-1A11-32-030, Revision 02, dated March 2, 2023.
BD-700-1A11, Bombardier Global 5000 Featuring Global Vision Flight Deck TLMC, Publication No. GL 5000 GVFD TLMC ⁶ .	Revision 16, dated December 19, 2023.	Revision 16, dated December 19, 2023.	700-32-5020, Revision 02, dated March 2, 2023.
BD-700-1A11, Bombardier Global 5500 TLMC, Publication No. GL 5500 TLMC ⁷ .	No action required by this AD because all airplanes were delivered with this task in their maintenance or inspection program and must comply with the task as part of the approved type design.	Revision 5, dated December 19, 2023.	700-32-5506, Revision 02, dated March 2, 2023.

¹For obtaining the tasks for Bombardier Global Express TLMC, Publication No. BD-700 TLMC, use Document Identification No. GL 700 TLMC.

²For obtaining the tasks for Bombardier Global Express XRS TLMC, Publication No. BD-700 XRS TLMC, use Document Identification No. GL XRS TLMC.

³For obtaining the tasks for Bombardier Global 6000 TLMC, Publication No. GL 6000 TLMC, use Document Identification No. GL 6000 TLMC.

⁴For obtaining the task for Bombardier Global 6500 Time Limits/Maintenance Checks, Publication No. GL 6500 TLMC, use Document Identification No. GL 6500 TLMC.

⁵For obtaining the tasks for Bombardier Global 5000 TLMC, Publication No. BD-700 TLMC, use Document Identification No. GL 5000 TLMC.

⁶For obtaining the tasks for Bombardier Global 5000 Featuring GVFD TLMC, Publication No. GL 5000 GVFD TLMC, use Document Identification No. GL 5000 GVFD TLMC.

⁷For obtaining the task for Bombardier Global 5500 TLMC, Publication No. GL 5500 TLMC, use Document Identification No. GL 5500 TLMC.

(h) Determination of Accumulated Landings

Within 90 days after the effective date of this AD, determine the accumulated landings on the installed No. 2 and No. 3 brake accumulators in accordance with Paragraph

2.A. of the Accomplishment Instructions of the applicable service bulletin specified in table 1 to paragraph (g) of this AD.

(i) No Alternative Actions or Intervals

After the existing maintenance or inspection program has been revised as required by paragraph (g) of this AD, no alternative actions (e.g., inspections) or

intervals may be used unless the actions and intervals are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (k)(1) of this AD.

(j) Credit for Previous Actions

This paragraph provides credit for actions required by paragraph (h) of this AD, if those actions were performed before the effective date of this AD using the applicable service information specified in paragraphs (j)(1) through (12) of this AD.

- (1) Bombardier Service Bulletin 700–1A11–32–030, dated October 27, 2021.
- (2) Bombardier Service Bulletin 700–1A11–32–030, Revision 01, dated March 8, 2022.
- (3) Bombardier Service Bulletin 700–32–043, dated October 27, 2021.
- (4) Bombardier Service Bulletin 700–32–043, Revision 01, dated March 8, 2022.
- (5) Bombardier Service Bulletin 700–32–5020, dated October 27, 2021.
- (6) Bombardier Service Bulletin 700–32–5020, Revision 01, dated March 8, 2022.
- (7) Bombardier Service Bulletin 700–32–5506, dated October 27, 2021.
- (8) Bombardier Service Bulletin 700–32–5506, Revision 01, dated March 8, 2022.
- (9) Bombardier Service Bulletin 700–32–6020, dated October 27, 2021.
- (10) Bombardier Service Bulletin 700–32–6020, Revision 01, dated March 8, 2022.
- (11) Bombardier Service Bulletin 700–32–6506, dated October 27, 2021.
- (12) Bombardier Service Bulletin 700–32–6506, Revision 01, dated March 8, 2022.

(k) Other FAA 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 (l)(1) 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 Bombardier, Inc.'s Transport Canada Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(l) Additional Information

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

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

(m) 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 this AD specifies otherwise.

(i) Bombardier Service Bulletin 700–1A11–32–030, Revision 02, dated March 2, 2023.

(ii) Bombardier Service Bulletin 700–32–043, Revision 02, dated March 2, 2023.

(iii) Bombardier Service Bulletin 700–32–5020, Revision 02, dated March 2, 2023.

(iv) Bombardier Service Bulletin 700–32–5506, Revision 02, dated March 2, 2023.

(v) Bombardier Service Bulletin 700–32–6020, Revision 02, dated March 2, 2023.

(vi) Bombardier Service Bulletin 700–32–6506, Revision 02, dated March 2, 2023.

(vii) Section 5–10–11, “Life Limits (Systems),” of Part 2, “Airworthiness Limitations,” of the Bombardier Global 5000 Time Limits/Maintenance Checks (TLMC), Publication No. BD–700 TLMC, Revision 26, dated December 19, 2023.

Note 1 to paragraph (m)(2)(vii):

For obtaining the tasks for Bombardier Global 5000 TLMC, Publication No. BD–700 TLMC, use Document Identification No. GL 5000 TLMC.

(viii) Section 5–10–11, “Life Limits (Systems),” of Part 2, “Airworthiness Limitations,” of the Bombardier Global 5000 Featuring Global Vision Flight Deck Time Limits/Maintenance Checks, Publication No. GL 5000 GVFD TLMC, Revision 16, dated December 19, 2023.

Note 2 to paragraph (m)(2)(viii):

For obtaining the tasks for Bombardier Global 5000 Featuring GVFD TLMC, Publication No. GL 5000 GVFD TLMC, use Document Identification No. GL 5000 GVFD TLMC.

(ix) Section 5–10–11, “Life Limits (Systems),” of Part 2, “Airworthiness Limitations,” of the Bombardier Global 5500 Time Limits/Maintenance Checks, Publication No. GL 5500 TLMC, Revision 5, dated December 19, 2023.

Note 3 to paragraph (m)(2)(ix):

For obtaining the task for Bombardier Global 5500 TLMC, Publication No. GL 5500 TLMC, use Document Identification No. GL 5500 TLMC.

(x) Section 5–10–11, “Life Limits (Systems),” of Part 2, “Airworthiness Limitations,” of the Bombardier Global 6000 Time Limits/Maintenance Checks, Publication No. GL 6000 TLMC, Revision 16, dated December 19, 2023.

Note 4 to paragraph (m)(2)(x):

For obtaining the tasks for Bombardier Global 6000 TLMC, Publication No. GL 6000 TLMC, use Document Identification No. GL 6000 TLMC.

(xi) Section 5–10–11, “Life Limits (Systems),” of Part 2, “Airworthiness Limitations,” of the Bombardier Global 6500 Time Limits/Maintenance Checks, Publication No. GL 6500 TLMC, Revision 5, dated December 19, 2023.

Note 5 to paragraph (m)(2)(xi):

For obtaining the task for Bombardier Global 6500 TLMC, Publication No. GL 6500 TLMC, use Document Identification No. GL 6500 TLMC.

(xii) Section 5–10–11, “Life Limits (Systems),” of Part 2, “Airworthiness Limitations,” of the Bombardier Global Express Time Limits/Maintenance Checks, Publication No. BD–700 TLMC, Revision 35, dated December 19, 2023.

Note 6 to paragraph (m)(2)(xii):

For obtaining the tasks for Bombardier Global Express TLMC, Publication No. BD–700 TLMC, use Document Identification No. GL 700 TLMC.

(xiii) Section 5–10–11, “Life Limits (Systems),” of Part 2, “Airworthiness Limitations,” of the Bombardier Global Express XRS Time Limits/Maintenance Checks, Publication No. BD–700 XRS TLMC, Revision 22, dated December 19, 2023.

Note 7 to paragraph (m)(2)(xiii):

For obtaining the tasks for Bombardier Global Express XRS TLMC, Publication No. BD–700 XRS TLMC, use Document Identification No. GL XRS TLMC.

(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 26, 2024.

Steven W. Thompson,

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

[FR Doc. 2024–28778 Filed 12–10–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2024–2440; Airspace Docket No. 24–ANM–86]

RIN 2120–AA66

Modification of Class D and Class E airspace; Abbotsford Airport, Abbotsford, BC

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action modifies the administrative portions of the Class D and Class E airspace legal descriptions for Abbotsford Airport, Abbotsford, BC. This action does not change the airspace boundaries or operating requirements.

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 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 the administrative portion of the Class D and Class E airspace legal descriptions to support visual flight rules (VFR) and instrument flight rules (IFR) operations at Abbotsford Airport, Abbotsford, BC.

Incorporation by Reference

Class D and E airspace areas are published in paragraphs 5000 and 6005, respectively, 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 administrative portions of the Class D and Class E airspace legal descriptions for Abbotsford Airport, Abbotsford, BC.

The airspace locations within line one of both the Class D and Class E legal descriptions are incorrect, as Abbotsford, BC does not reside within a United States region or territory and Point Roberts, WA is not geographically associated with airspace designated to Abbotsford Airport. An appropriate city within the lateral boundaries of the Class D airspace designated for Abbotsford Airport is not available. As such, the location of the Class D airspace designated to Abbotsford Airport is updated to Lynden, WA, which is the most appropriate, geographically adjacent city that also resides within the Northwest Mountain Region and the state of Washington. The location of the Class E airspace designated to Abbotsford Airport is updated to Kendall, WA, which is the most appropriately located city within the airspace that also resides within the Northwest Mountain Region and the state of Washington.

The locations for which airspace is designated within line two of both the Class D and Class E legal descriptions are updated to remove mention of the country name "Canada," as the locations should only include a city and state.

Abbotsford Airport's geographic location within line three of both the Class D and Class E legal descriptions is updated to match the FAA database. As such, the reference to Abbotsford airport's location within their Class D airspace legal description is updated to instead reference a "Point in Space." The airport's previous, outdated geographic location was used as the location of the newly established "Point in Space" to preserve the airspace boundaries as they were prior to this airspace action.

The geographic coordinates for Vancouver International Airport, BC, are

added to the Abbotsford Class D airspace legal description, as the airport is referenced within the description.

This action is an administrative change and does not affect the airspace boundaries or operating requirements; therefore, notice and public procedure under 5 U.S.C. 553(b) is unnecessary.

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); 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

7400.11J, Airspace Designations and Reporting Points, dated July 31, 2024, and effective September 15, 2024, is amended as follows:

Paragraph 5000 Class D Airspace.

* * * * *

ANM WA D Lynden, WA [Amended]

Abbotsford Airport, BC

(Lat. 49°01'31" N, long. 122°21'36" W)

Point in Space

(Lat. 49°01'31" N, long. 122°21'48" W)

Vancouver VORTAC

(Lat. 49°04'38" N, long. 123°08'57" W)

Vancouver International Airport, BC

(Lat. 49°11'41" N, long. 123°11'02" W)

That airspace extending upward from the surface to 2,500 feet MSL beginning at lat. 48°57'59" N, long. 122°18'57" W, thence counterclockwise along the 4-mile radius of the Point in Space to lat. 49°00'05" N, long. 122°16'08" W, thence west along the U.S./Canadian border to lat. 49°00'05" N, long. 122°45'58" W, thence clockwise along the 16-mile arc of the Vancouver VORTAC to lat. 48°57'59" N, long. 122°47'12" W, thence east along lat. 48°57'59" N to the point of beginning, excluding the airspace below 1,500 feet MSL and west of long. 122°33'50" W, the airspace within the Vancouver International Airport Class C airspace area, and the airspace overlying the territory of Canada.

* * * * *

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

* * * * *

ANM WA E5 Kendall, WA [Amended]

Abbotsford Airport, BC

(Lat. 49°01'31" N, long. 122°21'36" W)

That airspace extending upward from 1,200 feet above the surface bounded by a line beginning at lat. 49°00'00" N, long. 122°15'00" W; thence east along the U.S./Canadian border to lat. 49°00'00" N, long. 121°20'15" W; thence south to lat. 48°51'40" N, long. 121°20'15" W; thence west to lat. 48°51'40" N, long. 122°15'00" W; thence back to the point of origination.

* * * * *

Issued in Des Moines, Washington, on December 5, 2024.

B.G. Chew,

Group Manager, Operations Support Group, Western Service Center.

[FR Doc. 2024–29085 Filed 12–10–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 744

[Docket No. 241205–0313]

RIN 0694–AJ96

Additions to the Entity List

AGENCY: Bureau of Industry and Security, Department of Commerce.

ACTION: Final rule.

SUMMARY: In this rule, the Bureau of Industry and Security (BIS) amends the Export Administration Regulations (EAR) by adding 8 entities to the Entity List, under the destinations of Burma (2), China, People's Republic of (China) (2), and Russia (4). These entities have been determined by the U.S. Government to be acting contrary to the national security or foreign policy interests of the United States.

DATES: This rule is effective December 11, 2024.

FOR FURTHER INFORMATION CONTACT: Chair, End-User Review Committee, Office of the Assistant Secretary for Export Administration, Bureau of Industry and Security, Department of Commerce, Phone: (202) 482–5991, Email: ERC@bis.doc.gov.

SUPPLEMENTARY INFORMATION:

Background

The Entity List

The Entity List (supplement no. 4 to part 744 of the EAR (15 CFR parts 730–774)) identifies entities for which there is reasonable cause to believe, based on specific and articulable facts, that the entities have been involved, are involved, or pose a significant risk of being or becoming involved in activities contrary to the national security or foreign policy interests of the United States, pursuant to § 744.11(b). The EAR imposes additional license requirements on, and limits the availability of, most license exceptions for exports, reexports, and transfers (in-country) when a listed entity is a party to the transaction. The license review policy for each listing is identified in the “License Review Policy” column on the Entity List, and the impact on the availability of license exceptions is described in the relevant **Federal Register** document that added the listing to the Entity List. BIS amends the Entity List pursuant to parts 744 (Control Policy: End-User and End-Use Based) and 746 (Embargoes and Other Special Controls) of the EAR.

The End-User Review Committee (ERC), composed of representatives of

the Departments of Commerce (Chair), State, Defense, Energy and, where appropriate, the Treasury, makes all decisions regarding additions to, removals from, or other modifications to the Entity List. The ERC makes all decisions to add an entry to the Entity List by majority vote and makes all decisions to remove or modify an entry by unanimous vote.

Entity List Decisions

Additions to the Entity List

The ERC determined to add Sky Aviator Company Limited and Synpex Shwe Company Ltd., under the destination of Burma, to the Entity List. These additions are being made because Sky Aviator Company Limited, and Synpex Shwe Company Ltd., have supplied the Burmese military with parts and components that have enabled the military to carry out human rights violations, including brutal aerial attacks against the civilian population. These activities are contrary to the foreign policy interests of the United States under § 744.11 of the EAR. Licenses to export, reexport or transfer (in-country) items subject to the EAR to both of these entities will be required for all items subject to the EAR, and license applications will be reviewed with a license review policy of presumption of denial.

The ERC determined to add Beijing Zhongdun Security Technology Group Co., Ltd. and Zhejiang Uniview Technologies Co., Ltd., under the destination of China, to the Entity List. Beijing Zhongdun Security Technology Group Co., Ltd. is being added because it develops and sells products and services that enable China's public security establishment to carry out human rights violations. Zhejiang Uniview Technologies Co., Ltd. is being added because it enables human rights violations, including high-technology surveillance targeted at the general population, Uyghurs, and members of other ethnic and religious minority groups. These activities are contrary to the foreign policy interests of the United States under § 744.11 of the EAR. Licenses to export, reexport or transfer (in-country) items subject to the EAR to both of these entities will be required for all items subject to the EAR, and license applications will be reviewed with a license review policy of presumption of denial.

The ERC determined to add Aviasnab LLC and Joint Stock Company Gorizont, under the destination of Russia, to the Entity List. These additions are being made because Aviasnab LLC and Joint Stock Company Gorizont have supplied

the Burmese military with parts and components that have enabled the military to carry out human rights violations, including brutal aerial attacks against the civilian population. These activities are contrary to the foreign policy interests of the United States under § 744.11 of the EAR. Licenses to export, reexport or transfer (in-country) items subject to the EAR to both of these entities will be required for all items subject to the EAR, and license applications will be reviewed with a license review policy of presumption of denial.

The ERC determined to add NTechLab LLC and Technology Videoanalysis LLC, under the destination of Russia, to the Entity List. These additions are being made because NtechLab LLC and Technology Videoanalysis LLC develop and supply facial recognition software to the Russian government that uses these products and services to track and target peaceful protesters and activists. The products and services that these companies provide have become integral to Russia's mass-surveillance apparatus. These activities are contrary to the foreign policy interests of the United States under § 744.11 of the EAR. Licenses will be required for all items subject to the EAR. License applications will be reviewed with a license review policy of presumption of denial.

For the reasons described above, this final rule adds the following 8 entities including aliases where appropriate, to the Entity List:

Burma

- Sky Aviator Company Limited; and
- Synepex Shwe Company Ltd.

China

- Beijing Zhongdun Security Technology Group Co., Ltd.; and
- Zhejiang Uniview Technologies Co., Ltd.

Russia

- Aviasnab LLC;
- Joint Stock Company Gorizont;
- NtechLab LLC; and
- Technology Videoanalysis LLC.

Savings Clause

For the changes being made in this final rule, shipments of items removed from eligibility for a License Exception or export, reexport, or transfer (in-country) without a license (NLR) as a result of this regulatory action that were en route aboard a carrier to a port of export, reexport, or transfer (in-country), on December 11, 2024, pursuant to actual orders for export, reexport, or

transfer (in-country) to or within a foreign destination, may proceed to that destination under the previous eligibility for a License Exception or export, reexport, or transfer (in-country) without a license (NLR) before January 10, 2025. Any such items not actually exported, reexported or transferred (in-country) before midnight, on January 10, 2025, require a license in accordance with this final rule.

Export Control Reform Act of 2018

On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which included the Export Control Reform Act of 2018 (ECRA) (50 U.S.C. 4801–4852). ECRA provides the legal basis for BIS's principal authorities and serves as the authority under which BIS issues this rule. In particular, section 1753 of ECRA (50 U.S.C. 4812) authorizes the regulation of exports, reexports, and transfers (in-country) of items subject to U.S. jurisdiction. Further, section 1754(a)(1)–(16) of ECRA (50 U.S.C. 4813(a)(1)–(16)) authorizes, *inter alia*, establishing and maintaining a list of foreign persons and end-uses that are determined to be a threat to the national security and foreign policy of the United States pursuant to the policy set forth in section 1752(2)(A), and restricting exports, reexports, and in-country transfers of any controlled items to any foreign person or end-use so listed; apprising the public of changes in policy, regulations, and procedures; and any other action necessary to carry out ECRA that is not otherwise prohibited by law. Pursuant to section 1762(a) of ECRA (50 U.S.C. 4821(a)), these changes can be imposed in a final rule without prior notice and comment.

Rulemaking Requirements

1. This rule has been determined to be not significant for purposes of Executive Order 12866.

2. Notwithstanding any other provision of law, no person is required to respond to or be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This regulation involves an information collection approved by OMB under control number 0694–0088, Simplified Network Application Processing System. BIS does not anticipate a change to the burden hours associated with this collection as a result of this rule.

Information regarding the collection, including all supporting materials, can be accessed at <https://www.reginfo.gov/public/do/PRAMain>.

3. This rule does not contain policies with federalism implications as that term is defined in Executive Order 13132.

4. Pursuant to section 1762 of the Export Control Reform Act of 2018, this action is exempt from the Administrative Procedure Act (5 U.S.C. 553) requirements for notice of proposed rulemaking, opportunity for public participation, and delay in effective date.

5. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by 5 U.S.C. 553, or by any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, are not applicable. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

List of Subjects in 15 CFR Part 744

Exports, Reporting and recordkeeping requirements, Terrorism.

Accordingly, part 744 of the Export Administration Regulations (15 CFR parts 730–774) is amended as follows:

PART 744—END-USE AND END-USER CONTROLS

■ 1. The authority citation for part 744 is revised to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 3201 *et seq.*; 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.*; 22 U.S.C. 7210; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; Notice of September 7, 2023, 88 FR 62439 (September 11, 2023); Notice of November 1, 2023, 88 FR 75475 (November 3, 2023).

■ 2. Supplement no. 4 is amended by:

■ a. Under BURMA, adding entries in alphabetical order for “Sky Aviator Company Limited” and “Synepex Shwe Company Ltd.”

■ b. Under CHINA, PEOPLE'S REPUBLIC OF adding entries in alphabetical order for “Beijing Zhongdun Security Technology Group Co., Ltd.” and “Zhejiang Uniview Technologies Co., Ltd.,” and

■ c. Under RUSSIA, adding entries in alphabetical order for “Aviasnab LLC”, “Joint Stock Company Gorizont”,

“NtechLab LLC”, and “Technology Videoanalysis LLC”.

The additions read as follows:

Supplement No. 4 to Part 744—Entity List

* * * * *

Country	Entity	License requirement	License review policy	Federal Register citation
Burma	Sky Aviator Company Limited, a.k.a., the following four aliases: —Sky Aviator Company Ltd.; —Sky Aviator Co.; —Sky Aviator.; <i>and</i> —Sky Aviator Co. Ltd. No. (204/2), Myinthar 11th Street, 14/1 Ward, South Okkalarpa Township, Yangon Region, Burma; <i>and</i> No. 286, Bogyoke Street, Ward No. 2, Waibargi, North Okkalarpa Township, Yangon Region, Burma. Synpex Shwe Company Ltd., a.k.a., the following one alias: —SS Techniques Company Limited. Nat Yay Kann (1) Street, (35) Quarter, North Dagon Township, Yangon Region, Burma.	For all items subject to the EAR. (See § 744.11 of the EAR). For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial. Presumption of denial.	89 FR [INSERT FR PAGE NUMBER] AND December 11, 2024. 89 FR [INSERT FR PAGE NUMBER] AND December 11, 2024.
CHINA, PEOPLE'S REPUBLIC OF.	Beijing Zhongdun Security Technology Group Co., Ltd., a.k.a , the following one alias: —Beijing Zhongdun Security Technology Development Co. No. 1, Shouti South Road, Haidian District, Beijing, China; <i>and</i> No. 1 Capital Gymnasium South Road, Beijing, China. Zhejiang Uniview Technologies Co., Ltd., a.k.a., the following one alias: —Uniview. No. 369, Xietong Road, Xixing Sub-district, Binjiang District, Hangzhou City, Zhejiang Province, 310051, China.	For all items subject to the EAR. (See § 744.11 of the EAR). For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial. Presumption of denial.	89 FR [INSERT FR PAGE NUMBER] AND December 11, 2024. 89 FR [INSERT FR PAGE NUMBER] AND December 11, 2024.
RUSSIA	Aviasnab LLC, Leningradskaya Street, Khimki, Moscow Region, 141400, Russia. Joint Stock Company Gorizont, 2 “J” Omskaya Street, Rostov-on-Don, 344068, Russia. NtechLab LLC, a.k.a., the following two aliases: —NtechLab; <i>and</i> —ntech lab. Novolesnaya Ulitsa, Dom 2, Pomeshchenie 1/3, Moscow, 127055, Russia. Technology Videoanalysis LLC, a.k.a., the following two aliases: —Tevian; <i>and</i> —Technologii Videoanaliza. Skulptora Muchinnoi Ulitsa, Dom 7, Floor 1 pomeshchenie II komnata 2v, Moscow, 119634, Russia.	For all items subject to the EAR. (See § 744.11 of the EAR). For all items subject to the EAR. (See § 744.11 of the EAR). For all items subject to the EAR. (See § 744.11 of the EAR). For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial. Presumption of denial. Presumption of denial. Presumption of denial.	89 FR [INSERT FR PAGE NUMBER] AND December 11, 2024. 89 FR [INSERT FR PAGE NUMBER] AND December 11, 2024. 89 FR [INSERT FR PAGE NUMBER] AND December 11, 2024. 89 FR [INSERT FR PAGE NUMBER] AND December 11, 2024.

* * * * *

Matthew S. Borman,
Principal Deputy Assistant Secretary for
Strategic Trade and Technology Security.
[FR Doc. 2024–29136 Filed 12–10–24; 8:45 am]
BILLING CODE 3510–33–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 203, 206 and 291

[Docket No. FR–6051–F–03]

RIN 2502–AJ47

Federal Housing Administration (FHA): Single Family Sale Program

AGENCY: Office of the Assistant
Secretary for Housing—Federal Housing
Commissioner, HUD.

ACTION: Final rule.

SUMMARY: This rule amends the requirements for the sale of eligible single family mortgage loans insured by the Federal Housing Administration (FHA) that have been assigned to the Secretary of the Department of Housing and Urban Development (HUD) in exchange for claim payments. The mortgage notes are sold, without FHA insurance, to qualified purchasers in a manner that seeks to maximize recoveries and strengthen HUD's Mutual Mortgage Insurance Fund (MMIF) and to achieve HUD's operational goals for the MMIF. This rule transitions the pilot Single Family Sale Program from a demonstration to a permanent program and removes existing Disposition of HUD-Acquired and -Owned Single Family Property regulations, which provided for a retired program that handled the sale of HUD-held single family mortgage loans.

DATES: *Effective:* January 10, 2025.

FOR FURTHER INFORMATION CONTACT: John Lucey, Director, FHA Office of Asset Sales, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410–8000; telephone: (202) 708–2625 (this is not a toll-free number), or toll-free: (800) 481–9895. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as from individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit <https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs>.

SUPPLEMENTARY INFORMATION:

I. Background

Under section 204 of the National Housing Act,¹ HUD has general authority to pay insurance claims and dispose of mortgages and properties acquired under the FHA single family mortgage insurance programs. Section 204(g) specifically grants HUD broad discretion to implement a range of disposition alternatives. The National Housing Act also requires that HUD ensure the MMIF remains financially sound. HUD must effectively manage HUD's defaulted assets and minimize losses to the MMIF to carry out its fiduciary responsibility to ensure the financial soundness of the MMIF.

Since 2002, HUD has operated a demonstration program to implement its broad disposition authority with respect to mortgages and properties acquired under the FHA single family mortgage insurance programs. By notice published in the **Federal Register** on February 5, 2002, HUD announced the establishment of the Accelerated Claim and Asset Disposition (ACD) Demonstration to “address any programmatic concerns” and “assess its success and determine whether to implement the ACD process on a permanent basis, throughout the country.”² On October 29, 2002, HUD responded to public comments and conducted its first sale of defaulted mortgages through the ACD Demonstration.³ HUD has continuously operated the ACD Demonstration for the purpose of paying insurance claims and disposing of mortgages and related properties acquired under the FHA single family mortgage insurance programs.

HUD has used various names to refer to the demonstration program, including the ACD Demonstration, the Single Family Loan Sales (SFLS) Program, and the Distressed Asset Stabilization Program (DASP). For purposes of this rule, HUD will refer to the demonstration as the “Single Family Sale Program,” which encompasses all of the iterations of Single Family Loan Sales, including any sales HUD designates as part of this program. The final rule applies to all Single Family Loan Sales by HUD.

¹ See 12 U.S.C. 1710 (2010), as amended by section 601 of the Fiscal Year 1999 Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act (Pub. L. 105–276, approved October 21, 1998) (“FY 1999 Appropriations Act”).

² See Notice of FHA Accelerated Claim Disposition Demonstration, 67 FR 5418 (February 5, 2002).

³ See Notice of FHA Accelerated Claim Disposition Demonstration, 67 FR 66038 (October 29, 2002).

Absent the Single Family Sale Program, if a borrower is unable to resume their mortgage payments after loss mitigation, the mortgagee in most cases would be required to foreclose the defaulted loan to perfect an insurance claim. If the property cannot be sold to a third party at foreclosure or a second-chance auction, the mortgagee may file a conveyance claim, which gives the property to HUD in exchange for receiving the FHA mortgage insurance claim payment. Prior to filing the conveyance claim, the mortgagee will incur legal and holding costs for which the mortgagee may seek reimbursement from HUD through claim payment. A property conveyed to HUD increases HUD's Real Estate Owned (REO) inventory, posing an additional financial burden on the MMIF for asset management costs. As an alternative to filing a conveyance claim, for a forward loan that has been foreclosed, HUD will pay a claim without conveyance of title claim from the MMIF to the mortgagee if the borrower defaults and the mortgagee loses money after selling the house in a foreclosure or post-foreclosure sale. Disposing of delinquent forward mortgage loans shortens the period between default and claim payment, reducing the financial exposure to these insurance funds for costs incurred after default.

For a Home Equity Conversion Mortgage (HECM) that has been foreclosed, the mortgagee cannot file a conveyance claim but can sell the foreclosed property to a third party and receive claim payment if the mortgagee is owed more than it receives from such sale. For HECMs endorsed before 2009, HUD pays claims from the General Insurance (GI) Fund. For HECMs endorsed in 2009 or after, HUD pays claims from the MMIF.

HUD's sale of defaulted loans through the Program is generally intended to yield a recovery to the MMIF that meets or exceeds the recovery obtained as a result of a foreclosure-based claim.

When a borrower passes away after assignment of a HECM, HUD incurs costs associated with real property when it is vacant or abandoned. HUD's servicing tenure and attempts to foreclose can be delayed by title or jurisdictional issues and backlogs resulting from high volume. These issues result in higher servicing costs along with additional inspection and property preservation costs while the HECMs remain in HUD's portfolio. After foreclosure, HECMs that converted to REO are added to HUD's inventories, increasing asset management costs to protect and dispose of the properties. Disposition of eligible assigned HECMs,

such as HECMs secured by vacant and abandoned properties, can result in significant cost savings to the MMIF and GI Fund, as applicable, and enable better and more timely resolution of these assets.

On June 5, 2006, HUD issued an Advance Notice of Proposed Rulemaking (ANPR) soliciting public comment on HUD's Program.⁴ The ANPR solicited public comments to make "possible improvements to the program," including the most efficient way to "maximize the return to the FHA insurance fund" by "minimiz[ing] the time an asset is held."⁵

On April 30, 2007, HUD published a regulatory agenda providing public notice that FHA had withdrawn the ANPR effective March 1, 2007.⁶ After this action, HUD adopted additional modifications to the Program, including changing the disposition method from joint venture to whole loan sales.

II. The Proposed Rule

On July 16, 2024, HUD published for public comment a proposed rule (89 FR 57798) to amend 24 CFR parts 203, 206, and 291. The proposed rule sought to transition the Single Family Sale Program from a demonstration to a permanent program by revising HUD's Single Family Mortgage Insurance, Home Equity Conversion Mortgages, and Disposition of HUD-Acquired and -Owned Single Family Property regulations to provide for the sale of HUD-held single family forward mortgages and Home Equity Conversion Mortgages through competitive sale and direct sale of single family loans. In addition, HUD proposed to remove the existing Disposition of HUD-Acquired and -Owned Single Family Property regulations, which provided for a retired program that handled the sale of HUD-held single family mortgage loans.

HUD sought public comment on all aspects of the rule and sought public feedback on ten (10) specific issues regarding the operation of the Program.

III. This Final Rule

This final rule adopts the proposed rule with no changes. The next section outlines how various issues raised through public comments may be addressed through guidance or by future updates to sale documents, including but not limited to Conveyance, Assignment, and Assumption Agreements (CAAs), **Federal Register**

Notices (FRNs), and Bidder Information Package (BIP) forms.

IV. Public Comments

The public comment period closed on September 16, 2024. HUD received 11 distinct responsive comments from individuals, associations, advocacy organizations and a variety of interested parties. The following presents the significant issues and questions related to the proposed rule raised by the commenters, and HUD's responses to these issues and questions. HUD would like to thank all the commenters for their thoughtful responses

Specific Questions for Comment From the Proposed Rule

In section IV of the proposed rule, HUD included several specific questions for public comment. Those specific questions from the proposed rule and public comments received in response to those specific questions are summarized here, along with HUD's responses to the public comments received.

A. Question #1: What Additional Actions HUD Can Take To Provide Greater Bidding Opportunities for Nonprofit Organizations and Governmental Entities

1. Recommendation To Modify Capital Requirements

One commenter stated that HUD should reduce the capital requirement to participate in the program. The commenter said that the general \$5,000,000 net worth requirement is extremely high, out of scope with the requirements of various localities, and is a mismatch for the relatively low average sale prices in some states. The commenter stated this requirement precludes the participation of entities that know their communities best, including many mission-driven nonprofits and smaller entities, such as smaller minority-led developers.

The commenter stated that while HUD permits nonprofits to participate if they have a net worth of \$3,000,000 or provide an irrevocable letter of credit or performance bond, those are still barriers to participation and should be revisited. The commenter stated that the net worth requirement is arbitrarily high and prevents participation by many nonprofits and community development organizations and recommended that HUD allow nonprofits to jointly participate and bid with a financial partner to meet the net worth requirement, such as a locally situated and active community redevelopment entity.

The commenter recommended that HUD replace the requirement of an irrevocable letter of credit with a lower dollar amount line of credit. The commenter stated that irrevocable letters of credit and performance bonds are expensive and difficult to obtain and maintain and may have impacts on the balance sheets of nonprofit entities, while many nonprofits have access to revolving lines of credit. The commenter also stated that both the irrevocable line of credit and performance bond would likely be unnecessary if HUD implemented a meaningful prioritization and "first look" program so nonprofits could know the capital they would need to bid at the loan sale.

HUD Response: HUD appreciates the stakeholder feedback. To maximize the usefulness and applicability of the Program, any capital requirement changes and what documentation may be used to demonstrate financial viability would be addressed not in the rule itself, but via notice or sale documents, such as the Bidder Information Package.

One commenter recommended the establishment of a fund for use by qualified non-profit bidders.

HUD Response: HUD appreciates the stakeholder feedback; however, HUD is unable to establish a capital fund absent congressional appropriations that would provide for such a fund.

2. Request To Revisit a 95 Percent Value Requirement

Two commenters recommended that HUD revisit a perceived 95 percent value requirement. The commenters stated that the requirement, based on market rate data, poses a challenge amid rising home prices and limits nonprofit competition. One commenter stated that the Claims Without Conveyance of Title program imposes a similar requirement, which results in very few mission-driven nonprofits participating in the program. The commenters recommended basing the 95 percent requirement on census tract or other methodology that takes into consideration the income of the local area, as opposed to market or asset value. Alternatively, the commenters suggested that the formula take into account rehabilitation costs and holding cost and legal fees for eviction of occupied assets.

HUD Response: The Single Family Sale Program does not impose such a requirement on purchasers. The National Housing Act imposes a statutory fiduciary obligation on HUD to ensure the MMIF remains financially sound (12 U.S.C. 1708(a)(3)) while also

⁴ See *Accelerated Claim and Asset Disposition (ACD) Program; Advanced Notice of Proposed Rulemaking*, 71 FR 32392 (June 5, 2006).

⁵ *Id.*

⁶ See *HUD Semiannual Regulatory Agenda*, 72 FR 22694 (April 30, 2007).

directing the Secretary to ensure that it continues to meet the housing needs of the borrowers that the single family mortgage program is designed to serve (12 U.S.C. 1708(a)(7)(B)). Consistent with those obligations, HUD seeks to obtain the maximum recoveries for the agency while also encouraging as many participants in the Single Family Sale Program as practical. HUD believes the current method for valuating loans offered for sale under the Single Family Sale Program appropriately balances those two obligations, but the method used by the Program does not impose the 95 percent requirement referenced by the commenters.

3. Participation by Wholly Owned Special-Purpose Entities

Two commenters asked HUD to allow wholly owned special purpose entities, classified as disregarded entities by the Internal Revenue Service (IRS), to participate in the program. A commenter identified the inability of disregarded entities to participate as a barrier faced by nonprofits when seeking HUD recognition as a qualifying nonprofit. The commenters stated that without the requested change, a significant portion of mission-driven organizations that are considered disregarded entities cannot benefit from the incentives HUD is proposing that would benefit nonprofit participation in the program. The commenters recommended that HUD recognize disregarded entities under the definition of a nonprofit and adopt standards that are similar to those used by the IRS.

HUD Response: HUD appreciates the stakeholder feedback. HUD may allow a Purchaser to endorse and assign Single Family Loans from HUD to Purchaser's special purpose entity acquisition vehicle on terms permitted in the CAA. HUD can establish eligibility criteria through sale documentation, such as the CAA, and will consider doing in a way that addresses this concern in future loan sales. HUD is not making the requested change through the rule as that method would limit the flexibility that HUD requires to run the Program.

4. Third-Party Capital Partners

Two commenters stated that FHA should incorporate flexibility in the use of third-party capital partners by nonprofit entities in both the bidding process and the deployment of equity from upside revenues, with safeguards to prevent abuse. The commenters stated that many nonprofit entities are working with capital partners to unlock additional resources and create more affordable supply. One commenter stated that if FHA's stance on third-

party capital partners remains unchanged, then the commenter suggests creating a fund accessible to qualified nonprofits to allow them to bid more competitively.

HUD Response: HUD appreciates the stakeholder feedback. HUD is unable to establish a capital fund absent congressional appropriations that would provide for such a fund. The ability to use third-party capital partners could potentially be addressed through future sale documentation such as the Sale Notice to maintain flexibility for future sales and future market environments.

B. Question # 2: Whether a Competitive Sale of Single Family Loans Should Disallow Low-Value Mortgages and Properties That Are Vacant

One commenter stated that low-value mortgages and properties that are vacant should not be disallowed and that more of these assets should be made available only to non-profit organizations and at a greater discount. The commenter also stated there should be a mandate to sell these assets to very-low-income buyers and the prices should be low enough to be viable for a non-profit.

Another commenter said that HUD should include low-value mortgages as they may still be valuable to specialty servicers who can offer modifications not available under FHA's waterfall to borrowers with low cash flow but substantial equity, to enable impacted borrowers to keep their homes.

The same commenter stated that HUD should remove the "exclusion of low-value mortgages secured by vacant properties" from § 203.413(b) as loan sales may offer a fast path to re-occupancy by a new owner and result in cost savings and more timely resolution of those assets.

HUD Response: HUD appreciates the stakeholder feedback. HUD is retaining the exclusion of low-value mortgages secured by vacant properties in the § 203.413(b) of the final rule. HUD believes that selling low-value, vacant, forward loans in bulk note sales is detrimental for neighborhoods because investors have few to no incentives to invest in these properties, and, without investor interest, they will blight neighborhoods which is contrary to the purposes of the Single Family Sale Program. Instead, HUD will address the sale of low-value mortgages secured by vacant properties through other means.

C. Question # 3: Should All Single Family Sales Require a "First Look" Program for Loans That Convert to Real Estate Owned Property

Three commenters supported the inclusion of a "first look" program, with various recommended changes.

One commenter stated that a "first look" program geared towards nonprofit entities would be impactful and allow for participation by the local community and local organizations. The commenter stated a recurring and regularly scheduled "first look" would add predictability and enable nonprofit organizations to assemble the required team, paperwork, and financing. The commenter also stated that stakeholders with proven community development experience, including community-based organizations and national nonprofits, should have priority to bid over investors and "unknown nonprofits".

One commenter recommended that the language be revised to "may", rather than "will", include a "first look" program. The commenter stated that applying the requirement to every Participating Service Agreement (PSA) may lengthen rehabilitation and re-occupancy timelines, increase holding costs, and reduce the purchase price of the loans and the corollary benefit to the Insurance Fund. The commenter stated that the PSA should set the first-look requirements and enable the evaluation of a nonprofit's capital and capacity to support a nationwide first look program in specific non-performing loan sale localities on a sale-by-sale basis.

HUD Response: HUD appreciates the stakeholder feedback. This final rule will maintain the "first look" program for every sale and will not make it optional. In addition to minimizing losses to the MMIF, the purpose of the Single Family Sale Program is to further HUD's historic mission of providing housing opportunities for low- and moderate-income families. The "first look" requirement serves that important purpose by providing owner-occupant buyers, governmental entities, and eligible nonprofit organizations the first opportunity to purchase property that converts to real estate owned (REO) property by foreclosure or deed-in-lieu of foreclosure following the sale of a mortgage loan under the Single Family Sale Program.

HUD believes every sale should have this requirement and the final rule retains the proposed language in § 291.615(a) that post-sale requirements for Single Family Loans that convert to real estate owned property through foreclosure or deed-in-lieu of foreclosure will include a "first look

program, providing an exclusive listing period for owner occupant, nonprofit organization, governmental entities, and other prospective buyers as permitted by HUD.”

D. Question #4: Whether Post-Sale Servicing Requirements Should Include Loss Mitigation Requirements That Match or Exceed FHA Loss Mitigation Requirements for Insured Mortgage Loans, What Loss Mitigation Options Have Been Successful, and What Loss Mitigation Standard and Waterfall Should Be Utilized

1. Comments on Loss Mitigation Options and Scope

Several commenters were supportive of the importance of loss mitigation options and the proposal to require buyers under the Single Family Sale Program to offer loss mitigation options that are as or more generous than the FHA loss mitigation options.

Two commenters stated that the requirement to provide FHA loss mitigation options should be a floor and that the waterfall of allowable outcomes should be broader. One commenter suggested that servicers should be encouraged to consider options such as principal forgiveness and payment deferral. One commenter stated that the first priority should be foreclosure prevention, and all buyers should offer borrowers options to reinstate, enter a trial, or permanent modification and, if that's not possible, to assist the buyer with a short sale, deed in lieu of foreclosure or short payoff.

One commenter said required loss mitigation would not place a significant burden on servicers as the options are set out in the FHA Single Family Housing Policy Handbook and there is increased standardization of streamlined loss mitigation reviews in the industry.

Two commenters noted the importance of loss-mitigation options that take into account the needs of specific borrowers. One commenter stated that the National Housing Act and the obligation to affirmatively further fair housing require HUD to take into account the needs of specific borrowers and design systems to promote the success of those borrowers. The commenter said that the obligation to affirmatively further fair housing is particularly relevant to FHA's insured loan program because Black and Latino borrowers rely heavily on it to purchase homes.

One commenter stated that requiring the loss-mitigation options would mitigate the risk of investors purchasing notes for the purpose of foreclosing and

avoid the unfairness of stripping away the benefits of FHA servicing options when there is a default. The commenter also noted that a borrower's circumstances may have changed and another opportunity to receive an affordable workout option is essential.

One commenter stated that post-sale loss mitigation options should not be “as or more generous” as the FHA waterfall as the requirement is undefined and may force purchasers to offer the same options as those in the FHA waterfall to avoid allegations that the loss mitigation terms were less generous.

One commenter stated that if foreclosure is unavoidable the buyer should be required to assume HUD's responsibility to create affordable homeownership for new owner/occupants, a requirement that benefits very low-, low-, and moderate-income buyers should be in place, and purchasers should be required to provide a percentage of outcomes in all categories. The commenter also stated that exceptions should be made only after a written request to HUD and HUD approval should be required before a sale to investors.

One commenter raised concerns that loss-mitigation practices by private equity firms may not comply with FHA servicing requirements. The commenter provided an example of an entity that uses data to assess borrowers' “job security” to determine when to pursue loan modification or foreclosure, which does not consider other important factors or involve interactions with the borrower.

One commenter stated that loss mitigation is extremely important, the foreclosure process is detrimental to families and communities, and it is important to allow families who are traditionally ostracized by mortgage lenders an opportunity at homeownership and second chances during hard economic times.

HUD Response: HUD acknowledges the importance of loss mitigation in providing stability for families and communities, especially those traditionally marginalized by mortgage lenders. The final rule retains language in § 291.615(a) requiring Purchasers to offer loss mitigation options “that are as or more generous than FHA loss mitigation options,” as outlined in the FHA Single Family Housing Policy Handbook. This standard ensures that borrowers receive robust support, with the flexibility for Purchasers to offer additional, tailored assistance as needed.

HUD values the commenters' concerns and encourages Purchasers not

to be deterred from providing expanded or customized loss mitigation options that exceed FHA standards. While the final rule specifies baseline requirements, HUD will address further enforcement of these requirements and any necessary future adjustments in sale notifications and legal documentation, allowing for adaptability as needs evolve.

2. Loss Mitigation Standards Should Be Publicly Available

Two commenters stated that HUD should require Purchasers to make loss mitigation standards public. The commenters cited examples where a lack of transparency harmed borrowers and stated that without access to the guidelines and loss mitigation standards, borrowers and their advocates will be unable to effectively challenge denials and other errors, leading to avoidable foreclosures.

A commenter considered it a major omission that the requirement to make loss mitigation standards public was not in the proposed rule. The commenter urged HUD to make the obligation to make loss mitigation guidelines accessible to the public clear in the final rule and in the FHA Single Family Housing Policy Handbook.

HUD Response: HUD appreciates the stakeholder feedback. Due to the specificity and the potential for needed changes in the future, HUD's decisions to publish the Purchaser's loss mitigation requirements would be captured in future sale legal documentation (the CAA) and/or sale notifications such as a **Federal Register** Notice if this is desired, and not in the rule.

3. Importance of an Enforcement Mechanism

One commenter stated it is essential that FHA develop proactive enforcement mechanisms to ensure that note purchasers are complying with their loss mitigation obligations. The commenter also stated that HUD should not rely on self-certification by purchasers, and purchasers that violate these loss mitigation obligations must face serious consequences, including bans from future note sales and civil prosecution.

HUD Response: HUD appreciates the stakeholder feedback. Due to the specificity and the potential for needed changes in the future, HUD's decisions to enforce loss mitigation requirements would be captured in future sale legal documentation and/or sale notifications if this is desired, and not in the rule.

E. Question # 5: Should HUD Allow Nonprofit Organizations and Governmental Entities To Qualify for Priority Bidding Status in Single Family Sales

Several commenters supported priority bidding status to allow nonprofit entities to be awarded up to 50 percent of the loans in a sale. One commenter recommended a priority bidding status for up to 75 percent of the loan pool for nonprofit entities. One commenter stated HUD should offer priority bidding for nonprofit entities and proven community investment and community redevelopment organizations and create a preferred order of qualifications and priority to purchase homes (owner-occupant, nonprofits, and government).

Two commenters recommended that a portion of assets in a sale should be set aside for nonprofit organizations with priority bidding status. One commenter recommended a 50 percent set aside and one commenter recommended a 75 percent set aside for both Single Family Sale Program and HECM loan sales. The commenters recommended that if the set aside has not been reached and a nonprofit is bidding on an asset, the nonprofit should win even if it is below the reserve. The commenters also recommended that if there are no nonprofit bids for assets in the set-aside, nonprofits should be offered a last look on the assets in an effort to obtain nonprofit bids. One commenter recommended that the last look include pricing of the available assets in the pool to obtain more nonprofit bids and a reserve disclosure to allow nonprofits to better target their bid strategy.

Two commenters stated that acquisition by private investors leads to the conversion to high priced rental units that drive up housing costs and private investors tend to bid over reserve and win properties in locations where the need for affordable homeownership is great and impact potential is high. The commenters stated that nonprofits should be awarded properties that are closer to transit, have access to favorable jobs, and where homeownership equity is hardest to achieve.

One commenter stated that the priority status for nonprofits must have adequate and enforceable safeguards to protect against fraud and sham nonprofit organizations.

One commenter supported HUD's efforts to enforce mechanisms that allow owner occupants, nonprofit organizations, and government entities to acquire loans through the Program and recommended that HUD offer loan

pools for sale through auctions limited to single family buyers, similar to the prior Neighborhood Stabilization Program.

HUD Response: HUD appreciates the stakeholder feedback. If HUD decides to revise the carve-out percentage and how it will be applied to various sale types, it will be captured in future sale legal documentation and/or sale notifications and not in the rule itself. Such a change would also need to be reviewed by the Office of Management and Budget under the A-11 Circular. Maintaining this potential change as part of the sale documents and/or sale notification creates greater opportunities for HUD to retain some flexibility for future sales.

F. Question #6: Whether HUD Has Proposed a Workable and Efficient Process for Direct Sales of Single Family Loans

Several commenters stated that nonprofits should be able to request a direct sale without a unit of government involved. One commenter suggested HUD consider extending the opportunity to qualified, capitalized non-profit organizations with proven track records. Two commenters suggested that nonprofit organizations that often partner with government should be able to request a direct sale without a unit of government involved, so long as HUD ensures the nonprofit is controlling the management and disposition of the assets.

HUD Response: HUD appreciates the stakeholder feedback. HUD's implementation of the specifics of the direct sales will be established via Sale Notice pursuant to the Secretary's authority to "prescribe requirements for a Direct Sale of Single Family Loans through Sale Notice" as set out in § 291.619(a) of the final rule. HUD is currently considering allowing direct sales to nonprofits as permitted by § 291.617 of the final rule.

G. Question #7: Should a Borrower Loan Sale Notification Be Required and What Information Should Be Included

1. General Comments Regarding Borrower Loan Sale Notification

One commenter strongly supported a requirement for pre-sale notice as an essential due process protection for borrowers that would enhance compliance with FHA's loss mitigation guidelines and protect the insurance fund from unnecessary losses. The commenter recommended that all servicers be required to provide the form to borrowers when a loan is referred to HUD for inclusion in a future loan sale.

The same commenter stated that the notice should be a HUD form or HUD-approved template and include: (1) a description of the Single Family Loan Sale Program; (2) a summary of the FHA loss mitigation options; (3) a chronology of the servicer's review of the borrower for the FHA loss mitigation options, including dates for waterfall reviews and outcomes or, if a waterfall review was not conducted, the reasons it did not occur, including dates of outreach and reference to specific communications; (4) notification that the borrower can still seek a loss mitigation review from the servicer under FHA guidelines if the borrowers' circumstances have changed since a prior review; (5) information about how the borrower can dispute the servicer's representations about past loss mitigation reviews; (6) notification that the loan will not be placed in a loan sale pool as long as a dispute over past loss mitigation conduct is pending or a new loss mitigation review based on changed circumstances is underway; and (7) information about referrals to housing counselors and legal aid offices in the borrower's vicinity.

One commenter questioned whether an advance notice is helpful or detrimental to the distressed borrower's wellbeing and suggested adding information to the default/delinquency notice instead.

One commenter stated that FHA should allow servicers to comply with the requirement by adding elements to the servicing transfer notification already required under 12 CFR 1024.33(b). The commenter suggested this approach would reduce the borrower's confusion, the cost, and the environmental impact of sending two separate interrelated letters.

HUD Response: HUD appreciates the stakeholder feedback. The final rule retains language in § 291.605(a)(5) that requires the Participating Servicer to ensure that the Loan Sale Notification is provided to each borrower and any other parties required by the Secretary. The details around how the Loan Sale Notification to the borrower is structured and what information must be included in such notification will be set out in more detail by HUD in the Sale Notice or Mortgagee Letter.

2. Post-Notice Loss Mitigation Reviews

One commenter stated that if the borrower informs the servicer that they had a change in financial circumstances before the sale occurs, the servicer should reconsider the borrower's eligibility under the HUD waterfall. The commenter stated that the presale notice will prompt those discussions with

borrowers who have improved their financial circumstances and HUD should clearly state the expectation that servicers will re-review before the sale.

HUD Response: HUD appreciates the stakeholder feedback. Due to the specificity and the potential for needed changes in the future, HUD's decisions around post-notice loss mitigation reviews would be captured in future sale legal documentation, such as the Participating Servicer Agreement, and/or sale notifications if this is desired, and not in the rule.

3. Recommended Dispute Resolution System

One commenter stated that HUD should provide a more comprehensive dispute resolution system through its National Servicing Center (NSC), with the capacity to directly address borrower disputes regarding loss mitigation. The commenter stated that the NSC should review complaints, maintain written records of the reviews, and produce a memorandum of findings and conclusions. The commenter further stated that HUD should conduct a final review of the NSC's determination at the request of the borrower and HUD decisions should be subject to review under the Administrative Procedures Act. The commenter further stated that the presale notice should give details about a dispute resolution process for borrowers and direct the borrower or their representative to address the complaint to the NSC and the servicer.

HUD Response: HUD appreciates the stakeholder feedback regarding the importance of a comprehensive dispute resolution system through the HUD National Servicing Center (NSC). The NSC will be consulted to develop a framework to address borrower disputes related to loss mitigation, including the maintenance of written records and the provision for final review requests. Specific details about a dispute resolution process will be included in future sale legal documentation and notifications rather than in the rule itself, ensuring that borrowers are informed about how to address their complaints effectively. HUD remains committed to enhancing transparency and responsiveness in the resolution of borrower disputes.

H. Question #8: What Information Should HUD Include in Periodic Reports on Single Family Sales Loan and Property Outcomes

1. Content of Data Collection and Reports

One commenter stated that reporting the post-sale status of loans sold through the Single Family Sale Program is important to fully assess the impact of the program on communities and borrowers. The commenter recommended that the data be publicly available, updated at least annually, and include: (1) post-sale loss mitigation activities, including approvals and denials of options, including the levels and nature of payment changes, and (when available) old and new borrower debt-to-income ratios; (2) demographic and geographic data about homeowners and loss mitigation; (3) data on the long-term performance of loans after loss mitigation, including rates of redefault; and (4) data on subsequent sales and rentals involving the properties. The commenter stated that reports with this type of data were produced by government entities, including during and after the 2008 foreclosure crisis.

Two commenters stated that racial and other demographic data about homeowners is important to ensure the program is affirmatively furthering fair housing.

A commenter stated that buyers should include the number of loss mitigation approvals and denials and the outcomes of all loans or properties that they or related entities control and that information should be made public and regularly updated.

A commenter stated that HUD should provide performance outcomes for each buyer at least once annually. The commenter stated HUD should also provide qualified bidders with defaulted buyer information and should consider allowing performing buyers with the opportunity to acquire assets from those buyers in default.

One commenter stated that the proposed rules maintain the current standard of four years of outcome data and that is an insufficient period of time to properly assess program outcomes.

One commenter requested that FHA publish more information broken down by note pools, including information on vacancy rates and a breakdown by pool of unpaid loan balances. The commenter also requested that FHA provide more data broken down by note purchaser, including unpaid loan balances and sales prices.

HUD Response: HUD appreciates the stakeholder feedback regarding data transparency and reporting on Single

Family Sales outcomes. HUD recognizes the value of detailed reporting, including post-sale loss mitigation activity, demographic and geographic data, and long-term loan performance metrics. The final rule continues to provide that outcome data and the timeline for reporting will be set out in the CAA, which will generally continue to provide for outcome data over a four-year period, while sale notification and sale documentation may address updates to reporting requirements and additional data presentation as deemed necessary to support program goals.

2. Requested Clarity on Reporting Obligations

A commenter stated that the proposed rule appears to direct subsequent transferees from initial buyers to comply with post-sale reporting obligations. The commenter recommended that the language be edited to make that point clear as the post-sale reporting obligation would have little value if it did not apply to transferees.

HUD Response: HUD appreciates the stakeholder feedback and will review the current reporting requirements and the information gathered. Any changes to the reporting requirements and how HUD presents the information will be captured through sale notifications like the **Federal Register** Notice and/or sale legal documents, including the BIP and the CAA. This will provide flexibility for the Department and the ability to improve and enhance reporting based on program experience.

3. Oversight and Enforcement of Reporting Obligations

One commenter identified concerns about reliance on self-reporting to assess servicers' post-sale performance and recommended that loan purchase agreements authorize limited direct HUD oversight of servicers before and after the four-year mandatory post-sale reporting period. The commenter stated that such oversight would help determine whether a property remains owner-occupied or was converted to a rental investment property and would allow assessment of the long-term efficacy of loss-mitigation options offered by post-sale servicers. The commenter also stated that HUD should assess meaningful sanctions, including disqualification from future sales and financial penalties, for substantial noncompliance with reporting requirements.

HUD Response: HUD appreciates the stakeholder feedback and will review the current reporting requirements, and the information gathered. Any changes to the reporting requirements and how

HUD presents the information will be captured through sale notification and/or sale legal documents.

I. Question #9: Should Eligibility Criteria for a Single Family Sale Include Satisfaction of HUD's Loss Mitigation Requirements

One commenter strongly supported the language in the proposed rule that requires satisfaction of HUD's loss mitigation requirements as a condition for sale eligibility. The commenter stated that HUD has long represented that compliance with HUD's loss mitigation requirements is a condition to a loan's eligibility for a sale, which is consistent with HUD's requirement that mortgagees certify comply with HUD's regulations as a condition to payment on an insurance claim.

The commenter stated that HUD should develop a system to ensure compliance by servicers and that servicer check-box self-certification is insufficient. The commenter provided examples of improper self-certifications and stated that HUD Office of the Inspector General reports have found problems with self-certification by servicers and failures by servicers to provide correct loss mitigation assistance.

The commenter stated that HUD should require documentation of the servicer's loss mitigation review as a condition to a loan's eligibility for early claim payment and a sale of the loan. The commenter stated the loss mitigation waterfall in the FHA Single Family Housing Policy Handbook requires servicers to have a record of how the HUD waterfall was applied and if a servicer cannot produce that documentation, it must be required to establish compliance with the HUD outreach requirements as set out in the Handbook.

One commenter stated that a loss mitigation addendum should be signed with every application approval and a report indicating each outcome should be provided on a quarterly basis, including whether it is a reinstatement, trial or permanent modification, short sale or payoff, deed in lieu, or if after foreclosure than evidence of sale to an owner/occupant, lease to an income-qualified tenant, and evidence of sale to a community of color or marginalized individual if available.

HUD Response: HUD appreciates the stakeholder feedback on ensuring servicers' compliance with loss mitigation requirements for loan sale eligibility. HUD reaffirms that satisfying these requirements is essential for sale eligibility and is a post sale requirement under § 291.615(a) of the final rule.

HUD acknowledges that flexibility may be needed for certain scenarios, such as disaster-related sales. The final rule sets out actions HUD may take in the event there is a failure to meet post-sale requirements or any submission of false information or misrepresentation § 291.621. Any related criteria will be detailed in the sale notification or sale documents, rather than the rule, to allow for adaptable policy implementation.

J. Question #10: Should HUD Offer Favorable Sale Terms to Governmental or Nonprofit Entities

1. Potential Favorable Sale Terms

Several commenters directly supported providing favorable sale terms to nonprofit entities. A commenter stated that a government or non-profit operator is more likely to utilize the program for community benefit and sell or lease the home to an income qualified person or person of color. A commenter said that more favorable sale terms and conditions for nonprofit organizations and community-based entities, such as allowing a first look, will help organizations know what properties are coming into the sale and how they can be poised to obtain a property and return it to a useful purpose.

One commenter recommended reducing the reserve price to better facilitate transitions of the property to nonprofit organizations at a price that is closer to fair market value. The commenter recommended additional favorable terms such as bulk bidding to allow for greater flexibility and faster disposition and allow a financial incentive to nonprofit organizations in the form of a reduced price for a larger purchase.

One commenter stated HUD should allow a waiver of certain reporting criteria, such as proof of ethnicity, familial status or income as most purchasers cannot ask those questions and it is not always possible to get a HUD-approved non-profit organization to engage in the process. The commenter recommended that HUD use census tract information to help the buyer with this situation.

HUD Response: HUD appreciates the feedback supporting favorable sale terms for nonprofit entities and community-based organizations. Adjustments such as reduced reserve prices, first-look provisions, bulk bidding, and streamlined reporting requirements could enhance nonprofits' participation and community impact. HUD will consider making modifications to sale terms in sale

notifications and sale documentation to address this concern.

2. Safeguards on Benefits to Nonprofit Organizations

One commenter stated that any system created for the benefit of nonprofit organizations must have appropriate safeguards to prevent abuse of the system by straw buyers and there should be adequate enforcement and oversight.

HUD Response: HUD appreciates the feedback regarding safeguards to prevent misuse of systems established for nonprofit organizations. The Department is committed to preventing bid abuse and ensuring fair qualification processes. Any adjustments to the bidding or qualification criteria will be implemented through sale notifications including the **Federal Register** and sale documents like the BIP and the CAA rather than in the rule, allowing for greater flexibility in enforcement and oversight.

3. Recommended Deadline Extensions for Nonprofits

Two commenters recommended that nonprofits be allowed 60 days to perform pre-bid due diligence and 90 days to close. The commenters stated that nonprofits often request extensions from HUD because they rely on debt to finance the sales and do not have immediate access to substantial cash reserves and providing the additional time up front would alleviate pressure on both nonprofits and HUD. One commenter stated an extended pre-bid due diligence period would allow more time to assess the interest of affiliate networks in the properties.

HUD Response: HUD appreciates the feedback regarding extended timelines for nonprofits to conduct pre-bid due diligence and close sales. HUD acknowledges the unique challenges nonprofits face in securing financing and recognizes that additional time could alleviate pressures on both nonprofits and HUD. Any timeline extensions would likely apply to all bidder types to ensure equity. Such changes would be implemented through sale notifications (such as the **Federal Register** Notice) and sale documentation (the Qualification Statement, the BIP and CAA) rather than in the rule itself, providing the Department greater flexibility.

Public Comments and Recommendations

A. General Support

A number of commenters expressed overall support for the rulemaking and appreciated that the proposed rule

incorporated prior stakeholder input. Several commenters expressed support for converting the Single Family Sale Program from a pilot to a permanent program.

HUD Response: HUD appreciates the stakeholder feedback in support of the Single Family Sale Program and this rule.

B. Racial Homeownership Disparities

Several commenters discussed racial homeownership disparities, the racial wealth gap, and the importance of homeownership to individuals and communities. One commenter stated that Black and Latino homeowners are disproportionately impacted by HUD note sales and the related impacts to communities that are targeted by institutional investors. One commenter said that the obligation to affirmatively further fair housing is particularly relevant to FHA's insured loan program because Black and Latine borrowers rely heavily on it to purchase homes.

HUD Response: HUD appreciates the comments on racial disparities in homeownership, the racial wealth gap, and the vital role of homeownership in supporting communities. The Department understands concerns that Black and Latine homeowners may be disproportionately affected by note sales and institutional investor involvement. Recognizing the importance of affirmatively furthering fair housing, HUD is aware of the critical role FHA-insured loans play for many Black and Latine borrowers. HUD remains committed to promoting equitable outcomes and strengthening protections for communities impacted by systemic inequities. These insights support HUD's ongoing efforts to foster fair housing access and reduce disparities across all communities.

C. Support for Nonprofit Organizations and Concerns Regarding Private Investors

Several comments were submitted that provide general support for nonprofit and community-based organizations and raise concerns regarding the role of private investors. Commenters noted the importance of nonprofit and community-based organizations in single family loan sales, and said these organizations have the experience and expertise to meaningfully invest in communities, navigate public and private funding, and foster homeownership.

A number of commenters raised concerns regarding the impacts of private investors in loan sales. One commenter provided data on the impact of purchases by institutional investors

and stated HUD's goal should be to end the practice of selling FHA notes to private investors. Two commenters stated that market forces alone cannot address the cost constraints placed on low- and moderate-income families. A commenter noted that if private investors continue to purchase loans, strong enforcement of borrower protections and public reporting data regarding the program and outcomes will be important. One commenter stated that given the capacity limits of nonprofit organizations, profit-motivated investors will likely remain a major part of the program and stated it is important for HUD to mitigate the harm that profit-motivated investors could impose on FHA borrowers if those investors are left with largely unfettered discretion.

HUD Response: HUD appreciates the strong support expressed by commenters for nonprofit and community-based organizations and acknowledges the valuable role these organizations play in single family loan sales. HUD recognizes that nonprofits have a unique capacity to positively impact communities through their extensive expertise, commitment to fostering homeownership, and ability to navigate public-private funding sources effectively.

HUD also notes the concerns raised by commenters regarding the role of private investors in loan sales, including the potential challenges market-driven entities may pose for low- and moderate-income families. While HUD anticipates that private investors will continue to participate alongside nonprofits due to capacity constraints within the nonprofit sector, HUD is committed to exploring avenues to balance investor involvement with strong borrower protections and community-focused objectives. To this end, HUD will continue to enforce borrower protections and enhance transparency by providing public reporting on program outcomes.

HUD remains dedicated to reviewing feedback on how best to support nonprofit organizations while ensuring private investor participation aligns with HUD's mission of promoting sustainable, affordable homeownership opportunities. The Department will carefully consider all suggestions as part of its ongoing commitment to improve the Single Family Sales Program.

D. Recommendation That HUD Impose and Enforce Income Limits

Two commenters recommended that HUD bolster the objective of selling to households earning less than 120 percent AMI and renting to households

at or below 80 percent AMI by requiring that both non-profit and for-profit comply with those AMI limits and barring entities that do not comply with those objectives from future sales.

HUD Response: HUD appreciates the stakeholder feedback. Any requirements related to income limits, eligibility, or restrictions on future participation for non-compliance will be outlined within the sale notifications (such as the **Federal Register** Notice) and associated legal documents like the Qualification Statement, the CAA and the BIP) rather than in the rule itself. Addressing these criteria through sale documentation provides HUD with the flexibility needed to adjust and strengthen program requirements in response to changing market conditions and program goals. HUD remains committed to transparency and will ensure stakeholders have clear guidance through publicly accessible sale documents.

E. Clarify That the Participating Servicer Agreement (PSA) Controls Eligibility Criteria

One commenter stated that in order to set proper expectations with Participating Servicers, § 203.413(b) should expressly state that the "acceptability criteria include to the satisfaction of the Single-Family Sale loss mitigation eligibility requirements as defined in the PSA".

HUD Response: HUD appreciates the stakeholder feedback. HUD acknowledges the importance of clearly setting expectations for Participating Servicers. This clarification will be addressed through the PSA and associated sale documentation rather than in the rule itself. This approach allows HUD the flexibility to update and refine the criteria as necessary in response to evolving program needs, while ensuring that servicers understand their obligations under the PSA. These documents will be publicly posted for each sale, ensuring transparency for all stakeholders.

F. Repurchase Protocol When Participating Servicer Is Engaged in Significant Misconduct

One commenter recommended that HUD implement a protocol for the repurchase of loans in cases where a participating servicer engaged in significant misconduct and identified ambiguity in the current requirements. The commenter stated that the rules provide that HUD can withdraw a loan from a sale for any reason, including noncompliance with the Conveyance, Assignment and Assumption Agreement (CAA), at any time prior to the

settlement date and the definitions of CAA and Sale Notice state that the documents will include certain “repurchase requirements”. The commenter stated that the comments to § 291.605 mentions “repurchase criteria” applicable to servicers, although it is not clear whether the “repurchase” mechanism is distinct from the “withdrawal” of a loan before the settlement.

The commenter also stated that HUD should not terminate repurchase obligations at the post-sale settlement date. The commenter recommended that the Sale Notice and CAA inform purchasers that the loans are subject to repurchase as long as they are held by the initial purchaser. The commenter recommended that if it becomes apparent after a sale that the Participating Servicer misrepresented its compliance with FHA loss mitigation guidelines, the purchaser should not be permitted to foreclose. Instead, the commenter stated that HUD should require the noncomplying Participating Servicer to repurchase the loan, comply with FHA loss mitigation guidelines and provide other remedies available under FHA guidance. The commenter stated this would deter routine misrepresentations of compliance with FHA guidelines.

HUD Response: HUD appreciates the stakeholder feedback. The Department acknowledges the importance of ensuring transparency and accountability in the sale process, particularly when there are potential compliance issues with FHA loss mitigation guidelines. HUD will review the possibility of more clearly distinguishing between the “withdrawal” of a loan prior to settlement and the “repurchase” mechanism applicable post-settlement. This may include ensuring that the definitions of the CAA and Sale Notice reflect these distinctions more explicitly.

The commenter’s suggestion that repurchase obligations extend beyond the post-sale settlement date in cases of noncompliance with FHA guidelines will also be carefully considered. HUD agrees that robust mechanisms should be in place to deter misrepresentations of compliance and ensure that loans are managed in accordance with FHA’s loss mitigation guidelines.

As stated in the rule, the repurchase criteria and related terms will be more clearly defined in the Sale Notice, which will be publicly posted for each sale. Any adjustments to these terms will be addressed through the legal documents rather than in the rule itself, as this provides the flexibility needed to

adapt to evolving concerns and ensure compliance with FHA’s standards.

G. Clarification Making the Purchaser Bound by the Terms of the CAA and Notice of Sale

A commenter supported the requirement that “any subsequent transferee of or servicer” of the initial loan purchaser comply with the terms of the CAA and Notice of Sale. The commenter stated that the proposed rule specifies that subsequent transferees and their servicers must offer loss mitigation options that meet the same standard as those of the original purchaser.

The commenter stated that the term “transferee” in § 291.615(a) is not defined in the regulations and could be open to interpretation. The commenter stated that further Handbook or Mortgagee Letter of clarification would be appropriate to clarify it if means transferees of the note, assignees of the mortgage, or transferees of title to the real property. The definition is relevant because transferees of the promissory note may not have knowledge of the terms of the CAA and Sale Notice. To avoid later enforcement issues, HUD could require information about the CAA and Sale Notice obligations to be included in the recorded assignment of the mortgage to the initial purchaser and recording the CAA in property records would also provide notice to subsequent purchasers.

HUD Response: HUD appreciates the stakeholder feedback. The Department acknowledges the commenter’s concern regarding the interpretation of the term “transferee” in § 291.615(a) and its potential ambiguity in the absence of a defined meaning within the regulations.

HUD agrees that further clarification—potentially through a Handbook or Mortgagee Letter—could be useful to specify whether “transferee” refers to transferees of the note, assignees of the mortgage, or transferees of title to the real property. Additionally, HUD recognizes the concern that transferees of the promissory note may not be aware of the terms of the CAA and Sale Notice, which could lead to enforcement challenges.

HUD will consider incorporating information about the CAA and Sale Notice obligations into the recorded assignment of the mortgage to the initial purchaser and may review the potential for recording the CAA in property records to provide notice to subsequent purchasers. Any changes to the recorded assignment requirements or sale terms will be addressed within the sale agreements and related legal documents.

As noted in the rule, these documents will be publicly posted for each sale, and making changes through these legal documents allows HUD the flexibility to adapt to evolving needs and stakeholder feedback.

H. Clarify That Reporting Requirements in 24 CFR 291.615(b) Apply to Transferees and Their Servicers

A commenter stated it is unclear who must comply with the purchaser reporting requirements in § 291.615(b) and requested that HUD clarify that subsection. The commenter stated that § 291.615(b) refers to the obligation of the “purchaser”, while § 291.615(a) specifically extends the obligations to subsequent transferees and their servicers. The commenter suggested the absence of a reference to transferees and their servicers in § 291.615(b) may be an oversight and requested that HUD clarify by specifically designating the reporting obligations as applicable to transferees and their servicers.

HUD Response: HUD appreciates the stakeholder feedback. While § 291.615(a) specifically extends obligations to subsequent transferees and their servicers, HUD acknowledges that the absence of a reference to transferees and their servicers in § 291.615(b) may cause some confusion.

To clarify, the reporting obligations do extend to transferees and their servicers, as detailed in the sale agreements and related documentation. These requirements are more fully defined within the legal agreements governing each sale. As stated in the rule, HUD will publicly post these documents for each sale, providing greater transparency on the obligations of purchasers, transferees, and servicers. Any future changes to sale terms or definitions will be reflected through these legal agreements to maintain flexibility in adapting to evolving program needs.

I. Transactional Documents Should Be Made Available to the Public

One commenter stated that the rule should make clear that all key transactional documents described in § 291.601, and adapted for the specific sale, will be accessible to the public on HUD’s website. The commenter stated that documents such as the Participating Servicer Agreement, Bidder Information Package, the Conveyance, Assignment and Assumption Agreement, the Interim Servicing Agreement, and the Desk Guide are referenced and defined by the proposed rule. The commenter also stated that the rule provides that an “Addendum” to each of the documents will be published on HUD’s website for

each Single Family Sale. The commenter is unclear whether “Addendum” means the form as adapted to the specific loan sale, but strongly support the provision if that is the intended meaning.

The commenter stated that transparency is important so borrowers can know the post-sale servicing obligations that are binding on a loan purchaser and its assignees, including the Conveyance, Assignment and Assumption Agreement and the Sale Notice. The commenter said that without easy access to those documents, borrowers and their advocates will not know the eligibility requirements for loss-mitigation options and that will prevent borrower’s from effectively challenging errors in servicing and will lead to unnecessary foreclosures.

HUD’s Response: HUD appreciates the stakeholder feedback. HUD is committed to ensuring transparency in the single family sale program process. As stated in the rule, key documents—including the Participating Servicer Agreement (PSA), Conveyance, Assignment and Assumption Agreement (CAA), Interim Servicing Agreement (ISA), and Desk Guide—will be made available to the public on HUD’s website.

The Bidder Information Package (BIP), however, will only be made available to qualified bidders to protect the integrity of the bidding process. Regarding the commenter’s question about the “Addendum,” HUD clarifies that the term refers to the document as adapted for each specific loan sale, and this will also be made available as part of the public documentation for each sale.

HUD recognizes the importance of transparency so that borrowers and their advocates are informed about post-sale servicing obligations and loss-mitigation options. By providing public access to these documents, HUD aims to ensure borrowers have the information they need to challenge servicing errors and avoid unnecessary foreclosures.

J. Recommended Flexibility to Curtailment Provisions

One commenter advocated for reform to FHA’s claims curtailment rules for all claim types. The commenter was concerned by the provision that “HUD will curtail Debenture Interest” in § 203.413(d), even if a claim remains suspended for reasons beyond the servicer’s control. The commenter was also concerned that HUD’s definition of “Debenture Interest” included “approved reimbursable expenses” subject to curtailment.

The commenter recommended that the final rule: (a) limit curtailment to

deadlines missed due to factors within the servicer’s control and (b) clarifying that servicers may file supplemental claims under FHA Single Family Housing Policy Handbook if necessary. The commenter stated that addressing curtailment provisions would encourage participation in the Single Family Sales Program as servicers will not be penalized when making every effort to comply with claims filing deadlines. The commenter suggested that without this change the prospect of losing interest and out of pocket costs may chill participation.

HUD’s Response: HUD appreciates the stakeholder feedback; however, the curtailment of claims, including debenture interest and reimbursable expenses, is outside the scope of this current rulemaking. HUD acknowledges the importance of addressing these issues and encourages continued engagement on how to improve the claims process. HUD will consider this feedback for future policy updates and administrative guidance.

K. Required Sales to Owner-Occupants

One commenter stated that given the negative effects market speculation on the single-family home market, there should be a requirement that 100 percent of the properties sold end up in the hands of owner occupants. The commenter criticized the HVLS program for not doing enough to ensure a broader market effort to maintain affordable homes for first time buyers and younger generations.

HUD’s Response: HUD appreciates the thoughtful feedback regarding the impact of market speculation on the single-family home market and the suggestion to ensure that 100 percent of properties sold end up in the hands of owner-occupants. HUD is committed to supporting affordable homeownership opportunities, particularly for first-time homebuyers and younger generations.

HUD will carefully consider this proposal as part of our ongoing efforts to enhance the Home Equity Conversion Mortgage Loan Sales (HVLS) program and other Single Family Sale Program initiatives. However, any modifications to the percentage of properties designated for owner-occupants would be implemented through the sale notifications and legal documents, rather than the rule itself. This approach allows the Department the flexibility to adapt sale requirements as needed in response to evolving market conditions and program goals.

HUD remains committed to exploring all options to increase affordable homeownership and reduce market

pressures on low- and moderate-income buyers.

L. Recommended Convening of Practitioners

Two commentors recommended that FHA convene practitioners with experience using the program to allow HUD to better understand the concerns of nonprofits working to expand their single-family housing footprint. The commenters suggested that providing an opportunity for mission-driven stakeholders to share best practices would expand the reach and effectiveness of the program and continue to inform necessary reforms.

HUD Response: HUD appreciates the insightful comments regarding the value of convening practitioners with experience in the Single Family Sale Program. HUD recognizes the importance of engaging mission-driven stakeholders to better understand the challenges nonprofits face as they work to expand their single-family housing footprint. HUD agrees that providing a forum for practitioners to share best practices would not only strengthen program effectiveness but also support broader affordable housing goals.

HUD is committed to expanding collaboration with the nonprofit community and will explore opportunities to convene experienced practitioners. Such a platform could enhance stakeholder engagement, facilitate knowledge sharing, and inform ongoing program reforms, ensuring that the needs and expertise of nonprofits are integrated into future improvements of the program. HUD welcomes continued dialogue on this important initiative.

M. Credit Scores for First-Time Homeowners

One commenter stated that credit scores should not be a consideration for first-time homeowners, who can build credit through homeownership.

HUD Response: HUD appreciates the comment regarding the consideration of credit scores for first-time homebuyers. HUD understands the viewpoint that homeownership itself can serve as a pathway to building credit. However, credit scores play an important role in assessing a borrower’s ability to repay a loan and managing overall risk within the housing market.

At the same time, HUD remains committed to expanding homeownership opportunities and continues to explore ways to responsibly assist first-time homebuyers, including offering programs with more flexible credit requirements. HUD values input on this

issue and will take it into account as we seek to balance financial accessibility with sustainable homeownership outcomes.

V. Findings and Certifications

Regulatory Review—Executive Orders 12866, 13563, and 14094

Pursuant to Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant, and therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. Executive Order 13563 (Improving Regulations and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The order also directs executive agencies to analyze regulations that are “outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand or repeal them in accordance with that has been learned.” Executive Order 13563 further directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. Executive Order 14094 entitled “Modernizing Regulatory Review” (hereinafter referred to as the “Modernizing E.O.”) amends section 3(f) of Executive Order 12866 (Regulatory Planning and Review), among other things.

As previously discussed, this rule would provide flexibility for the management of defaulted loans, more efficiently accept assignment, and dispose of assigned mortgages through loan sales and reduce the overall financial exposure of the MMIF. This final rule was determined not to be a “significant regulatory action” as defined in section 3(f) of Executive Order 12866 as amended by Executive Order 14094.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit organizations, and small governmental jurisdictions.

This rule makes the Single Family Sales Program permanent and makes changes to HUD’s regulations to implement parts 203, 206, respectively referring to Single Family Forward loans and HECM, and part 291 to efficiently manage HUD’s defaulted single family assets and minimize losses to the MMIF. While small entities such as mortgage service providers may be affected by this Program, these entities would not incur a significant economic impact because the Program would provide servicers with the chance to assign burdensome and problematic loans to HUD. Therefore, the undersigned certifies this proposed rule will not have a significant economic impact on a substantial number of small entities.

Environmental Impact

This rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 under 24 CFR 50.19(c)(1) because it does not direct, provide assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, rehabilitation, alteration, demolition, or new construction, or establish, revise or provide for standards for construction or construction materials, manufactured housing, or occupancy.

Executive Order 13132, Federalism

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

Paperwork Reduction Act

The information collection requirements contained in this final rule have not been revised from those provided in the proposed rule and have been submitted to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) for review and approval.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for Federal agencies to assess the effects

of their regulatory actions on State, local, and Tribal governments, and on the private sector. This rule does not impose any Federal mandates on any State, local, or Tribal government, or on the private sector, within the meaning of the UMRA.

List of Subjects

24 CFR Part 203

Hawaiian Natives, Home improvement, Indians—lands, Loan programs—housing and community development, Mortgage insurance, Reporting and recordkeeping requirements, and Solar energy.

24 CFR Part 206

Aged, Condominiums, Loan programs—housing and community development, Mortgage insurance, and Reporting and recordkeeping requirements.

24 CFR Part 291

Community facilities, Conflicts of interest, Homeless, Lead poisoning, Low- and moderate-income housing, Mortgages, Reporting and recordkeeping requirements, and Surplus government property.

Accordingly, for the reasons described in the preamble, HUD amends 24 CFR parts 203, 206, and 291 as follows:

PART 203—SINGLE FAMILY MORTGAGE INSURANCE

■ 1. The authority citation for part 203 continues to read as follows:

Authority: 12 U.S.C. 1707, 1709, 1710, 1715b, 1715z–16, 1715u, and 1715z–21; 15 U.S.C. 1639c; 42 U.S.C. 3535(d).

■ 2. Add § 203.413 to read as follows:

§ 203.413 Amount of payment—Single Family Sale assignments.

(a) *Time of payment.* Upon an assignment of a mortgage insured under this part *that is acceptable to the Commissioner, made pursuant to a Single Family Sale* and in accordance with § 291.609 or § 291.619 of this chapter, the Commissioner shall pay to the mortgagee the unpaid principal balance of the loan at the time of assignment and an amount calculated in accordance with the Participating Servicer Agreement (PSA), as defined in § 291.601 of this chapter.

(b) *Acceptability criteria.* For assignment, the mortgagee must determine and certify the mortgage satisfies the Commissioner’s acceptability criteria for the Single Family Sale. Acceptability criteria includes satisfaction of the Single Family Sale loss mitigation eligibility requirements and exclusion of low-

value mortgages secured by vacant properties.

(c) *Reduction in claim.* The mortgagee's claim for insurance will be reduced for failure to take the required actions within the specified schedule of dates for the Single Family Sale, as specified in the PSA.

(d) *Curtailment of Debenture Interest.* HUD will curtail Debenture Interest at the thirtieth (30th) day following the earliest anticipated claim submission date, as identified on the schedule of dates in the PSA, if:

(1) The mortgagee's claim for insurance is not submitted to HUD; or

(2) The claim for insurance is in a suspended status.

(e) *Debenture Interest.* For purposes of this section, *Debenture Interest* means interest at the debenture rate as computed by HUD in accordance with its rules and requirements for such calculations, on the unpaid principal balance as of the claim payment date, *plus* the approved reimbursable expenses identified in the PSA, *minus* any amount of such interest or expenses that would have been curtailed or for which the Participating Servicer would have been denied reimbursement pursuant to HUD's requirements for servicing defaulted notes and processing claims, including § 203.402(k)(1)(i) and (ii), had the Participating Servicer conveyed title to the property securing the Single Family Loan to the Secretary rather than assigned the Single Family Loan in connection with an insurance claim.

(f) *Rejection of claim.* HUD may reject the mortgagee's claim for insurance and exclude the related mortgage from settlement if within the thirty (30)-day period prior to the claim's submission cut-off date, as identified on the schedule of dates in the PSA:

(1) Any insurance claim is not submitted; or

(2) Any suspended insurance claim is not resolved.

PART 206—HOME EQUITY CONVERSION MORTGAGE INSURANCE

■ 3. The authority citation for part 206 continues to read as follows:

Authority: 12 U.S.C. 1715b, 1715z-20; 42 U.S.C. 3535(d).

■ 4. Add § 206.130, under the undesignated center heading "Claim Procedure," to read as follows:

§ 206.130 Amount of payment—HECM Single Family Sale assignments.

(a) *Time of payment.* Upon an assignment of a mortgage insured under this part that is acceptable to the

Commissioner, made pursuant to a *HECM Single Family Sale* and in accordance with § 291.609 or § 291.619 of this chapter, the Commissioner shall pay to the mortgagee the unpaid principal balance of the loan at the time of assignment and an amount calculated in accordance with the Participating Servicer Agreement (PSA), as defined in § 291.601 of this chapter.

(b) *Acceptability criteria.* For assignment, the mortgagee must determine and certify the mortgage satisfies the Commissioner's acceptability criteria for the Single Family Sale.

(c) *Reduction in claim.* The mortgagee's claim for insurance will be reduced for failure to take the required actions within the specified schedule of dates for the Single Family Sale, as specified in the PSA.

(d) *Curtailment of debenture interest.* HUD will curtail debenture interest at the thirtieth (30th) day following the earliest anticipated claim submission date, as identified on the schedule of dates in the PSA, if:

(1) The mortgagee's claim for insurance is not submitted to HUD; or

(2) The claim for insurance is in a suspended status.

(e) *Debenture Interest.* For purposes of this section, *Debenture Interest* means interest at the debenture rate as computed by HUD in accordance with its rules and requirements for such calculations, on the unpaid principal balance as of the claim payment date, *plus* the approved reimbursable expenses identified in the PSA, *minus* any amount of such interest or expenses that would have been curtailed or for which the Participating Servicer would have been denied reimbursement pursuant to HUD's requirements for servicing due and payable notes and processing claims, including § 206.129(d)(3)(x), had the Participating Servicer foreclosed or the borrower sold the property in connection with an insurance claim.

(f) *Rejection of the claim.* HUD may reject the mortgagee's claim for insurance and exclude the related mortgage from settlement if, within the thirty (30)-day period prior to the claim's submission cut-off date, as identified on the schedule of dates in the PSA:

(1) An insurance claim is not submitted; or

(2) Any suspended insurance claim is not yet resolved.

PART 291—DISPOSITION OF HUD-ACQUIRED AND -OWNED SINGLE FAMILY PROPERTY

■ 5. The authority citation for part 291 continues to read as follows:

Authority: 12 U.S.C. 1701 *et seq.*; 42 U.S.C. 1441, 1441a, 1551a, and 3535(d).

SUBPART D—[Removed and Reserved]

■ 6. Remove and reserve subpart D, consisting of §§ 291.301 through 291.307.

■ 7. Add subpart G, consisting of §§ 291.601 through 291.621, to read as follows:

Subpart G—Sale of HUD-Held Single Family Mortgage Loans

Sec.	
291.601	Definitions.
291.603	Purpose, scope, and applicability.
291.605	Participating Servicers.
291.607	Qualified participants.
291.609	Bidding process.
291.611	Post-bid process and HUD's execution of the CAA.
291.613	Settlement requirements.
291.615	Purchaser servicing requirements.
291.617	General policy—Direct Sales of Single Family Loans.
291.619	Direct Sale of Single Family Loans process.
291.621	Disqualifications.

§ 291.601 Definitions.

For purposes of this subpart, the following definitions apply:

Aggregate Loan Database (ALD) means the electronic data file containing Single Family Loan information available for Qualified Participants to review before a Single Family Sale.

Bidder Information Package (BIP) means the documents prepared for participants in a Single Family Sale, which may include, but are not limited to, the following: an executive summary of the Programs; the Single Family Sale post-sale servicing and reporting requirements published by HUD; due diligence information and reports; Single Family Loan information; the Conveyance, Assignment and Assumption Agreement (CAA); bidding and settlement information; and necessary information and requirements as determined by the Secretary.

Bidder Qualification Statement means HUD Forms 9611 and 9612, or any form approved for similar purpose in the future as prescribed by the Secretary. (OMB number 2502-0576)

Claim Date means, with respect to each Single Family Loan, the date on which the Single Family Sale assignment claim is paid by HUD to the P-Servicer.

Competitive Sale of Single Family Loans means a sale of an individual or group of Single Family Loans to Qualified Participants through a bid process prescribed by the Secretary in competition with other Qualified Participants in accordance with § 291.609.

Confidentiality Agreement means a nondisclosure agreement under which the individual or entity seeking to participate in Single Family Sales agrees that Single Family Loan data and documentation shared with the individual or entity as due diligence will remain confidential in accordance with the terms of the agreement as determined by the Secretary.

Conveyance, Assignment and Assumption Agreement (CAA) means the contract between HUD and a Purchaser, along with all applicable exhibits and riders, that governs the terms of the Single Family Sale as prescribed by the Secretary. The CAA will include any sale-specific post-sale servicing and outcome requirements, representations, repurchase requirements, schedule of dates, and reporting requirements published by the Secretary for the Single Family Sale through a Sale Notice.

Cut-off date or claim submission cut-off date means the last date specified by the Secretary on which the P-Servicer is permitted to submit to HUD a Single Family Sale insurance claim for payment under 24 CFR 203.413 and 206.130.

Desk Guide means the technical manual included in the PSA detailing the P-Servicer's steps for submitting Single Family Loans related to a Single Family Sale, including but not limited to the process for identifying eligible Single Family Loans, uploading due diligence files, and submitting insurance claims.

Direct Sale of Single Family Loans means a sale of an individual or group of Single Family Loans to a Qualified Participant through the process described in § 291.619.

Home Equity Conversion Mortgage (HECM) means reverse mortgages insured in accordance with 24 CFR part 206 under the FHA Home Equity Conversion Mortgage insurance program.

Interim Servicing Agreement (ISA) means the agreement between a Purchaser and P-Servicer that governs the servicing and administration of the purchased loans, including but not limited to transfer of mortgage information and loss mitigation evaluations, during the Interim Servicing Period in accordance with the terms prescribed by the Secretary.

Interim Servicing Period means the period commencing with Claim Date and ending with the Servicing Transfer Date.

Low-value means, in reference to a Mortgage, the value minimum stated in the Participating Servicer Agreement (PSA).

Nonprofit organization means an entity that is tax-exempt under section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C.A. 501(c)(3)) and meets the qualification requirements prescribed by the Secretary for participation in a Single Family Sale.

Participating Servicer (P-Servicer) means a mortgagee that complies with § 291.605 and submits Single Family Loans for a Single Family Sale.

Participating Servicer Agreement (PSA) means the agreement between HUD and a P-Servicer that governs the P-Servicer's submission of Single Family Loans to be sold in a Single Family Sale on terms as prescribed by the Secretary.

Purchaser means a Qualified Participant to which HUD has awarded one or more Single Family Loans through a Single Family Sale, as of the date of notification of the award.

Qualified Participant means an individual or entity that satisfies the requirements in § 291.607 for participation in Single Family Sales.

Sale Notice means an announcement published by HUD for an upcoming Single Family Sale and includes any stated mission objectives and additional sale, participant qualification, and loan eligibility requirements; representations; post-sale servicing, outcomes, and reporting requirements; and repurchase requirements for inclusion in the Qualification Statement, PSA, ISA, and CAA as applicable.

Servicing Transfer Date means, with respect to any Single Family Loan, the date on which the actual servicing duties for such Single Family Loan has been or will be transferred from the P-Servicer to the Purchaser's servicer. The latest Servicing Transfer Date will be set forth in a schedule of dates prescribed by the Secretary and included in the PSA, ISA, and CAA.

Single Family Loan means any HUD-selected eligible forward mortgage loan insured under Section 203 of the National Housing Act (12 U.S.C. 1709) that has or will be assigned to HUD and any HUD-selected eligible HECM insured under section 255 of the National Housing Act (12 U.S.C. 1715z-20) that has or will be assigned to HUD, or any other eligible single family mortgage loans owned by the Secretary that will be sold in a Single Family Sale.

Single Family Sale means a Competitive Sale of Single Family Loans

or Direct Sale of Single Family Loans conducted by HUD in accordance with this subpart.

Vacant means a mortgaged property is determined to be vacant or abandoned in accordance with the requirements of 24 CFR part 203 and FHA policy.

§ 291.603 Purpose, scope, and applicability.

The sale of Single Family Loans is at the discretion of the Secretary. All Single Family Loans will be sold without recourse to HUD and without FHA insurance. HUD may sell individual Single Family Loans or groups of Single Family Loans to Qualified Participants as a Competitive Sale of Single Family Loans, § 291.609, or as a Direct Sale of Single Family Loans, § 291.619. Nothing in this section shall be construed to prevent HUD from grouping Single Family Loans with other types of HUD assets for sale, including grouping any associated HUD-held mortgages subordinate to the respective assets. The procedures set out in this subpart, including any cross-referenced regulations, documentation, and published notices detailed in this subpart, govern the Single Family Sales.

§ 291.605 Participating Servicers.

(a) **Participation.** To participate in a Single Family Sale, a Participating Servicer must:

- (1) Be an FHA-approved Mortgagee contributing eligible Single Family Loans and assigning loans to HUD; and
- (2) Execute a PSA and agree to execute an ISA, as needed.

(b) **Sale.** For each Single Family Sale, the Participating Servicer must:

- (1) Identify mortgages that meet the eligibility criteria in accordance with terms of the PSA;
- (2) Conduct all sale activities in accordance with the PSA and ISA;
- (3) Comply with any Single Family Sale and Loan Sale Notification requirements as prescribed by the Secretary through notice; and
- (4) Comply with the terms of the Sale Notice.

(5) Ensure the Loan Sale Notification is provided to each borrower and any other parties as required by the Secretary and the Loan Sale Notification complies with all applicable law. Loan Sale notification requirements will be announced to the Participating Servicer through notice.

(c) **Claim payment requirements.** The Participating Servicer must comply with the claim payment process and requirements for Single Family Sales in accordance with the PSA and processes outlined in §§ 203.413 and 206.130, as applicable.

(d) *Interim servicing.* During the Interim Servicing Period, the Participating Servicer must service the purchased Single Family Loans on behalf of the Purchaser in accordance with the ISA.

(e) *Transfer documents and servicing.* The Participating Servicer must conduct the servicing transfer of the Single Family Loans in accordance with the requirements of the PSA and ISA and must service the purchased Single Family Loans in accordance with all applicable state and Federal law requirements, including applicable Consumer Finance Protection Bureau (CFPB) requirements.

§ 291.607 Qualified participants.

(a) *Confidentiality Agreement and Bidder Qualification Statement.* Individuals or entities must become a Qualified Participant before they may bid or purchase Single Family Loans in a Single Family Sale. An individual or entity seeking to participate in a Single Family Sale must sign a Confidentiality Agreement and complete a Bidder Qualification Statement. The Secretary will specify which Bidder Qualification Statement form(s) are applicable to a particular Single Family Sale and any additional sale specific qualification criteria through notice. HUD will only provide access to sensitive Single Family Sale materials to Qualified Participants.

(b) *Process for determining Qualified Participant.* HUD will qualify any individual or entity seeking to participate in a Single Family Sale if they have met the qualification requirements and executed the applicable Bidder Qualification Statement for the Single Family Sale.

§ 291.609 Bidding process.

(a) *Sale notice.* The Secretary will prescribe requirements for a Single Family Sale through the Sale Notice. For each Single Family Sale, HUD will publish the PSA Addendum, Desk Guide, ISA Addendum, CAA Addendum, and Sale Notices on HUD's public website.

(b) *Submission of bids.* All bids by a Qualified Participant must be submitted to HUD in accordance with the Sale Notice and the instructions in the BIP. By submitting a bid, the Qualified Participant is considered to have made an offer to purchase Single Family Loans as presented in the BIP. Submission of a bid constitutes acceptance of the terms and conditions set forth in the BIP. Along with the bid, the Qualified Participant must submit an executed copy of the CAA and ISA, as applicable.

(c) *Bids by brokers or agents.* Any bid submitted by a broker or agent for a Qualified Participant must be made in the name of the Qualified Participant and signed by the broker or agent as the attorney-in-fact for the Qualified Participant. All such bid documents must bind the Qualified Participant. Each bid must also include a power of attorney satisfactory to HUD as to form and content.

(d) *Earnest money deposits.* The Qualified Participant must submit to HUD, along with its bid, an earnest money deposit, as required in the CAA or Sale Notice. The earnest money deposit is nonrefundable for a Qualified Participant whose bid is selected for award and will be credited toward the purchase price. If a Qualified Participant's bid is not selected for any award, their earnest money will be returned.

(e) *Timing for withdrawal of bids.* A Qualified Participant may withdraw a submitted bid in accordance with the instructions in the BIP for a Single Family Sale. However, a previously submitted bid may not be withdrawn once the bidding has closed.

(f) *Termination of Single Family Sale.* HUD reserves the right to terminate a Single Family Sale in whole or in part at any time before the bid date.

(g) *Withdrawal of Single Family Loans.* HUD reserves the right to withdraw Single Family Loans from a Single Family Sale prior to the settlement date. Any earnest money deposits made by a Purchaser relating to withdrawn Single Family Loans will be retained by the Secretary and credited toward the total purchase price of the remaining Single Family Loans in the pool, in accordance with the CAA and BIP. After the bid date, HUD can withdraw Single Family Loans or not deliver all the Single Family Loans for settlement for any reason, including those set forth in the BIP and CAA.

(h) *Rejection of bids.* At HUD's discretion, any bid may be rejected under the following circumstances:

(1) The bid does not conform with the instructions in the BIP;

(2) HUD determines that an award based on the bid would not be in the best interests of the Secretary because the award would not further HUD's fiduciary responsibility to the mutual mortgage insurance fund (MMIF) or any stated mission objectives in the Sale Notice; or

(3) HUD can also issue a conditional rejection that would provide the opportunity for the bid to be amended and resubmitted for acceptance upon fulfillment of HUD's requests.

§ 291.611 Post-bid process and HUD's execution of the CAA.

After HUD evaluates conforming bids, HUD may request an adjustment to a bid in accordance with the BIP. After any bid adjustments, HUD will select bids for award and provide notice of award in a manner set forth in the BIP. After selection of a Purchaser, HUD will execute the CAA.

§ 291.613 Settlement requirements.

(a) *Settlement payment.* On the settlement date of a Single Family Sale, the Purchaser must pay to HUD the settlement payment, consisting of the balance of the amount due on the bid price, as adjusted in accordance with the CAA.

(b) *Settlement statement.* When the Purchaser delivers to HUD the documents required at settlement and the settlement payment in paragraph (a) of this section, HUD will execute and deliver to the Purchaser a settlement statement and updated Single Family Loan schedule for the CAA to document the Single Family Loans sold to the Purchaser in the Single Family Sale.

(c) *Endorsement and assignment.* HUD may grant a temporary Limited Power of Attorney to the Purchaser to effect endorsement and assignment of the Single Family Loans to the Purchaser.

(d) *Purchaser's special purpose entity.* HUD may allow a Purchaser to endorse and assign Single Family Loans from HUD to Purchaser's special purpose entity acquisition vehicle on terms permitted in the CAA.

§ 291.615 Purchaser servicing requirements.

(a) *Purchaser post-sale servicing.* The Purchaser and its servicer, and any subsequent transferee of or servicer for the Single Family Loan, must comply with the terms of the CAA and the Sale Notice post-sale loss mitigation and outcome requirements. Post-sale requirements will include a requirement that any Single Family Loan that converts to real estate owned property via foreclosure or deed-in-lieu of foreclosure be offered for sale through a first look program, providing an exclusive listing period for owner occupant, nonprofit organization, governmental entities, and other prospective buyers as permitted by HUD. Post-sale requirements will also include requirements that Purchasers offer borrowers loss mitigation options that are as or more generous than the FHA loss mitigation options, a prohibition on reselling real estate owned property through a contract for deed or similar financing mechanism, a

requirement that the Purchaser obtain prior approval from HUD before entering into a lease-purchase agreement with a prospective purchaser, and a prohibition on releasing liens on particular categories of properties, including vacant properties. Purchasers must take all lawful steps to service the Single Family Loans and collect amounts due in accordance with requirements as set forth by the CAA and all state and Federal law requirements, including applicable CFPB requirements.

(b) *Purchaser reporting requirements.* Purchasers must report on the post-sale servicing actions and outcomes obtained for each Single Family Loan purchased as prescribed by the CAA. HUD will publish reports for the public on loan and property outcomes and will include a breakdown of outcomes in different geographies. HUD will prescribe the reporting period as a specified period after settlement in the CAA.

(c) *Remedy for performance failures.* HUD may pursue appropriate remedies, including, but not limited to, the ability to deny future participation in loan sales, for a Purchaser's failure to comply with Single Family Sale requirements, including CAA obligations.

§ 291.617 General policy—Direct Sale of Single Family Loans.

The Secretary may pursue a Direct Sale of Single Family Loans to individuals or entity type the Secretary determines may be eligible to qualify as set forth in the Sale Notice. The Direct Sale of Single Family Loans will be subject to the requirements of this subpart, excluding §§ 291.609 and 291.611. The Secretary will publish in the Sale Notice, sale specific Single Family Loan eligibility criteria.

§ 291.619 Direct Sale of Single Family Loans process.

(a) *Sale Notice.* The Secretary will prescribe requirements for a Direct Sale of Single Family Loans through a Sale Notice.

(b) *Sale feasibility.* In all stages of the Direct Sale of Single Family Loans process, HUD may determine whether continuation with the Direct Sale of Single Family Loans is feasible and in HUD's interest, consistent with HUD's fiduciary responsibility to the MMIF and any stated mission objectives.

(c) *Direct Sale of Single Family Loans process.* An individual or entity interested in purchasing Single Family Loans through a Direct Sale of Single Family Loans must:

(1) Meet the Secretary's prescribed requirements for the Direct Sale of Single Family Loans in the Sale Notice;

(2) Submit a letter of interest to the Secretary that includes, at a minimum:

(i) The description of the individual or entity and a statement about how it would be able to satisfy the participant eligibility requirements and mission objectives, if any;

(ii) The geographic area of interest where the party wishes to purchase the loans;

(iii) The individual or entity's goals and how this purchase would assist in achieving these goals through post-sale outcomes;

(iv) The approximate timeframe for the purchase;

(v) The approximate number of loans or, alternatively, the approximate gross sale amount desired; and

(vi) The organizational documents for an entity including, but not limited to organizational documents, any required authorizing resolutions, and disclosure of all nonprofit organization or private entity partnership interests in the Direct Sale of Single Family Loans transaction.

(d) *HUD determination.* Upon receipt of a letter in paragraph (c)(2) of this section, HUD will respond in writing to the submitter to confirm receipt of the letter and, if necessary, request additional information needed for a final determination.

(e) *Secretary's determination to proceed.* (1) If the Secretary makes a final determination to proceed, the Secretary will request from the individual or entity, a business plan proposal from the individual or entity that details its ability to meet any stated mission objectives in the Sale Notice along with its goals and how these goals will be achieved with post-sale outcomes. Business plans must be received by HUD within 30 business days of request.

(2) Upon receipt and review of business plan proposal, HUD will:

(i) Reject the business plan proposal;

(ii) Issue a conditional rejection that would provide the opportunity for a business plan proposal to be amended and resubmitted for approval upon fulfillment of HUD's request; or

(iii) Approve the business plan proposal.

(3) Upon approval of such business plan proposal, HUD and the individual or entity will begin the Direct Sale of Single Family Loans process that includes:

(i) An executed Confidentiality Agreement;

(ii) An executed Bidder Qualification Statement;

(iii) A P-Servicer executed PSA; and

(iv) Review of Single Family Loans from P-Servicer(s) or HUD.

(4) HUD and the individual or entity reviews the ALD and will agree on the

Single Family Loan Sale List for the Direct Sale of Single Family Loans.

(f) *Direct Sale of Single Family Loans.* After satisfaction of the requirements in paragraph (d) of this section, HUD will conduct its valuation review, and issue a final price determination and a CAA, containing an estimated settlement date, to the individual or entity. If accepted, a final Settlement date is scheduled, and the Single Family Loan List is appended to the CAA.

(g) *Settlement.* HUD and the Purchaser will execute the CAA for settlement. The remaining settlement and transfer requirements will follow those in § 291.613.

§ 291.621 Disqualifications.

(a) *Fraudulent information.* If HUD determines there is any information indicating any certification or required document provided by any party participating in a Single Family Sale, including but not limited to P-Servicer, Purchaser, Qualified Participant, or a Purchaser's servicer, is false, misleading, or constitutes fraud or misrepresentation, HUD will not approve that party's participation in the Single Family Sale and will revoke any prior approval. The submission of false information or misrepresentation by an approved lender or mortgagee may result in the referral of the mortgagee to the Mortgagee Review Board.

(b) *Participant ineligibility.* An individual or entity is ineligible to participate in a Single Family Sale if, at the time of the Single Family Sale, that individual or entity is suspended, debarred, under a limited denial of participation (LDP), or otherwise restricted under 2 CFR part 180 or 2424, 24 CFR part 25, 48 CFR part 9, subpart 9.4, or under similar procedures of any other Federal agency.

(c) *Future participation.* Purchasers that made misrepresentations in the qualification process or failed to meet their contractual obligations under CAAs, including failing to meet post-sale requirements, for previous Single Family Sales in which they participated may be disqualified from participation in one or more future Single Family Sales or for a set period of time at the discretion of the Secretary.

Julia R. Gordon,

Assistant Secretary for the Office of Housing—Federal Housing Commissioner.
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ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 82****[EPA-HQ-OAR-2003-0118; FRL-12145-01-OAR]****RIN 2060-AG12****Protection of Stratospheric Ozone: Determination 39 for the Significant New Alternatives Policy Program****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Determination of acceptability.

SUMMARY: This determination of acceptability expands the list of acceptable substitutes pursuant to the U.S. Environmental Protection Agency's Significant New Alternatives Policy program. This action lists four substitutes as acceptable additional substitutes for use in the refrigeration and air conditioning and foam blowing sectors.

DATES: This determination is applicable on December 11, 2024.

ADDRESSES: EPA established a docket for this action under Docket ID No. EPA-HQ-OAR-2003-0118 (continuation of Air Docket A-91-42). All electronic documents in the docket are listed in the index at <https://www.regulations.gov>. 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. Publicly available docket materials are available either electronically at <https://www.regulations.gov> or in hard copy at the EPA Docket Center (EPA/DC), (Docket Nos. A-91-42 and EPA-HQ-OAR-2003-0118), William J. Clinton West, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20460. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air and Radiation Docket is (202) 566-1742. The Docket Center's hours of operations are 8:30 a.m.-4:30 p.m., Monday-Friday (except Federal Holidays). For further information on the EPA Docket Center services and the current status, please visit online at <https://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:**I. Listing of New Acceptable Substitutes**

This action is listing as acceptable additional substitutes for use in the refrigeration and air conditioning and foam blowing sectors. This action presents EPA's most recent decisions under the Significant New Alternatives Policy (SNAP) program to list as acceptable several substitutes in different end-uses. The new substitutes are:

- R-471A in retail food refrigeration, industrial process refrigeration, and cold storage warehouses (retrofit equipment only);
- R-480A in cold storage warehouses, commercial ice machines, positive displacement chillers, refrigerated transport, and water coolers (retrofit equipment only);
- R-513A in residential and light commercial air conditioning and heat pumps—self-contained units (new equipment only);
- XPS foam blowing agent blends of 0 to 90 percent hydrofluoroolefin (HFO)-1336mzz(Z), 0 to 90 percent HFO-1234ze(E), 0 to 75 percent hydrofluorocarbon (HFC)-152a, and 0 to 90 percent carbon dioxide (CO₂) in polystyrene: extruded boardstock and billet.

Listing decisions in the end-uses in this document do not prejudice EPA's listings of these substitutes for other end-uses. For additional information on SNAP, visit the SNAP website at <https://www.epa.gov/snap>. The full lists of acceptable substitutes for ozone-depleting substances (ODS) in the industrial sectors covered by the SNAP program are available at <https://www.epa.gov/snap/substitutes-sector>. For more information on the Agency's process for administering the SNAP program or criteria for evaluation of substitutes, refer to the initial SNAP rulemaking (59 FR 13044; March 18, 1994). The regulations are codified at 40 CFR part 82, subpart G. SNAP decisions and the appropriate **Federal Register** citations are available at: <https://www.epa.gov/snap/snap-regulations>.

Under the SNAP program, EPA may list a substitute as acceptable for specified end-uses where the Agency has reviewed the substitute and found no reason to restrict or prohibit its use. Substitutes listed as unacceptable; acceptable, subject to narrowed use limits; or acceptable, subject to use conditions are also listed in the appendices to 40 CFR part 82, subpart G.

This document discusses each substitute listing in detail and summarizes the results of EPA's assessment of the human health and environmental risks posed by each substitute. EPA's evaluation applies the criteria in 40 CFR 82.180(a)(7), including atmospheric effects and related health and environmental effects, ecosystem risks, occupational risks, consumer risks, flammability, and cost and availability of the substitute. EPA evaluates these criteria in risk screens, or technical documents that evaluate risks to human health and the environment from substitutes in specific end-uses, including comparisons to other available substitutes and evaluations against relevant thresholds of risk starting with protective assumptions. The risk screens cited in this document include evaluation of atmospheric effects, toxicity data, exposure assessments, flammability, and other environmental impacts such as ecotoxicity and local air quality impacts. You can find more information on the criteria used in the evaluation of substitutes in the SNAP program at <https://www.epa.gov/snap/snap-regulations>.

In this document, EPA determined the global warming potential (GWP) for a chemical or blend using the 100-year GWP values from the Intergovernmental Panel on Climate Change's (IPCC) Fourth Assessment Report (AR4)¹ for substances or components of blends if included.² Note that Annex F to the *Montreal Protocol on Substances that Deplete the Ozone Layer* lists GWPs for HFCs that are numerically equivalent to

¹ IPCC, 2007: *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* [Solomon, S., Qin, D., Manning, M., Chen, Z., Marquis, M., Averyt, K.B., Tignor M., and Miller, H.L. (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA. Available at: https://www.ipcc.ch/publications_and_data/ar4/wg1/en/contents.html.

² The IPCC, 2007 100-year GWP values are consistent with the exchange values for the regulated HFCs listed in subsection (c) of the AIM Act and with the GWPs in Annex F of the Montreal Protocol.

the AR4 values.³ These HFC 100-year GWP values are also numerically equivalent to the exchange values listed in the American Innovation and Manufacturing Act of 2020 (hereafter referred to as “the AIM Act”). If no GWP is provided in AR4 for a substance, the SNAP program is using the 100-year GWP listed in World Meteorological Organization (WMO), 2022.⁴ To calculate the GWP of blends of chemicals, such as the listed refrigerant blends, this document weights the GWP of each component of the blend by its mass percentage. This method of calculating GWPs is consistent with the method used to calculate GWPs in the October 2023 Technology Transitions Rule as codified at 40 CFR 84.64.

Under section 612 of the Clean Air Act (CAA), the SNAP program reviews substitutes using a comparative risk framework in different industrial sectors. In making listing decisions, EPA considers overall risk to human health and the environment. As a general matter, the substitutes being added through this action to the acceptable lists have a similar or lower risk than other substitutes already listed as acceptable in those end-uses. However, certain substitutes may have a higher risk than certain other substitutes already listed as acceptable or acceptable subject to restrictions. In such cases, those already-listed alternatives have other factors that limit their use in some situations within a particular end-use.

Appendix A contains tables summarizing each listing decision in this action. The statements in the “Further Information” column in the tables provide additional information, but these are not legally binding under section 612 of the CAA. Although users are not required to follow recommendations in the “Further Information” column of the table under section 612 of the CAA, some of these statements may refer to obligations that are enforceable or binding under federal or state programs other than the SNAP program. The identification of other enforceable or binding requirements should not be construed as a comprehensive list of such obligations. In many instances, the information simply refers to standard operating practices in existing industry standards

and/or building codes. When using these substitutes in the identified end-use, EPA strongly encourages you to apply the information in the “Further Information” column. Many of these recommendations, if adopted, would not require significant changes to existing operating practices.

It should be noted that a substitute listed as acceptable under the SNAP program may also be subject to requirements or limitations under other statutory or regulatory provisions. For example, there are relevant regulations under subsection (i) of the AIM Act that restrict the use of certain HFCs in a variety of sectors and subsectors. See 88 FR 73098 (October 24, 2023). Consequently, if a substitute listed as acceptable under the SNAP program is also subject to limitations on its use under other regulations, it may not be permitted for use in accordance with those other regulations. Those intending to use a substitute listed as acceptable under the SNAP program may need to consider restrictions under subsection (i) of the AIM Act, as well as other relevant authorities, and must also be followed.⁵

You can find submissions to EPA for the substitutes listed in this document, as well as other materials supporting the decisions in this action, in the docket (EPA-HQ-OAR-2003-0118) at <https://www.regulations.gov>.

A. Refrigeration and Air Conditioning

1. R-471A

EPA's decision: EPA finds R-471A acceptable as a substitute for use in:

- Cold storage warehouses (retrofit equipment only);
- Industrial process refrigeration (retrofit equipment only);
- Retail food refrigeration—Refrigerated food processing and dispensing equipment (retrofit equipment only);
- Retail food refrigeration—Remote condensing units (retrofit equipment only);
- Retail food refrigeration—Supermarket systems (retrofit equipment only).

R-471A, marketed under the trade name Solstice® N71, is a weighted blend of 78.7 percent HFO-1234ze(E), also known as *trans*-1,3,3,3-tetrafluoroprop-1-ene (Chemical Abstracts Service Registry Number [CAS Reg. No.] 29118–

24–9); 17.0 percent HFO-1336mzz(E), also known as *trans*-1,1,1,4,4,4-hexafluoro-2-butene (CAS Reg. No. 66711–86–2); and 4.3 percent HFC-227ea, which is also known as 1,1,1,2,3,3,3-heptafluoropropane (CAS Reg. No. 431–89–0).

You may find a copy of the applicant's submission, with CBI redacted, providing the required health and environmental information for this substitute in this end-use in the docket (EPA-HQ-OAR-2003-0118) at <https://www.regulations.gov> under the name, “Supporting Materials for Notice 39 Listing of R-471A in Refrigeration and Air Conditioning, SNAP Submission Received September 15, 2023.” EPA performed assessments to examine the health and environmental risks of this substitute, and the results are summarized below. These assessments are available in the docket EPA-HQ-OAR-2003-0118:

- “Risk Screen on Substitutes in Retail Food Refrigeration (Retrofit Equipment) Substitute: R-471A (Solstice® N71).”

- “Risk Screen on Substitutes in Industrial Process Refrigeration and Cold Storage Warehouses (Retrofit Equipment) Substitute: R-471A (Solstice® N71).”

Environmental information: R-471A has an ozone depletion potential (ODP) of 0. Its components, HFO-1234ze(E), HFO-1336mzz(E), and HFC-227ea, have GWPs of 1,⁶ 26,⁷ and 3,220,⁸ respectively. When these values are weighted by mass percentage of the blend, R-471A has a GWP of about 144. The components of R-471A are excluded from the EPA's regulatory definition of volatile organic compounds (VOC) under CAA regulations (see 40 CFR 51.100(s)) addressing the development of state implementation plans (SIPs) to attain and maintain the National Ambient Air Quality Standards (NAAQS). Knowingly venting or otherwise knowingly releasing this refrigerant blend is limited by the venting prohibition under section 608(c)(2) of the CAA, codified in EPA regulations at 40 CFR 82.154(a).

Flammability information: The component HFO-1234ze(E) has lower flammability as defined using the standard test method American Society of Testing and Materials (ASTM) E681.⁹ The other two components of R-471A are not flammable using the same

³ Annex F of the Montreal Protocol is available at: <https://ozone.unep.org/treaties/montreal-protocol/articles/annex-f-controlled-substances>.

⁴ WMO, *Scientific Assessment of Ozone Depletion: 2022*, GAW Report No. 278, 509 pp.; WMO: Geneva, 2022. Available at: <https://ozone.unep.org/system/files/documents/Scientific-Assessment-of-Ozone-Depletion-2022.pdf>. (WMO, 2022).

⁵ For example, there may be restrictions or prohibitions in regulations issued under section 610 of the CAA at 40 CFR part 82 subpart C for nonessential products containing ODS, under the Toxic Substances Control Act, under the Occupational Safety and Health Act, and under state or local laws and regulations that warrant consideration.

⁶ WMO, 2022.

⁷ WMO, 2022.

⁸ Annex F to the Montreal Protocol.

⁹ ASTM, E681. Standard Test Method for Concentration Limits of Flammability of Chemicals (Vapors and Gases).

method. R-471A is not flammable as formulated, in the worst-case formulation for flammability (WCF) and the worst-case of fractionation for flammability (WCFF). The American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) has assigned R-471A a flammability class of “1,” meaning it does not propagate a flame under standard test conditions.¹⁰

Toxicity and exposure data: Potential health effects of exposure to this substitute include drowsiness or dizziness. The substitute may also irritate the skin or eyes or cause frostbite in the case of rapid evaporation of the liquid. The substitute could cause asphyxiation if air is displaced by vapors in a confined space. Excessive exposure may cause central nervous system effects including drowsiness and dizziness. Excessive exposure may also cause cardiac arrhythmia. These potential health effects are common to many refrigerants.

ASHRAE has adopted an occupational exposure limit (OEL) for the blend of 710 ppm¹¹ on an eight-hour time-weighted average (8-hr TWA) for HFO-1336mzz(E), the American Industrial Hygiene Association (AIHA) has established a WEEL of 1,000 ppm (8-hr TWA) for HFC-227ea, and ASHRAE has adopted an OEL of 800 ppm (8-hr TWA) for HFO-1234ze(E).¹³ EPA anticipates that users will be able to meet these workplace guidance limits and address potential health risks by following recommendations in the manufacturer’s safety data sheet (SDS), ASHRAE Standard 15,¹⁴ other industry standards, and other safety precautions common to the refrigeration and air conditioning industry.

Comparison to other substitutes in these end-uses: R-471A has an ODP of 0, comparable to or less than other listed substitutes in retrofits for these end-uses with ODPs ranging from 0 to less than 0.0004.

As a retrofit for supermarket systems, remote condensing units, and refrigerated food processing and dispensing equipment, R-471A with a GWP of 144 is lower than that of all other acceptable substitutes such as R-450A which has a GWP of 601; R-513A

with a GWP of 630; R-448A with a GWP of 1,386; R-449A with a GWP of 1,396; R-449B with a GWP of 1,412; R-407C with a GWP of 1,770; R-407F with a GWP of 1,825; and R-407A with a GWP of 2,107.

For retrofits in industrial process refrigeration, R-471A’s GWP of 144 is lower than that of other acceptable substitutes such as HFC-134a which has a GWP of 1,430; R-407C with a GWP of 1,770; and R-407F with a GWP of 1,825. Other alternatives in this sector have a lower GWP than R-471A such as CO₂ with a GWP of 1 and R-290 (propane) with a GWP of 3. There may be situations in which lower-GWP options may not be feasible for certain retrofitted industrial process refrigeration equipment. For example, CO₂, which has a GWP of 1 is a high-pressure refrigerant and cannot be used as a retrofit for low-pressure refrigerant systems. R-471A is a low-pressure refrigerant, making it more technically feasible to retrofit systems that use similar low-pressure refrigerants. R-290 is an A3, highly flammable refrigerant and may not be feasible for certain retrofitted industrial process refrigeration equipment where flammability is a concern.

Further, refrigerants offer cooling within a specific temperature range. Adding R-471A to the list of available substitutes in industrial process refrigeration systems may offer a refrigerant that achieves a specific cooling temperature that other retrofit alternatives with lower GWPs cannot achieve.¹⁵ For retrofits of cold storage warehouses, R-471A’s GWP of 144 is lower than that of all other acceptable substitutes such as R-450A with a GWP of 601; R-513A with a GWP of 630; HFC-134a with a GWP of 1,430; R-407C with a GWP of 1,770; and R-407F with a GWP of 1,825.

Flammability and toxicity risks are comparable to or lower than flammability and toxicity risks of other available substitutes in the same retrofit end-uses. Toxicity risks can be minimized by use consistent with the AIHA and OARS WEELs, ASHRAE OELs and ASHRAE 15, other industry standards, recommendations in the manufacturer’s SDS, and other safety precautions common in the refrigeration and air conditioning industry.

Based on the considerations described above, EPA finds R-471A acceptable as a retrofit refrigerant for the following end-uses: cold storage warehouses,

industrial process refrigeration, and retail food refrigeration (including supermarket systems, remote condensing units, and refrigerated food processing and dispensing equipment), because it does not pose greater overall environmental and human health risk than other available substitutes in the same end-uses.

2. R-480A

EPA’s decision: EPA finds R-480A acceptable as a substitute for use in:

- Cold storage warehouses (retrofit equipment only);
- Commercial ice machines (retrofit equipment only);
- Positive displacement chillers (retrofit equipment only);
- Refrigerated transport (retrofit equipment only);
- Water coolers (retrofit equipment only).

R-480A, marketed under the trade name RS-20, is a weighted blend of 5 percent CO₂ (CAS Reg. No. 124-38-9), 86 percent HFO-1234ze(E), also known as *trans*-1,3,3,3-tetrafluoroprop-1-ene (CAS Reg. No. 29118-24-9), and 9 percent HFC-227ea, also known as 1,1,1,2,3,3,3-heptafluoropropane (CAS Reg. No. 431-89-0).

You may find a copy of the applicant’s submission, with CBI redacted, providing the required health and environmental information for this substitute in this end-use in the docket (EPA-HQ-OAR-2003-0118) at <https://www.regulations.gov> under the name, “Supporting Materials for Notice 39 Listing of R-480A in Refrigeration and Air Conditioning. SNAP Submission Received May 16, 2024.” EPA performed assessments to examine the health and environmental risks of this substitute, and the results are summarized below. These assessments are available in the docket EPA-HQ-OAR-2003-0118:

- “Risk Screen on Substitutes in Cold Storage Warehouses (Retrofit Equipment). Substitute: R-480A (RS-20).”
- “Risk Screen on Substitutes in Commercial Ice Machines (Retrofit Equipment). Substitute: R-480A (RS-20).”
- “Risk Screen on Substitutes in Chillers (Retrofit Equipment). Substitute: R-480A (RS-20).”
- “Risk Screen on Substitutes in Refrigerated Transport (Retrofit Equipment). Substitute: R-480A (RS-20).”
- “Risk Screen on Substitutes in Water Coolers (Retrofit Equipment). Substitute: R-480A (RS-20).”

Environmental information: R-480A has an ODP of 0. This blend consists of

¹⁰ ASHRAE Standard 34-2022: Designation and Safety Classification of Refrigerants. (ASHRAE, 2022).

¹¹ ASHRAE, 2022.

¹² *Trans*-1,1,1,4,4,4-hexafluoro-2-butene (HFO-1336mzz-E) (2018). *Toxicology and Industrial Health*. 2019; 35(3):204–210. doi:10.1177/0748233719825529.

¹³ ASHRAE, 2022.

¹⁴ ASHRAE 15. Safety Standard for Refrigeration Systems.

¹⁵ The October 2023 Technology Transitions Rule does not restrict the use of HFCs (*i.e.*, establish GWP limits) in retrofit applications (See 88 FR 73127).

CO₂ with a GWP of 1,¹⁶ HFO-1234ze(E) with a GWP of 1,¹⁷ and HFC-227ea with a GWP of 3,220.¹⁸ Weighting these values by mass percentage results in a GWP of 291 for R-480A. The components of R-480A are excluded from EPA's regulatory definition of VOC under CAA regulations (see 40 CFR 51.100(s)) addressing the development of SIPs to attain and maintain the NAAQS. Knowingly venting or otherwise knowingly releasing this refrigerant blend is limited by the venting prohibition under CAA section 608(c)(2), codified at 40 CFR 82.154(a).

Flammability information: The component HFO-1234ze(E) has lower flammability as defined using the standard test method ASTM E681, while the other two components of R-480A are not flammable using the same method. R-480A is not flammable as formulated, in the WCF and the WCFF. ASHRAE has assigned R-480A a flammability class of "1," meaning it does not propagate a flame under standard test conditions.

Toxicity and exposure data: The substitute may be hazardous if inhalation, skin contact, or eye contact with the substitute occurs at sufficiently high levels. The substitute could cause symptoms of asphyxiation if air is displaced by vapors in a confined space. These potential health effects are common to many refrigerants.

ASHRAE has adopted an OEL for the blend of 900 ppm (8-hr TWA).¹⁹ For the components of R-480A, the U.S. Occupational Safety and Health Administration (OSHA) has established a permissible exposure limit (PEL) of 5,000 ppm (8-hr TWA) for CO₂. AIHA has established a WEEL of 1,000 ppm for HFC-227ea, and ASHRAE has adopted an OEL of 800 ppm (8-hr TWA) for HFO-1234ze(E).²⁰ EPA anticipates that users will be able to meet these workplace guidance limits and address potential health risks by following recommendations in the manufacturer's SDS, ASHRAE Standard 15, other industry standards, and other safety precautions common to the refrigeration and air conditioning industry.

Comparison to other substitutes in these end-uses: R-480A has an ODP of 0, comparable to or less than other listed substitutes in these end-uses with ODPs ranging from 0 to less than 0.0004.

For cold storage warehouses, R-480A with a GWP of 291 is lower than all other acceptable substitutes for retrofit

equipment in this end-use, such as a number of HFC blends, including R-450A and R-513A, with GWPs of 601 and 630, respectively.

For commercial ice machines, R-480A's GWP of 291 is lower than all other acceptable substitutes for retrofit equipment in this end-use, such as a number of HFC blends, including R-450A and R-513A, with GWPs of 601 and 630, respectively.

For positive displacement chillers, R-480A's GWP of 291 is lower than that of certain other acceptable substitutes for retrofit equipment in this end-use, such as a number of HFC blends, including R-450A and R-513A, with GWPs of 601 and 630, respectively. The GWP of R-480A is higher than the GWPs of two other acceptable substitutes for retrofit equipment in this end-use, namely R-1224yd(Z) and R-514A, with GWPs of 1²¹ and 2,²² respectively. EPA is listing this substitute as acceptable because available lower-GWP options are not feasible to use in certain applications. For example, equipment retrofitted with R-480A can operate within a specific temperature range and pressure range that other retrofitted chillers using lower-GWP options such as R-1224yd(Z) and R-514A cannot achieve. For refrigerated transport, R-480A's GWP of 291 is lower than that of all other acceptable substitutes for retrofit equipment in this end-use, such as R-450A, R-513A, and HFC-134a, with GWPs of 601, 630, and 1,430, respectively.

For water coolers, R-480A's GWP of 291 is lower than that of all other acceptable substitutes for retrofit equipment in this end-use, such as R-450A, R-513A, R-426A, and R-411A, with GWPs of 601, 630, 1,510, and 1,600, respectively.

Flammability and toxicity risks are comparable to or lower than flammability and toxicity risks of other available substitutes in the same retrofit end-uses. Toxicity risks can be minimized by use consistent with the OSHA PEL, AIHA WEEL, ASHRAE OELs, ASHRAE 15 and other industry standards, recommendations in the manufacturer's SDS, and other safety precautions common in the refrigeration and air conditioning industry.

Based on the considerations described above, EPA finds R-480A acceptable in retrofit equipment in the following end-uses: cold storage warehouses,

commercial ice machines, positive displacement chillers, refrigerated transport, and water coolers, because it does not pose greater overall environmental and human health risk than other available substitutes in the same end-uses.

3. R-513A

EPA's decision: EPA finds R-513A acceptable as a substitute for use in:

- Residential and light commercial air conditioning and heat pumps—self-contained units (new equipment only).

R-513A, marketed under the trade name Opteon® XP-10, is a weighted blend of 44 percent HFC-134a and 56 percent HFO-1234yf by weight. HFC-134a is an HFC and is also known as 1,1,1,2-tetrafluoroethane (CAS Reg. No. 811-97-2). HFO-1234yf is an HFO and is also known as 2,3,3,3 tetrafluoroprop-1-ene (CAS Reg. No. 754-12-1).

You may find a copy of the applicant's submission, with CBI redacted, providing the required health and environmental information for this substitute in this end-use category in Docket EPA-HQ-OAR-2003-0118 at www.regulations.gov under the name, "SNAP Information Notice for R-513A as a Refrigerant. SNAP Submission Received January 9, 2024." EPA has performed an assessment to examine the health and environmental risks of this substitute and the results are summarized below. This assessment is available in Docket EPA-HQ-OAR-2003-0118:

- "Risk Screen on Substitutes for Use in Residential and Light Commercial Air Conditioning and Heat Pumps—Self-Contained Units (New Equipment) Substitute: R-513A (Opteon® XP-10)."

Environmental information: R-513A is a blend of HFC-134a and HFO-1234yf with an ODP of 0. HFC-134a has a GWP of 1,430²³ and HFO-1234yf has a GWP of 1.²⁴ The GWP of R-513A is 630 when the two components are weighted by mass percentage of their GWPs. All components of the blends are excluded from the EPA's regulatory definition of VOC under CAA regulations (see 40 CFR 51.100(s)) addressing the development of SIPs to attain and maintain the NAAQS. Knowingly venting or otherwise knowingly releasing this refrigerant blend is limited by the venting prohibition under section 608(c)(2) of the CAA, codified in EPA's regulations at 40 CFR 82.154(a).

Flammability information: The component HFO-1234yf has lower flammability as defined using the

¹⁶ IPCC, 2007.

¹⁷ WMO, 2022.

¹⁸ Annex F to the Montreal Protocol.

¹⁹ ASHRAE, 2022, Addendum h.

²⁰ ASHRAE, 2022.

²¹ WMO, 2022.

²² This value is calculated by weighting the GWPs of HFO-1336mzz(Z) (2) and 1,2-dichloroethene(Z) (1) from WMO, 2022 by the mass percentages of the blend components of 74.7 percent and 25.3 percent, respectively.

²³ Annex F to the Montreal Protocol.

²⁴ WMO, 2022.

standard test method ASTM E681. HFC-134a is not flammable using the same method. R-513A is not flammable as formulated in the WCF and the WCF. ASHRAE has assigned R-513A a flammability class of “1,” meaning it does not propagate a flame under standard test conditions.

Toxicity and exposure data: Potential health effects of exposure to this substitute include skin and eye irritation and frostbite upon contact. The substitute could cause asphyxiation if air is displaced by vapors in a confined space. These potential health effects are common to many refrigerants. EPA anticipates that R-513A will be used consistent with the recommendations specified in the SDS. ASHRAE has adopted an OEL for the blend R-513A of 650 ppm as an 8-hr TWA. The AIHA has established WEELs of 1000 ppm for HFC-134a and of 500 ppm for HFO-1234yf, both as an 8-hr TWA. EPA anticipates that users will be able to meet these workplace guidance limits and will address potential health risks by following requirements and recommendations in the manufacturer’s SDSs, ASHRAE Standard 15, other industry standards, and other safety precautions common to the refrigeration and air conditioning industry.

Comparison to other refrigerants in this end-use category: R-513A has an ODP of 0, which is comparable to other acceptable substitutes in the residential and light commercial air conditioning and heat pumps—self-contained units end-use category with ODPs ranging from 0 to less than 0.0004. R-513A which has a GWP of 630 is lower than or comparable to those of some acceptable substitutes in the same end-use category for which we are finding it acceptable, such as R-452B which has a GWP of 700 and HFC-32 which has a GWP of 675. R-513A has a GWP of 630, which is higher than those of other acceptable substitutes in this end-use category such as R-290, which has a GWP of 3, R-454A, which has a GWP of 240, R-454B, which has a GWP of 470, R-454C, which has a GWP of 150, and R-457A, which has a GWP of 140.

While other acceptable substitutes have lower GWPs, EPA is listing R-513A as acceptable in this end-use category recognizing it likely will be used only in certain self-contained units that use R-134a where other available options are not technically feasible. Self-contained units can include but are not limited to window units, packaged terminal air conditioners, packaged terminal heat pumps, portable room air conditioning units, and portable air conditioners used to cool commercial

aircraft interiors while on the ground.²⁵ As a general matter, the replacements for most of the equipment in the residential and light commercial air conditioning and heat pumps end-use category use refrigerants that mimic the thermodynamic qualities and high pressure of R-410A which was the dominant refrigerant used for the majority of equipment types in this end-use category. There are, however, some specific applications where R-134a was used in self-contained units because of its unique thermodynamic properties that make it a better choice. For example, self-contained portable air conditioners used to cool commercial aircraft while on the ground currently use R-134a. This refrigerant is used because R-134a is optimized for equipment that use screw compressors and need to be able to operate at extremely high ambient temperatures with high humidity. R-513A’s thermodynamic properties closely mimic those of R-134a, making it an important option for applications where R-134a is used. As noted above, self-contained portable air conditioners used to cool the aircraft interior while on the ground must function in a wide range of ambient temperatures and humidities, making R-513A an important option for this specific use. Other available refrigerant options with lower GWPs do not have the correct thermodynamic properties to fit the technical needs for this specific use. In addition, R-513A and R-134a are both low pressure refrigerants. As a result, R-513A could replace R-134a in equipment with minimal modifications but it is not expected to replace R-410A due to the extensive re-engineering required.

EPA expects that use of R-513A in residential and light commercial air conditioning and heat pumps will be limited to a narrow set of specific applications because it is likely to be used only in those few applications where R-134a is currently used in self-contained units and where other available options are not technically feasible. Therefore, EPA is listing this refrigerant as acceptable for use in the residential and light commercial air conditioning and heat pumps—self-contained units end-use category.

Flammability and toxicity risks are comparable to or lower than flammability and toxicity risks of other

available substitutes in the same end-use category. For example, R-513A is non-flammable and has comparable or lower flammability risk compared to other acceptable refrigerants in this end-use category, such as the lower flammability refrigerants R-454B and R-454C. Toxicity risks can be minimized by use consistent with the AIHA’s WEELs, ASHRAE’s OEL, ASHRAE 15 and other industry standards, recommendations in the SDS, and other safety precautions common in the refrigeration and air conditioning industry.

Based on the considerations described above, EPA finds R-513A acceptable in new self-contained units in the residential and light commercial air conditioning end-use because it provides a lower-GWP alternative for this end-use category. R-513A does not pose greater overall environmental and human health risk than other available substitutes in the same end-use category.

B. Foam Blowing

1. Extruded Polystyrene (XPS) Blowing Agent Blends of 0 to 90 Percent HFO-1336mzz(Z), 0 to 90 Percent HFO-1234ze(E), 0 to 75 Percent HFC-152a, and 0 to 90 Percent CO₂

EPA’s decision: EPA finds blends of 0 to 90 percent HFO-1336mzz(Z), 0 to 90 percent HFO-1234ze(E), 0 to 75 percent HFC-152a, and 0 to 90 percent CO₂ (“HFO-1336mzz(Z)/HFO-1234ze(E)/HFC-152a/CO₂ blends”) acceptable as a substitute for use as a foam blowing agent in:

- Polystyrene: extruded boardstock and billet.

HFO-1336mzz(Z) is an HFO and is also called (Z)-1,1,1,4,4,4-hexafluorobut-2-ene or *cis*-1,1,1,4,4,4-hexafluorobut-2-ene (CAS Reg. No. 692–49–9); it also goes by the trade names of FEA-1100 or Formacel® 1100. HFO-1234ze(E) is an HFO and is also known as *trans*-1,3,3,3-tetrafluoroprop-1-ene (CAS Reg. No. 29118–24–9). HFC-152a is an HFC and is also called ethane, 1,1-difluoro (CAS Reg. No. 75–37–6). CO₂ has CAS Reg. No. 124–38–9.

You may find a copy of the applicant’s submission, with CBI redacted, providing the required health and environmental information for this substitute in this end-use in the docket (EPA-HQ-OAR-2003–0118) at <https://www.regulations.gov> under the name, “SNAP Information Notice for Extruded Polystyrene Blend of 0 to 90% HFO-1336mzz(Z), 0 to 90% HFO-1234ze(E), 0 to 75% HFC-152a, and 0 to 90% CO₂ as a Foam Blowing Agent SNAP Submission Received August 7, 2023.”

²⁵ These are all examples of equipment defined as “factory sealed appliances” in the UL 60335–2–40 standard for electrical heat pumps, air-conditioners, and dehumidifiers, in which all refrigerating system parts have been sealed tight during the manufacturing process. Other equipment that meets the UL definition of factory sealed appliances are also self-contained units.

EPA has performed an assessment to examine the health and environmental risks of this substitute. This assessment is available in the docket EPA-HQ-OAR-2003-0118:

- “Risk Screen on Substitutes for Use in Extruded Polystyrene Boardstock and Billet Foam Substitute: HFO-1336mzz(Z)/HFO-1234ze(E)/HFC-152a/CO₂ Blends.”

Environmental information: These HFO-1336mzz(Z)/HFO-1234ze(E)/HFC-152a/CO₂ foam blowing agent blends have an ODP of 0. The components, HFO-1336mzz(Z), HFO-1234ze(E), HFC-152a, and CO₂ have GWPs of 2,²⁶ 1,²⁷ 124,²⁸ and 1, respectively. The GWPs of the blowing agent blends using these components range from 1 to 94. These reflect the composition ranges that result in the lowest GWP of 1 to the highest GWP of 94 given the GWP and range of percentages for each component. The components of the HFO-1336mzz(Z)/HFO-1234ze(E)/HFC-152a/CO₂ blends are excluded from EPA’s regulatory definition of VOC under CAA regulations (see 40 CFR 51.100(s)) addressing the development of SIPs to attain and maintain the NAAQS.

Flammability information: The component HFC-152a is flammable at standard temperature and pressure as defined by standard test method ASTM E681. HFO-1336mzz(Z) and HFO-1234ze(E) are not flammable at standard temperature and pressure using the same method. However, at higher temperatures, such as the temperatures typical for extruding XPS, HFO-1234ze(E) may also be flammable, particularly at higher humidity levels.²⁹ HFO-1336mzz(Z)/HFO-1234ze(E)/HFC-152a/CO₂ blends anticipated to be used in manufacturing polystyrene: extruded boardstock and billet are flammable at the temperatures typical for extruding XPS.

Toxicity and exposure data: Potential health effects of exposure to this substitute include skin or eye irritation or frostbite. At sufficiently high concentrations, the substitute may cause irregular heartbeat. The substitute could cause asphyxiation if air is displaced by vapors in a confined space. These potential health effects are common to many foam blowing agents. Exposure may be possible during the blowing of the foam if the foam manufacturer does not take standard precautions such as the use of personal protective equipment. EPA anticipates that these HFO-1336mzz(Z)/HFO-1234ze(E)/HFC-152a/CO₂ blends will be used consistent with the recommendations specified in the SDS.

The AIHA has established a WEEL of 1,000 ppm for HFC-152a as an 8-hr TWA. The WEEL committee of the OARS has established a WEEL of 500 ppm³⁰ for HFO-1336mzz(Z). OSHA has established a PEL of 5,000 ppm on an 8-hr TWA for CO₂. The manufacturer of HFO-1234ze(E) recommends an OEL of 800 ppm³¹ (8-hr TWA) for this chemical. EPA anticipates that users will be able to meet the AIHA and OARS WEELs, OSHA PEL, and manufacturer’s OEL and will follow requirements and recommendations in the manufacturer’s SDSs and other safety precautions common to the foam blowing industry, thereby addressing potential health risks.

Comparison to other foam blowing agents in this end-use: These HFO-1336mzz(Z)/HFO-1234ze(E)/HFC-152a/CO₂ blends have an ODP of 0, comparable to other acceptable substitutes in the polystyrene: extruded boardstock and billet end-use, such as HFC-152a, HFO-1234ze(E), methyl formate, and CO₂. These HFO-1336mzz(Z)/HFO-1234ze(E)/HFC-152a/CO₂ blends’ GWPs from 1 to 94 are lower than or comparable to those of other acceptable substitutes in the same

end-use for which we are finding it acceptable. Examples include HFC-152a, HFO-1234ze(E), light saturated hydrocarbons C3-C6, and methyl formate, with respective GWPs of 124,³² 1,³³ less than 4,³⁴ and 11.³⁵ Depending on the specific composition, the blend used may have a higher GWP than that of some individual chemicals that are acceptable substitutes in this end-use that are more flammable (e.g., HFO-1234ze(E)) or are less able to meet standard specifications (e.g., ASTM C578) than the blends because of properties such as solvency in the plastic resin (e.g., HFO-1336mzz(Z)) or contributions to insulation value (e.g., CO₂, water).

Flammability and toxicity risks are comparable to or lower than flammability and toxicity risks of other available substitutes in the same end-use. Toxicity risks can be minimized by use consistent with the AIHA’s and OARS’s WEELs, OSHA’s PEL, recommendations in the SDS, and other safety precautions common in the foam blowing industry.

Based on the considerations described above, EPA finds blends of 0 to 90 percent HFO-1336mzz(Z), 0 to 90 percent HFO-1234ze(E), 0 to 75 percent HFC-152a, and 0 to 90 percent CO₂ acceptable in the polystyrene: extruded boardstock and billet end-use because they do not pose greater overall environmental and human health risk than other available substitutes in the same end-use.

List of Subjects in 40 CFR Part 82

Environmental protection, Administrative practice and procedure, Air pollution control, Reporting and recordkeeping requirements.

Paul M. Gunning,

Director, Office of Atmospheric Protection.

Appendix A: Summary of Decisions for New Acceptable Substitutes

REFRIGERATION AND AIR CONDITIONING

End-use	Substitute	Decision	Further information ¹
Cold storage warehouses (retrofit equipment only).	R-471A	Acceptable	This substitute is a blend of 78.7 percent hydrofluoroolefin (HFO)-1234ze(E), which is also known as <i>trans</i> -1,3,3,3-tetrafluoroprop-1-ene; (Chemical Abstracts Service Registry Number [CAS Reg. No.] 29118-24-9); 17.0 percent HFO-1336mzz(E), also known as <i>trans</i> -1,1,1,4,4,4-hexafluoro-2-butene (CAS Reg. No. 66711-86-2); and 4.3 percent HFC-227ea, which is also known as 1,1,1,2,3,3,3-heptafluoropropane (CAS Reg. No. 431-89-0). R-471A has a global warming potential (GWP) of 144 and an ozone depletion potential (ODP) of 0. The blend is not flammable as it has an American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) flammability classification of “1”.

²⁶ WMO, 2022.

²⁷ WMO, 2022.

²⁸ Annex F to the Montreal Protocol.

²⁹ Bellair and Hood, 2019. Comprehensive evaluation of the flammability and ignitability of HFO-1234ze, R.J. Bellair and L. Hood, Process

Safety and Environmental Protection 132 (2019) 273–284. Available online at doi.org/10.1016/j.psep.2019.09.033.

³⁰ *Cis*-1,1,1,4,4,4-hexafluoro-2-butene (HFO-1336mzz-Z) (2018). *Toxicology and Industrial Health*. 2019;35(3):180–188. doi:10.1177/0748233719825530.

³¹ ASHRAE, 2022.

³² Annex F to the Montreal Protocol.

³³ WMO, 2022.

³⁴ IPCC, 2007.

³⁵ WMO, 2022.

REFRIGERATION AND AIR CONDITIONING—Continued

End-use	Substitute	Decision	Further information ¹
Cold storage warehouses (retrofit equipment only).	R-480A	Acceptable	ASHRAE has adopted an occupational exposure limit (OEL) for the blend of 710 ppm on an eight-hour time-weighted average (8-hr TWA). For the components of R-471A, the Workplace Environmental Exposure Limit (WEEL) Committee of the Occupational Alliance for Risk Science (OARS) has established a WEEL of 400 ppm on an 8-hr TWA for HFO-1336mzz(E), the AIHA has established a WEEL of 1,000 ppm for HFC-227ea (8-hr TWA), and ASHRAE has adopted an OEL of 800 ppm on an 8-hr TWA for HFO-1234ze(E). This substitute is a weighted blend of 5 percent CO ₂ , 86 percent HFO-1234ze(E), which is also known as <i>trans</i> -1,3,3,3-tetrafluoroprop-1-ene CAS Reg. No. 29118-24-9, and 9 percent HFC-227ea, which is also known as 1,1,1,2,3,3,3-heptafluoropropane (CAS Reg. No. 431-89-0). R-480A has a GWP of 291 and an ODP of 0. The blend is not flammable as it has an ASHRAE flammability classification of “1.” ASHRAE has adopted an OEL for the blend of 900 ppm (8-hr TWA). For the components of R-480A, the Occupational Safety and Health Administration (OSHA) has established a permissible exposure limit (PEL) for CO ₂ of 5,000 ppm on an 8-hr TWA, AIHA has established a WEEL of 1,000 ppm for HFC-227ea (8-hr TWA), and ASHRAE has adopted an OEL of 800 ppm on an 8-hr TWA for HFO-1234ze(E).
Commercial ice machines (retrofit equipment only).	R-480A	Acceptable	This substitute is a weighted blend of 5 percent CO ₂ , 86 percent HFO-1234ze(E), which is also known as <i>trans</i> -1,3,3,3-tetrafluoroprop-1-ene CAS Reg. No. 29118-24-9, and 9 percent HFC-227ea, which is also known as 1,1,1,2,3,3,3-heptafluoropropane (CAS Reg. No. 431-89-0). R-480A has a GWP of 291 and an ODP of 0. The blend is not flammable as it has an ASHRAE flammability classification of “1.” ASHRAE has adopted an OEL for the blend of 900 ppm (8-hr TWA). For the components of R-480A, OSHA has established a PEL for CO ₂ of 5,000 ppm on an 8-hr TWA, AIHA has established a WEEL of 1,000 ppm for HFC-227ea (8-hr TWA), and ASHRAE has adopted an OEL of 800 ppm on an 8-hr TWA for HFO-1234ze(E).
Industrial process refrigeration (retrofit equipment only).	R-471A	Acceptable	This substitute is a blend of 78.7 percent HFO-1234ze(E), which is also known as <i>trans</i> -1,3,3,3-tetrafluoroprop-1-ene; (CAS Reg. No. 29118-24-9); 17.0 percent HFO-1336mzz(E), also known as <i>trans</i> -1,1,1,4,4,4-hexafluoro-2-butene (CAS Reg. No. 66711-86-2); and 4.3 percent HFC-227ea, which is also known as 1,1,1,2,3,3,3-heptafluoropropane (CAS Reg. No. 431-89-0). R-471A has a GWP of 144 and an ODP of 0. The blend is not flammable as it has an ASHRAE flammability classification of “1.” ASHRAE has adopted an OEL for the blend of 710 ppm (8-hr TWA). For the components of R-471A, OARS has established a WEEL of 400 ppm on an 8-hr TWA for HFO-1336mzz(E), AIHA has established a WEEL of 1,000 ppm for HFC-227ea (8-hr TWA), and ASHRAE has adopted an OEL of 800 ppm on an 8-hr TWA for HFO-1234ze(E).
Positive displacement chillers (retrofit equipment only).	R-480A	Acceptable	This substitute is a weighted blend of 5 percent CO ₂ , 86 percent HFO-1234ze(E), which is also known as <i>trans</i> -1,3,3,3-tetrafluoroprop-1-ene CAS Reg. No. 29118-24-9, and 9 percent HFC-227ea, which is also known as 1,1,1,2,3,3,3-heptafluoropropane (CAS Reg. No. 431-89-0). R-480A has a GWP of 291 and an ODP of 0. The blend is not flammable as it has an ASHRAE flammability classification of “1.” ASHRAE has adopted an OEL for the blend of 900 ppm (8-hr TWA). For the components of R-480A, the Occupational Safety and Health Administration (OSHA) has established a permissible exposure limit (PEL) for CO ₂ of 5,000 ppm on an 8-hr TWA, AIHA has established a WEEL of 1,000 ppm for HFC-227ea (8-hr TWA), and ASHRAE has adopted an OEL of 800 ppm on an 8-hr TWA for HFO-1234ze(E).
Refrigerated transport (retrofit equipment only).	R-480A	Acceptable	This substitute is a weighted blend of 5 percent CO ₂ , 86 percent HFO-1234ze(E), which is also known as <i>trans</i> -1,3,3,3-tetrafluoroprop-1-ene CAS Reg. No. 29118-24-9, and 9 percent HFC-227ea, which is also known as 1,1,1,2,3,3,3-heptafluoropropane (CAS Reg. No. 431-89-0). R-480A has a GWP of 291 and an ODP of 0. The blend is not flammable as it has an ASHRAE flammability classification of “1.” ASHRAE has adopted an OEL for the blend of 900 ppm (8-hr TWA). For the components of R-480A, OSHA has established a PEL for CO ₂ of 5,000 ppm on an 8-hr TWA, AIHA has established a WEEL of 1,000 ppm for HFC-227ea (8-hr TWA), and ASHRAE has adopted an OEL of 800 ppm on an 8-hr TWA for HFO-1234ze(E).
Residential and light commercial air conditioning and heat pumps—self-contained units (new equipment only).	R-513A	Acceptable	This HFC-134a/HFO-1234yf blend R-513A has an ODP of 0. Its components include HFC-134a which has a GWP of 1,430 and HFO-1234yf which has a GWP of 1. If these values are weighted by mass percentage, then the blend would have a GWP of 630. All components of the blends are excluded from EPA’s regulatory definition of VOC under CAA regulations (see 40 CFR 51.100(s)). ASHRAE has assigned R-513A a flammability class of “1,” meaning it does not propagate a flame under standard test conditions. ASHRAE has adopted an OEL for the blend R-513A of 650 ppm (8-hr TWA). The AIHA has established WEELS of 1000 ppm for HFC-134a and of 500 ppm for HFO-1234yf, both as an 8-hr TWA.
Retail food refrigeration—Refrigerated food processing and dispensing equipment (retrofit equipment only).	R-471A	Acceptable	This substitute is a blend of 78.7 percent HFO-1234ze(E), which is also known as <i>trans</i> -1,3,3,3-tetrafluoroprop-1-ene; (CAS Reg. No. 29118-24-9); 17.0 percent HFO-1336mzz(E), also known as <i>trans</i> -1,1,1,4,4,4-hexafluoro-2-butene (CAS Reg. No. 66711-86-2); and 4.3 percent HFC-227ea, which is also known as 1,1,1,2,3,3,3-heptafluoropropane (CAS Reg. No. 431-89-0). R-471A has a GWP of 144 and an ODP of 0. The blend is not flammable as it has an ASHRAE flammability classification of “1.” ASHRAE has established an OEL for the blend of 710 ppm on an eight-hour time-weighted average (8-hr TWA). For the components of R-471A, OARS has established a WEEL of 400 ppm on an 8-hr TWA for HFO-1336mzz(E), AIHA has established a WEEL of 1,000 ppm for HFC-227ea (8-hr TWA), and ASHRAE has adopted an OEL of 800 ppm on an 8-hr TWA for HFO-1234ze(E).

REFRIGERATION AND AIR CONDITIONING—Continued

End-use	Substitute	Decision	Further information ¹
Retail food refrigeration—Remote condensing units (<i>retrofit equipment only</i>).	R-471A	Acceptable	This substitute is a blend of 78.7 percent HFO-1234ze(E), which is also known as <i>trans</i> -1,3,3,3-tetrafluoroprop-1-ene; (CAS Reg. No. 29118-24-9); 17.0 percent HFO-1336mzz(E), also known as <i>trans</i> -1,1,1,4,4,4-hexafluoro-2-butene (CAS Reg. No. 66711-86-2); and 4.3 percent HFC-227ea, which is also known as 1,1,1,2,3,3,3-heptafluoropropane (CAS Reg. No. 431-89-0). R-471A has a GWP of 144 and an ODP of 0. The blend is not flammable as it has an ASHRAE flammability classification of “1”. ASHRAE has established an OEL for the blend of 710 ppm (8-hr TWA). For the components of R-471A, OARS has established a WEEL of 400 ppm on an 8-hr TWA for HFO-1336mzz(E), AIHA has established a WEEL of 1,000 ppm for HFC-227ea (8-hr TWA), and ASHRAE has adopted an OEL of 800 ppm on an 8-hr TWA for HFO-1234ze(E).
Retail food refrigeration—Supermarket systems (<i>retrofit equipment only</i>).	R-471A	Acceptable	This substitute is a blend of 78.7 percent HFO-1234ze(E), which is also known as <i>trans</i> -1,3,3,3-tetrafluoroprop-1-ene; (CAS Reg. No. 29118-24-9); 17.0 percent HFO-1336mzz(E), also known as <i>trans</i> -1,1,1,4,4,4-hexafluoro-2-butene (CAS Reg. No. 66711-86-2); and 4.3 percent HFC-227ea, which is also known as 1,1,1,2,3,3,3-heptafluoropropane (CAS Reg. No. 431-89-0). R-471A has a GWP of 144 and an ODP of 0. The blend is not flammable as it has an ASHRAE flammability classification of “1”. ASHRAE has established an OEL for the blend of 710 ppm (8-hr TWA). For the components of R-471A, OARS has established a WEEL of 400 ppm on an 8-hr TWA for HFO-1336mzz(E), AIHA has established a WEEL of 1,000 ppm for HFC-227ea (8-hr TWA), and ASHRAE has adopted an OEL of 800 ppm on an 8-hr TWA for HFO-1234ze(E).
Water coolers (<i>retrofit equipment only</i>).	R-480A	Acceptable	This substitute is a weighted blend of 5 percent CO ₂ , 86 percent HFO-1234ze(E), which is also known as <i>trans</i> -1,3,3,3-tetrafluoroprop-1-ene CAS Reg. No. 29118-24-9, and 9 percent HFC-227ea, which is also known as 1,1,1,2,3,3,3-heptafluoropropane (CAS Reg. No. 431-89-0). R-480A has a GWP of 291 and an ODP of 0. The blend is not flammable as it has an ASHRAE flammability classification of “1.” ASHRAE has adopted an OEL for the blend of 900 ppm (8-hr TWA). For the components of R-480A, OSHA has established a PEL for CO ₂ of 5,000 ppm on an 8-hr TWA, AIHA has established a WEEL of 1,000 ppm for HFC-227ea (8-hr TWA), and ASHRAE has adopted an OEL of 800 ppm on an 8-hr TWA for HFO-1234ze(E).

¹ See recommendations in the manufacturer's SDS and guidance for all listed refrigerants.

FOAM BLOWING

End-use	Substitute	Decision	Further information ¹
Polystyrene: Extruded boardstock and billet.	Extruded polystyrene (XPS) foam blowing agent blends of 0 to 90 percent HFO-1336mzz(Z), 0 to 90 percent HFO-1234ze(E), 0 to 75 percent HFC-152a, and 0 to 90 percent CO ₂ .	Acceptable	HFO-1234ze(E) is also known as <i>trans</i> -1,3,3,3-tetrafluoroprop-1-ene (Chemical Abstracts Service Registry Number [CAS Reg. No.] 29118-24-9). HFO-1336mzz(Z) is also known as (Z)-1,1,1,4,4,4-hexafluoro-2-butene and <i>cis</i> -1,1,1,4,4,4-hexafluoro-2-butene (CAS Reg. No. 692-49-9). HFC-152a is also known as 1,1-difluoroethane (CAS Reg. No. 75-37-6). CO ₂ has CAS Reg. No. 124-38-9. These blends have 100-year GWPs from 1 to about 94, depending on the specific composition. Blends of these compounds anticipated to be used in manufacturing are flammable. The AIHA has established a WEEL of 1,000 ppm for HFC-152a on an eight-hour Time-Weighted Average (8-hr TWA). The OARS has established a WEEL of 500 ppm (8-hr TWA) for HFO-1336mzz(Z). The manufacturer of HFO-1234ze(E) has established an OEL of 800 ppm (8-hr TWA) and the American Society of Heating, Refrigerating and Air-Conditioning Engineers has adopted an OEL of 800 ppm (8-hr TWA) for this compound. The U.S. OSHA has established a PEL of 5,000 ppm on an 8-hr TWA for CO ₂ .

¹ See recommendations in the manufacturer's SDS and guidance for all listed foam blowing agents.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 261, 262, and 266

[EPA-HQ-OLEM-2023-0081; FRL 8687-04-OLEM]

RIN 2050-AH23

Hazardous Waste Generator Improvements Rule, the Hazardous Waste Pharmaceuticals Rule, and the Definition of Solid Waste Rule; Technical Corrections

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA or the Agency) is finalizing five amendments that were withdrawn in its December 6, 2023, partial withdrawal of direct final rule. Due to receipt of adverse comments, the EPA withdrew eight amendments from the August 9, 2023, direct final rule that included revisions to the 2016 Hazardous Waste Generator Improvements Rule, the 2019 Hazardous Waste Pharmaceuticals Rule and the 2018 Vacatur of the Definition of Solid Waste Rule (88 FR 54086). The EPA is

responding to the relevant adverse comments in this action.

DATES: This final rule is effective on February 10, 2025.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-HQ-OLEM-2023-0081. All documents in the docket are listed on the <http://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 electronically through <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT:

Kathy Lett, U.S. Environmental Protection Agency, Office of Resource Conservation and Recovery (MC: 5304T), 1200 Pennsylvania Avenue NW, Washington, DC 20460, (202) 566-0517, (lett.kathy@epa.gov) or Kristin Fitzgerald, U.S. Environmental Protection Agency, Office of Resource Conservation and Recovery (MC: 5304T), 1200 Pennsylvania Avenue NW, Washington, DC 20460, (202) 566-0512 (fitzgerald.kristin@epa.gov).

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

Entities potentially affected by this action include hazardous waste generators, treatment, storage, and disposal facilities, healthcare facilities, reverse distributors, importers/exporters of hazardous waste, and users of the transfer-based exclusion to the definition of solid waste. Also affected are States and EPA Regions implementing these RCRA hazardous waste regulations.

This discussion is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This discussion includes the types of entities that the EPA is now aware could potentially be regulated by this action. Other types of entities not included could also be regulated. To determine whether your entity is regulated by this action, you should carefully examine the applicability criteria found in Section IV of the preamble. If you have questions regarding the applicability of this action to a particular entity, consult the persons listed in the **FOR FURTHER INFORMATION CONTACT** section.

B. What action is the agency taking?

This action finalizes five amendments that were included in its August 9, 2023, direct final rule that made technical corrections to three rulemakings related to the generation of hazardous waste: the 2016 Hazardous Waste Generator Improvements Rule, the 2019 Hazardous Waste Pharmaceuticals Rule, and the 2018 Vacatur of the Definition of Solid Waste Rule (88 FR 54086). Due to receipt of adverse comments, eight amendments were withdrawn in the EPA's December 6, 2023, partial withdrawal of direct final rule (88 FR 84710). EPA has evaluated the comments received on the amendments and is finalizing five of these amendments, found in §§ 261.4(e)(1), 262.16(b)(1), 262.17(a)(8)(i) introductory text, 262.17(a)(8)(i)(A) and 266.508(a)(2)(ii). These five provisions relate to the 2016 Hazardous Waste Generator Improvements Rule and the 2019 Hazardous Waste Pharmaceuticals Rule.

Finalizing these technical corrections will correct or clarify the regulations for generators and handlers of hazardous waste. The EPA is also responding in this preamble to the adverse comments on the items that we are finalizing in this action. The three provisions we are not finalizing will not go into effect with this action and the EPA is not responding to the adverse comments on these three provisions.

C. What is the agency's authority for taking this action?

This rule is authorized under sections 1004, 2002, 3001, 3002, 3003, 3004, 3005, 3006, and 3010, of the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. 6903, 6912, 6921, 6922, 6923, 6924, 6925, 6926, and 6930.

III. Background

In the EPA's August 9, 2023, direct final rule (88 FR 54086), EPA explained that the Agency views the minor fixes and clarifications included in the action as noncontroversial. However, EPA published a parallel proposed rule the same day that could serve as the proposed rule to adopt the provisions in the direct final rule if adverse comments were received. EPA stated that in this case, there would not be a second comment period on this action.

The direct final rule preamble also stated that if the Agency were to receive adverse comment on any individual correction, we would publish a timely withdrawal in the **Federal Register** informing the public about the specific regulatory paragraph or amendment that will not take effect.

The EPA received adverse comments on eight amendments from the direct final rule and withdrew them on December 6, 2023 (88 FR 84710). All corrections that were not withdrawn became effective on December 7, 2023.

IV. Provisions Being Finalized and Response to Comment

A. Section 261.4(e)(1)

The August 9, 2023, direct final rule identified a number of regulatory citations that were incorrect and outdated in the regulations for generators of hazardous waste and updated those citations. Section 261.4(e) provides requirements for management of samples used in treatability studies and included citations that needed to be updated. The list of corrections included revising § 261.4(e)(1) to replace the references to quantity determinations in §§ 261.5 and 262.34(d) with a reference to the counting requirements in § 262.13 and the accumulation limits in § 262.16(b)(1).

EPA received an adverse comment to this revision. The commenter stated that it appears that the revised citation in this location, which identifies which categories of generators do not need to count treatability sample weight towards generator accumulation limits was incomplete. The comment stated that the revised citation should point to the accumulation limits for very small quantity generators (VSQGs), large quantity generators (LQGs), and satellite accumulation areas (SAAs), not just SQGs.

EPA partially agrees with the commenter and is revising this citation to include references to §§ 262.14(a)(3) and (4), the accumulation limits for VSQGs accumulating acute and non-acute hazardous waste. The original language in this section referred to accumulation limits for VSQGs and SQGs and this revision reestablishes those two references. Generators accumulating waste at SAAs must include that waste in their monthly quantities for determining generator status, but the original regulatory language did not refer to the SAA requirements and LQGs do not have an accumulation limit. For these reasons, EPA is not amending the language to add any references to SAA or LQG requirements.

B. Section 262.16(b)(1)

The 2016 Generator Improvements rule established definitions for very small, small, and large quantity generators, reorganized the regulations for these categories of generators, and

clearly distinguished the generator categories—determined by how much hazardous waste is generated per calendar month at a site—from the conditions for exemption that specify limits for how much hazardous waste small and very small quantity generators can accumulate on site at any one time.

However, the small quantity generator conditions for exemption include an on-site accumulation limit of 6,000 kilograms for non-acute hazardous waste but do not specify an on-site accumulation limit for acute hazardous waste.

In the original 1980 hazardous waste generator regulations, there were only two categories of hazardous waste generator: small (generating less than 1,000 kilograms of hazardous waste per month) and large (generating more than 1,000 kilograms of hazardous waste per month). These pre-1986 small quantity generators had a total on-site hazardous waste accumulation limit of 6,000 kilograms of non-acute hazardous waste and one kilogram of acute hazardous waste. The 1986 rule that established the category and specific requirements for those generating between 100 kilograms and 1,000 kilograms per month (small quantity generators) (51 FR 10146; March 24, 1986) implemented the changes to the hazardous waste program required by the Hazardous and Solid Waste Amendments of 1984 (HSWA) and established a new category of “conditionally exempt small quantity generator” for those generating less than 100 kilograms of non-acute hazardous waste per month.

The scope of HSWA and the new regulations for conditionally exempt small quantity generators did not include acute hazardous waste. Therefore, generators generating less than one kilogram of acute hazardous waste per month are conditionally exempt small quantity generators and those generating more than one kilogram of acute hazardous waste per month are large quantity generators. There is no separate small quantity generator category based solely on generation of acute hazardous waste.

The EPA clarified the distinctions between the three generator categories in the 2016 Generator Improvements rule and stated that a small quantity generator can only generate up to one kilogram of acute hazardous waste in a calendar month, but it was not clear in the new language whether there is a limit on the amount of acute hazardous waste a small quantity generator can accumulate on site at any one time. Consistent with what has been historically allowed for generators of

small amounts of acute hazardous waste since the 1980 regulations, in the August 2023 technical correction notice, the EPA revised § 262.16(b)(1) to clarify that the acute hazardous waste accumulation limit for a small quantity generator is one kilogram.

The EPA received an adverse comment on this provision. One commenter stated that a 1-kilogram limit for small quantity generators accumulating acute hazardous waste would create severe logistical issues for facilities that generate just slightly under 1 kilogram per month of acutely hazardous waste as the proposed rule will essentially make their allowable accumulation time 30 days. The commenter stated that it would be “impossible to collect samples, characterize the waste, receive disposal approval for the waste and have the waste transported offsite within the allowable time frame.”

EPA disagrees with the comment. As described in this preamble, a 1-kilogram accumulation limit for this category of generator was part of the RCRA regulations starting in 1980 and the revision being made is to make that clearer in the regulations. The generator regulations are designed so that if a generator needs additional time to sample, characterize, and arrange for disposal of an acute hazardous waste that is accumulating on site, it can operate under the requirements for a large quantity generator instead of those of a small quantity generator and remain in compliance with the generator regulations. The additional large quantity generator standards ensure the safe handling of the elevated amounts of acute hazardous waste being accumulated at the generator site.

EPA is finalizing this provision as described in the August 9, 2023, notice.

C. Section 262.17(a)(8)(i) Introductory Text and (a)(8)(i)(A)

The 2016 Hazardous Waste Generator Improvements Rule added a requirement that LQGs undergoing closure of a hazardous waste unit submit a notification that they are closing that unit, including information on the timing of the closure. The generators have two options for submitting that notification when a specific waste accumulation unit is closing, but the generator as a whole is not closing all its units on site (*i.e.*, it will continue generating and accumulating hazardous waste on site). The 2023 direct final rule revised the language in § 262.17(a)(8)(i) and (a)(8)(i)(A) to more clearly describe when the provisions apply and used the defined term “final closure.” The

preamble to the 2023 direct final rule explained that EPA made these changes to distinguish between the requirements that apply when a unit is closing and those that apply when the whole facility is closing.

EPA received an adverse comment on this revision from a State that implements hazardous waste regulations. The commenter argued that a reference to the defined term “final closure” in this introductory text is not appropriate and suggested that EPA instead use the phrase “undergoing closure of the facility.” The commenter argues that this would be more appropriate for a generator closing a waste unit and needing to follow this requirement.

The commenter also submitted comments on a suggested revision to § 262.17(a)(8)(i)(A), stating that this part of the closure regulations would be clearer if the last statement in § 262.17(a)(8)(i)(B) about when a generator can remove a closure notice from its operating record because a waste accumulation unit was reopened was moved from § 262.17(a)(8)(i)(B) to § 262.17(a)(8)(i)(A).

EPA agrees that using the term “final closure” in this paragraph adds unnecessary confusion and that the sentence the commenter identified would make more sense in the revised § 262.17(a)(8)(i)(A). EPA is finalizing revisions to this section to make those changes and to state that the regulations apply when closing a waste accumulation unit but not all waste accumulation units.

D. Section 266.508(a)(2)(ii)

The preamble to the 2023 direct final rule explained that EPA was amending § 266.508(a)(2)(ii) in two ways. First, EPA allowed the four-character PHRM code as well as the existing six-character PHARMS code in Item 13 when manifesting non-creditable hazardous waste pharmaceuticals to a TSDF. This was consistent with guidance EPA issued in 2019.¹ Second, EPA inserted a sentence at the end clarifying that a healthcare facility may choose to include the applicable EPA hazardous waste numbers (*i.e.*, hazardous waste codes) in Item 13 of EPA Form 8700–22, in addition to the PHARMS or PHRM code that was already required. This was consistent with preamble from the Hazardous Waste Pharmaceuticals final rule.²

EPA received one adverse comment on the second provision. The

¹ From Johnson to EPA Regions, December 19, 2019, RCRA Online #14919.

² 84 FR 5877; February 22, 2019.

commenter was a State that expressed concerns that the rule does not resolve the issue that the inclusion of RCRA codes with PHRM/PHARMS on a manifest seems to negate any benefits for a healthcare facility operating under Subpart P. The State was concerned that a healthcare facility would be charged a higher fee by those States which collect fees. The State noted that including PHRM or PHARMS along with RCRA hazardous waste codes creates confusion and that it is unclear why the RCRA codes are being listed.

EPA disagrees with the commenter and is finalizing the provision as proposed. First, with respect to the PHRM code, while we did not receive any comments on this specific aspect of the proposed amendment, the adverse comment on other portions of the same paragraph meant that this was withdrawn, as well. This final rule allows healthcare facilities to use the PHRM or PHARMS code in Item 13 when manifesting non-creditable hazardous waste pharmaceuticals.

Second, with respect to hazardous waste codes, this final rule allows healthcare facilities to include hazardous waste codes in addition to the PHRM/PHARMS code when manifesting non-creditable hazardous waste pharmaceuticals. As discussed in a Frequent Question that is posted to our website,³ as well as in a memorandum,⁴ there are certain situations where the hazardous waste codes need to be included when manifesting non-creditable hazardous waste pharmaceuticals. For example, in States that have not yet adopted part 266 subpart P, healthcare facilities are subject to the standard 40 CFR part 262 generator regulations for their hazardous waste pharmaceuticals, which require healthcare facilities to include all applicable waste codes on the manifest. Therefore, if a healthcare facility that is operating under part 266 subpart P ships non-creditable hazardous waste pharmaceuticals to a TSDF that is in a State that has not yet adopted part 266 subpart P, the healthcare facility would need to include the hazardous waste codes to satisfy the regulatory requirements in the receiving State. Additionally, some vendors may require their healthcare facility customers to include the hazardous waste codes and EPA does not want to preclude that practice because including all applicable hazardous waste codes could

help receiving facilities better understand the wastes and determine the best course of management including, for example, complying with the land disposal restriction treatment standards.

Finally, waste industry representatives have told EPA that their practice is to not commingle hazardous waste pharmaceuticals in the same container with non-pharmaceutical hazardous wastes.⁵ This means that when hazardous waste codes are included on the same line of the manifest as the PHRM/PHARMS code, the hazardous waste codes can be presumed to be referring to hazardous waste pharmaceuticals, and not to other, non-pharmaceutical hazardous wastes.

For these reasons, EPA is finalizing regulatory language that allows a healthcare facility to include the hazardous waste codes in Item 13 of the manifest, in addition to the PHRM/PHARMS code.

V. State Authorization

A. Applicability of Rules in Authorized States

Under section 3006 of RCRA, the EPA may authorize a qualified State to administer its own hazardous waste program within the State in lieu of the Federal program. Following authorization, the EPA retains enforcement authority under sections 3008, 3013, and 7003 of RCRA, although authorized States have primary enforcement responsibility. The standards and requirements for State authorization are found at 40 CFR part 271.

Prior to enactment of the Hazardous and Solid Waste Amendments of 1984 (HSWA), a State with final RCRA authorization administered its hazardous waste program entirely in lieu of the EPA administering the Federal program in that State. The Federal requirements no longer applied in the authorized State, and the EPA could not issue permits for any facilities in that State, since only the State was authorized to issue RCRA permits. When new, more stringent Federal requirements were promulgated, the State was obligated to enact equivalent authorities within specified time frames. However, the new Federal requirements did not take effect in an authorized State until the State adopted the Federal requirements as State law.

In contrast, under RCRA section 3006(g) (42 U.S.C. 6926(g)), which was

added by HSWA, new requirements and prohibitions imposed under HSWA authority take effect in authorized States at the same time that they take effect in unauthorized States. The EPA is directed by the statute to implement these requirements and prohibitions in authorized States, including the issuance of permits, until the State is granted authorization to do so. While States must still adopt HSWA related provisions as State law to retain final authorization, the EPA implements the HSWA provisions in authorized States until the States do so.

Authorized States are required to modify their program only when the EPA enacts Federal requirements that are more stringent or broader in scope than the existing Federal requirements. RCRA section 3009 allows the States to impose standards more stringent than those in the Federal program (see also 40 CFR 271.1). Therefore, authorized States may, but are not required to, adopt Federal regulations, both HSWA and non-HSWA, that are considered less stringent than or equally as stringent as the previous Federal regulations.

B. Effect on State Authorization

This final rule finalizes technical corrections to regulations in 40 CFR parts 261, 262, and 266 that are being promulgated in part under the authority of HSWA, and in part under non-HSWA authority. Thus, the technical corrections and clarifications finalized in this direct final rule that are under non-HSWA authority would be applicable on the effective date only in those States that do not have final authorization of their base RCRA programs. However, the technical corrections to regulations in § 262.16(b)(1) are promulgated under the authority of HSWA and would be effective on the effective date of this final rule in all States.

This final rule is considered to be neither more nor less stringent than the current standards. Therefore, because of section 3009 of RCRA, which allows States to impose more stringent regulations than the Federal program, as described in section V.a. of this preamble, authorized States would not be required to modify their programs to adopt the technical corrections promulgated in this final rule, although we would strongly urge the States to adopt these technical corrections to avoid any confusion or misunderstanding by the regulated community and the public.

³ <https://www.epa.gov/hwgenerators/frequent-questions-about-management-standards-hazardous-waste-pharmaceuticals-and#e2>.

⁴ From Johnson to EPA Regions, December 19, 2019, RCRA Online #14919.

⁵ Per personal communication with Charlotte Smith of Waste Management, January 26, 2022, and email communication with Mike Crisenbery of Clean Harbors, February 10, 2022.

VI. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at <https://www.epa.gov/laws-regulations/laws-and-executive-orders>.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 14094: Modernizing Regulatory Review

This action is not a significant regulatory action as defined in Executive Order 12866, as amended by Executive Order 14094, and was therefore not subject to a requirement for Executive Order 12866 review.

B. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA because it does not contain any information collection activities. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control numbers 2050–0213, 2050–0202, and 2050–0212.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action simply corrects typographical errors, incorrect citations, and omissions; provides clarifications; and makes conforming changes where they have not been made previously. We have therefore concluded that this action will have no regulatory burden for all directly regulated small entities.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of \$100 million (adjusted annually for inflation) or more (in 1995 dollars) as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local, or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. Because the rule does not make any substantive change, it will not impose substantial direct costs on Tribal governments. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2–202 of the Executive Order.

Therefore, this action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk. Since this action does not concern human health, EPA’s Policy on Children’s Health also does not apply.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes that these technical corrections do not concern human health or environmental conditions and therefore cannot be evaluated with respect to potentially disproportionate and adverse effects on people of color, low-income populations and/or indigenous peoples because this final rule does not create any new regulatory requirements, but rather clarifies existing requirements and makes conforming changes.

K. Congressional Review Act (CRA)

This action is subject to the CRA, and the 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).

List of Subjects

40 CFR Part 261

Environmental protection, Administrative practice and procedure, Air pollution control, Confidential business information, Hazardous waste, Intergovernmental relations, Licensing and registration, Reporting and recordkeeping requirements.

40 FR Part 262

Environmental protection, Exports, Hazardous materials transportation, Hazardous waste, Imports, Labeling, Packaging and containers, Reporting and recordkeeping requirements.

40 FR Part 266

Environmental protection, Energy, Hazardous waste, Recycling, Reporting and recordkeeping requirements.

Michael S. Regan,
Administrator.

For the reasons set forth in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

■ 1. The authority for part 261 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, 6922, 6924(y) and 6938.

■ 2. Section 261.4 is amended by revising (e)(1) introductory text to read as follows:

§ 261.4 Exclusions.

(e) * * *

(1) Except as provided in paragraphs (e)(2) and (4) of this section, persons who generate or collect samples for the purpose of conducting treatability studies as defined in 40 CFR 260.10, are not subject to any requirement of this part, 40 CFR parts 262 and 263, or to the notification requirements of Section 3010 of RCRA, nor are such samples included in the quantity determinations of 40 CFR 262.13 and the accumulation limits in 40 CFR 262.14(a)(3), 40 CFR 262.14(a)(4), and 40 CFR 262.16(b)(1) when:

* * * * *

PART 262—STANDARDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTE

■ 3. The authority for part 262 continues to read as follows:

Authority: 42 U.S.C. 6906, 6912, 6922–6925, 6937, 6938 and 6939g.

■ 4. Section 262.16 is amended by revising paragraph (b)(1) to read as follows:

§ 262.16 Conditions for exemption for a small quantity generator that accumulates hazardous waste.

(b) * * *

(1) *Accumulation limit.* The quantity of acute hazardous waste accumulated on site never exceeds 1 kilogram (2.2 pounds) and the quantity of non-acute hazardous waste accumulated on site never exceeds 6,000 kilograms (13,200 pounds);

* * * * *

■ 5. Section 262.17 is amended by revising (a)(8)(i) to read as follows:

§ 262.17 Conditions for exemption for a large quantity generator that accumulates hazardous waste.

(a) * * *

(8) * * *

(i) *Notification for closure of a waste accumulation unit.* A large quantity generator must perform one of the following when closing a waste accumulation unit, but not all waste accumulation units:

(A) Place a notice in the operating record within 30 days after closure identifying the location of the unit within the facility (if the waste accumulation unit is subsequently reopened, the generator may remove the notice from the operating record); or

(B) Meet the closure performance standards of paragraph (a)(8)(iii) of this section for container, tank, and containment building waste accumulation units or paragraph (a)(8)(iv) of this section for drip pads and notify EPA following the procedures in paragraph (a)(8)(ii)(B) of this section for the waste accumulation unit.

* * * * *

PART 266—STANDARDS FOR THE MANAGEMENT OF SPECIFIC HAZARDOUS WASTES AND SPECIFIC TYPES OF HAZARDOUS WASTE MANAGEMENT FACILITIES

■ 6. The authority for part 266 continues to read as follows:

Authority: 42 U.S.C. 1006, 2002(a), 3001–3009, 3014, 3017, 6905, 6906, 6912, 6921, 6922, 6924–6927, 6934, and 6937.

■ 7. Section 266.508 is amended by revising paragraph (a)(2)(ii) to read as follows:

§ 266.508 Shipping non-creditable hazardous waste pharmaceuticals from a healthcare facility or evaluated hazardous waste pharmaceuticals from a reverse distributor.

(a) * * *

(2) * * *

(ii) A healthcare facility shipping non-creditable hazardous waste

pharmaceuticals must write the word “PHRM” or “PHARMS” in Item 13 of EPA Form 8700–22. A healthcare facility may also include the applicable EPA hazardous waste numbers (*i.e.*, hazardous waste codes) in Item 13 of EPA Form 8700–22.

* * * * *

[FR Doc. 2024–28802 Filed 12–10–24; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. NHTSA–2023–0021]

RIN 2127–AM37

Federal Motor Vehicle Safety Standards; Automatic Emergency Braking Systems for Light Vehicles; Correction

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Final rule; response to petitions for reconsideration; correction.

SUMMARY: This document corrects a November 26, 2024 final rule partially granting petitions for reconsideration of a May 9, 2024, final rule that adopted Federal Motor Vehicle Safety Standard (FMVSS) No. 127, “Automatic Emergency Braking for Light Vehicles,” which requires automatic emergency braking (AEB), pedestrian automatic emergency braking (PAEB), and forward collision warning (FCW) systems on all new light vehicles. This document corrects a typographical error in the amendatory instructions.

DATES: Effective January 27, 2025.

ADDRESSES: Correspondence related to this rule should refer to the docket number set forth above (NHTSA–2023–0021) and be submitted to the Administrator, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: For technical issues: Mr. Markus Price, Office of Crash Avoidance Standards, Telephone: (202) 366–1810, Facsimile: (202) 366–7002. For legal issues: Mr. Eli Wachtel, Office of the Chief Counsel, Telephone: (202) 366–2992, Facsimile: (202) 366–3820. The mailing address for these officials is: National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590.

SUPPLEMENTARY INFORMATION: In FR Doc. 2024–27349 appearing on page 93199 in the **Federal Register** of Tuesday, November 26, 2024, the following correction is made:

§ 571.127 [Corrected]

■ On page 93220, in the first column, in part 571, in amendment 2.b, the instruction “Revising S5.1.1(a)(3) and (4), S5.1.1(b)(2), S5.1.3, and S8.3.3(g).” is corrected to read “Revising S5.1.1(a)(3) and (4), S5.1.1(b)(1), S5.1.3, and S8.3.3(g).”.

Issued in Washington, DC, under authority delegated in 49 CFR 1.95 and 501.8.

Raymond R. Posten,
Associate Administrator, Rulemaking.

[FR Doc. 2024–28998 Filed 12–10–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 29

[Docket No. FWS–HQ–NWRs–2019–0017; FF09R50000–XXX–FVRS3451900000]

RIN 1018–BD78

Permitting of Rights-of-Way Across National Wildlife Refuges and Other U.S. Fish and Wildlife Service-Administered Lands

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), are revising our process for permitting of rights-of-way across National Wildlife Refuge System lands and other Service-administered lands. By aligning Service processes more closely with those of other Department of the Interior bureaus, to the extent practicable and consistent with applicable law, we will reduce the amount of time the Service requires to process applications for rights-of-way across Service-managed lands. We will require a preapplication meeting and use of a standard application, allow electronic submission of applications, and provide the Service with additional flexibility, as appropriate, to determine the fair market value or fair market rental value of rights-of-way across Service-managed lands. Additionally, we are implementing new permit terms and conditions and other regulatory changes.

DATES: This rule is effective January 10, 2025.

ADDRESSES: This final rule, its supporting documents, and the comments we received on the proposed rule (86 FR 5120, January 19, 2021) and revised proposed rule (88 FR 47442, July 24, 2023) are available at <https://www.regulations.gov> at Docket No. FWS-HQ-NWRS-2019-0017.

Information collection requirements: Written comments and suggestions on the information collection requirements may be submitted at any time to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, MS: PRB (JAO/3W), Falls Church, VA 22041-3803 (mail); or Info_Coll@fws.gov (email). Please reference “OMB Control Number 0596-0249” in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: Ken Fowler, U.S. Fish and Wildlife Service, MS: NWRS, 5275 Leesburg Pike, Falls Church, VA 22041; (703) 358-1876. 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:

Background

The mission of the U.S. Fish and Wildlife Service (Service) is working with others to conserve, protect, and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people. The Service has some amount of management responsibility for more than 96 million terrestrial acres as well as an additional 760 million acres of submerged lands in marine national monuments. The 96 million acres of terrestrial land includes:

- approximately 89 million acres where the Service is the principal land manager and permitting authority;
- nearly 4.9 million acres of conservation easements on private lands, where landowners are the principal land managers but the Service has a permitting role when a proposed use will affect the United States’ real property interest;
- more than 1.7 million acres of public land, where another Federal agency is the principal land manager and permitting authority but where the Service has some management responsibility through an agreement with another agency; and
- approximately 775,000 acres under a temporary lease or agreement where

another entity is the permitting authority.

Of the 89 million acres of terrestrial land principally managed by the Service, 76.8 million acres are in Alaska, 12.2 million acres are in the lower 48 States, and 50,000 acres are in Hawaii. The vast majority of these acres are part of the National Wildlife Refuge System (Refuge System), the mission of which is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans (16 U.S.C. 668dd(a)(2)). The total also includes approximately 21,000 acres of public land in the National Fish Hatchery System, which the Service manages for the propagation and distribution of fish and other aquatic animal life.

The 89 million acres of terrestrial land includes more than 20 million acres of designated wilderness that the Service manages for “the preservation of their wilderness character” in accordance with the Wilderness Act of 1964 (16 U.S.C. 1131 *et seq.*). Subject to existing private rights, and special provisions included in specific wilderness-designation statutes, the Wilderness Act prohibits commercial enterprises and permanent roads. The law also prohibits temporary roads; motor vehicles, motorized equipment, motorboats, landing of aircraft, and other forms of mechanical transport; structures; and installations, unless their use can be demonstrated to be necessary to meet minimum requirements for the administration of the area for Wilderness Act purposes. The Alaska National Interest Lands Conservation Act (ANILCA; Pub. L. 96-487; 16 U.S.C. 3101 *et seq.*) includes provisions that allow for transportation and utility system uses within conservation system units, including designated wilderness.

Statutory Authority

Refuge System lands and waters are managed according to the authorities of the National Wildlife Refuge System Administration Act of 1966 (Administration Act; 16 U.S.C. 668dd-668ee), as amended by the National Wildlife Refuge System Improvement Act of 1997 (Improvement Act; Pub. L. 105-57), and ANILCA. For lands in Alaska, the Improvement Act specifies that ANILCA provisions prevail in any situation in which there is a conflict between any provision in the Improvement Act and any provision of ANILCA. If a right-of-way across Refuge System lands is authorized by ANILCA

(see 16 U.S.C. 3162(B)), then the Service must follow the procedures in 43 CFR part 36 when permitting the right-of-way and follow other applicable Refuge System laws and regulations where they do not conflict with ANILCA.

The Administration Act, as amended by the Improvement Act, authorizes the Service to permit a new use, or expand, renew, or extend an existing use, of a refuge only when the Service determines it is a compatible use. The Improvement Act defines a “compatible use” as a wildlife-dependent recreational use or any other use of a refuge that, in the sound professional judgment of the Service Director, will not materially interfere with or detract from the fulfillment of the mission of the Refuge System or the purpose(s) of the refuge.

Compatible Use Determinations

A “compatibility determination” is a written determination, typically signed and dated by the Refuge Manager, that an existing or new use of a refuge is compatible with the Refuge System mission and the purpose(s) of the refuge. Currently, there are more than 570 national wildlife refuges, and each refuge has different establishing authorities, purposes, habitat types, wildlife species, and public uses, which can result in different compatibility determinations for the same use. The Improvement Act required the Service to issue regulations establishing a process for determining whether a proposed use is a compatible use; these regulations are set forth in title 50 of the Code of Federal Regulations (CFR) in parts 25 and 26. The Improvement Act authorizes the Service to permit a right-of-way across Refuge System land only when the right-of-way is a compatible use.

The Improvement Act’s compatibility requirements apply only to Service permitting of rights-of-way across Refuge System lands and do not apply to other Service lands, except in the case of National Fish Hatchery System lands, where, by regulation at 50 CFR 70.6, the Refuge compatibility requirements in 50 CFR part 26 are equally applicable to fish hatcheries, and at 50 CFR 70.7, where the right-of-way regulations are equally applicable to fish hatcheries. The Service processes applications for other rights-of-way across lands outside the Refuge System and National Fish Hatchery System under the applicable authority cited at 43 CFR part 2800, and these lands are not subject to the Improvement Act’s compatibility requirement.

The Administration Act authorizes the Secretary of the Interior, acting

through the Service Director, to issue a right-of-way permit for a compatible use across Refuge System lands only if the applicant pays the Service the fair market value or fair market rental value of the right-of-way, unless the applicant is exempt from such payment by any other provision of Federal law, including certain provisions of ANILCA. In addition, before issuing a right-of-way permit, the Service must assess the effects of the proposed use, as required by the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*); the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*); the National Historic Preservation Act of 1966 (NHPA; 54 U.S.C. 300101 *et seq.*); and other applicable laws and Executive orders.

Existing Rights-of-Way

The regulations at 50 CFR 26.41 state that, for existing rights-of-way, the Service will not make a compatibility determination and will deny any request for maintenance of an existing right-of-way that will affect a unit of the Refuge System, unless:

- the design adopts appropriate measures to avoid resource impacts and includes provisions to ensure no net loss of habitat quantity and quality;
- restored or replacement areas identified in the design are afforded permanent protection as part of the national wildlife refuge or wetland management district affected by the maintenance; and
- all restoration work is completed by the applicant prior to any title transfer or recording of the easement, if applicable.

In accordance with the Improvement Act and 50 CFR 25.21, in the case of any right-of-way permit issued on or before November 17, 2000, for a term of more than 10 years (such as an electric utility right-of-way), the Service will not reevaluate whether the use is a compatible use during the permit term so long as the right-of-way holder is in compliance with all the terms and conditions of the permit. Prior to extending or renewing such long-term uses at the expiration of the authorization, the Service will make a new compatibility determination, but such compatibility determinations will base their analysis on the existing conditions with the use in place, not from a pre-use perspective. All permits issued after November 17, 2000, must include terms and conditions that specifically allow for modifications to the terms and conditions, if necessary to ensure compatibility. For older permits that do not include this stipulation, the Service may request permit

modifications to ensure that a use remains a compatible use. All right-of-way permits issued by the Service include language allowing the Service to terminate the right-of-way permit if the permit holder's use violates the permit terms and conditions.

Additionally, this final rule and the Improvement Act's compatibility requirement do not apply to permanent rights and rights-of-way in existence prior to land acquisition by the United States, including prior existing highway rights-of-way held by State and local units of government, except in situations where there is a proposed expansion, rerouting, or additional use of a right-of-way that will encumber Refuge System lands. The Improvement Act requires that all uses of Refuge System lands be compatible with the purpose(s) for which those areas were established and the mission of the Refuge System, and activities not authorized by a preexisting right-of-way are subject to 50 CFR 26.41 and the regulations in this final rule.

The Service may not authorize an expansion, rerouting, or additional use of a right-of-way that will encumber Refuge System lands unless the use is compatible with the purpose(s) for which those areas were established and the Refuge System mission.

Amendments to the Right-of-Way Regulations

On January 19, 2021, we published in the **Federal Register** (86 FR 5120) a proposed rule to revise and streamline the Service's process for permitting of rights-of-way across National Wildlife Refuge System lands and other Service-administered lands, to the extent practicable and consistent with applicable law. On July 24, 2023, we published in the **Federal Register** (88 FR 47442) a revised proposed rule based on feedback we received on the original proposed rule. For a description of the substantive changes proposed to the regulations in 50 CFR part 29, subpart B, see the January 19, 2021, proposed rule (86 FR 5120) and the July 24, 2023, revised proposed rule (88 FR 47442).

Summary of Comments and Responses

We accepted public comments on the January 19, 2021, proposed rule (86 FR 5120) for 60 days, ending March 22, 2021. By that date, we received 11 comments. Three comments suggested that the Service make no changes to its regulations to streamline right-of-way permitting. Overall, nine comments suggested no additional changes to those we had proposed. We discussed the remaining comments in our July 24,

2023, revised proposed rule (88 FR 47442).

We accepted public comments on the revised proposed rule for 30 days, ending August 23, 2023. We received comments from 13 different individuals or organizations. Two individuals or organizations suggested the Service make no changes to its regulations to streamline right-of-way permitting. Two others suggested the Service streamline its permitting process only when doing so would benefit transmission of renewable energy. We discuss the remaining comments by topic, below.

Comment (1): The Center for Biological Diversity and another commenter expressed opposition to the changes in the proposed rule and urged the Service to withdraw the proposed rule, but, if the Service did not, these commenters suggested that the Service not finalize the rule until the Service completes a programmatic consultation under the ESA.

Our response: No regulatory revisions in this rule will change the types of uses that the Service authorizes across Service-managed lands. The rule provides more clarity to applicants about the right-of-way application process and streamlines inefficient processes for applicants and the Service. Given that this rule has no impact on authorized uses, a programmatic consultation to determine cumulative impacts is not appropriate. Where appropriate, the Service will conduct the appropriate ESA consultation when processing individual right-of-way permit applications. We did not make any changes to the proposed rule as a result of these comments.

Comment (2): The Edison Electric Institute (EEI) requested that the Service ensure that electric infrastructure rights-of-way remain a compatible use on Refuge System lands, and EEI requested guidance concerning the submittal of facility construction plans and vegetation management plans.

Our response: Consistent with the final compatibility regulations implementing the National Wildlife Refuge System Improvement Act, published at 65 FR 62458 (October 18, 2000), it is not the Service's intent to restrict or eliminate previously permitted rights-of-way for infrastructure. However, in accordance with 50 CFR 25.21, the Service may seek modifications to the terms and conditions of existing right-of-way permits if necessary to ensure that a permitted use remains a compatible use.

With respect to such preexisting uses, in this final rule, we added a new section, § 29.12, Preexisting uses, to clarify that these regulations have no

impact on activities explicitly authorized by a permanent right or right-of-way obtained prior to acquisition by the United States, such as existing rights-of-way for power lines and other electrical infrastructure. However, any proposed expansion, rerouting, or additional use of a right-of-way that will encumber Refuge System lands must be in accordance with the requirements and procedures of 50 CFR 25.21 and 26.41(c).

Before the Service will process a request for a right-of-way permit, the Service requires a preliminary site and facility construction plan for a proposed right-of-way that requires construction. A preliminary site and facility construction plan is an attachment required by the Standard Form 299, Application for Transportation, Utility Systems, Telecommunications and Facilities on Federal Lands and Property (SF-299), which applicants must submit to request a right-of-way permit. Before the Service can issue a right-of-way permit or renewal, the Service also requires a vegetation management plan when vegetation will be disturbed by construction, operation, or maintenance of the right-of-way. The contents of facility construction plans and vegetation management plans will vary depending on the scope and location of the proposed right-of-way and the wildlife habitat and species impacted. During a preapplication consultation for a right-of-way, a modification of an existing right-of-way, or a renewal, the Service can provide guidance to an applicant about information that must be covered by these plans. We did not make any changes to the final rule as a result of EEI's comments pertaining to these plans.

Comment (3): The Energy and Wildlife Action Coalition (EWAC) suggested that the Service revise proposed § 29.21–3, Compatibility-determination requirement, by adding “or to activities authorized by preexisting rights-of-way” after “privately owned minerals,” to make the language of the regulation consistent with the preamble.

Our response: We concur with EWAC's suggestion to make the language of the regulation consistent with the preamble of the proposed rule about how the Service handles preexisting rights-of-way. Therefore, in addition to adding the new section, § 29.12, as discussed above, to clarify that these regulations have no impact on permanent rights and rights-of-way in existence prior to acquisition by the United States, we also revised proposed § 29.21–3 (now at § 29.13 in this final rule) to add the words “or to activities

explicitly authorized by a permanent right or right-of-way obtained prior to acquisition by the United States” after “privately owned minerals” in this final rule.

Comment (4): EWAC suggested that, since a compatibility determination is a threshold requirement, the Service's implementing regulations should limit the information the agency initially requests to the information it requires to make a compatibility determination. Consistent with that idea, EWAC suggested that the Service be more flexible with respect to the amount of environmental information that must accompany a right-of-way application.

Our response: The Service typically requires an environmental analysis before we may make a final determination that a proposed use is compatible with the mission of the Refuge System and the purpose(s) of the refuge. However, the Service may require less information to ascertain whether or not a proposed use would conflict with the goals or objectives in an approved refuge management plan (e.g., comprehensive conservation plan, comprehensive management plan, or step-down management plan), which describe how the Service will accomplish the purpose(s) of the refuge. Such a conflict would require changes to the proposed use before it could potentially be found compatible with the purpose(s) of the refuge.

We concur with EWAC that the Service's implementing regulations should limit the information the agency initially requests to the information it requires to make a compatibility determination, and that an applicant should not prepare an environmental analysis to satisfy NEPA requirements until after the applicant has discussed the proposed use with the Service and provided basic environmental information to inform discussions with the Service. Therefore, we revised proposed § 29.21–4 (now at § 29.16, Right-of-way permit application, in this final rule), to require supplemental environmental information in lieu of an environmental analysis with initial application submission. Consistent with this change, we added the new section, § 29.15, General application procedures, which summarizes the steps in the right-of-way application process and clarifies that the Service will deem an application to be complete, and notify the applicant of such, after the Service has determined that the provided information is sufficient for the agency to make a compatibility determination and comply with NEPA. This section also states that the Service will notify

the applicant if additional information is required for a complete application.

Comment (5): EWAC suggested that, since NEPA documents are routinely developed by third-party contractors in consultation with the Service, required upfront payments for application processing should not include the estimated cost of preparing environmental review documents to satisfy NEPA requirements.

Our response: We concur, and we revised proposed § 29.21–6 (now at § 29.18 in this final rule) to clarify that the Service's required upfront payments for application processing will not include the cost of preparing environmental review documents to satisfy NEPA requirements when the applicant will assume responsibility for the costs of that work.

Comment (6): The State of Utah, Public Lands Policy Coordinating Office, suggested that the regulations include language similar to that included in the preamble of the proposed rule stating that there will be “no impact on prior existing highway rights-of-way held by State and local units of government on Service-administered land.”

Our response: We concur with the State of Utah's suggestion to make the language of the regulations consistent with the preamble of the proposed rule. Therefore, as discussed earlier in this final rule, we have added a new section, § 29.12, Preexisting uses, to clarify that these regulations have no impact on permanent rights-of-way in existence prior to acquisition by the United States. Additionally, consistent with this change, we revised proposed § 29.21–3, Compatibility-determination requirement (now at § 29.13 in this final rule), to clarify that no compatibility determination is required for activities explicitly authorized by a permanent right or right-of-way obtained prior to acquisition by the United States.

Comment (7): The State of Utah, Public Lands Policy Coordinating Office, reiterated its concern that, in remote areas, requiring an applicant to provide a survey plat prepared by a licensed professional land surveyor or another professional licensed by the State will create an unnecessary burden. The State reiterated its recommendation that the Service waive the requirement for a survey plat when it would be a burden for a right-of-way requestor.

Our response: The Service recognizes the challenges in surveying rights-of-way in remote areas. In the final rule, to increase flexibility for unique circumstances, we added a provision to allow a licensed Service land surveyor to waive the requirement of a survey

plat for a proposed right-of-way in a remote location if they determine that the Global Positioning System (GPS) coordinates and supporting location information submitted by the applicant for inclusion in the right-of-way permit are adequate to locate the proposed right-of-way with minimal risk to the United States.

Comment (8): The Wireless Infrastructure Association (WIA) recommended that the Service clarify that, in situations where tower or support infrastructure for wireless communications is owned by a neutral host provider that is separate from the entity operating the wireless communications equipment, the operator of the wireless communications equipment and not the owner of the tower or support infrastructure is responsible for compliance with Federal rules and requirements related to wireless communication. WIA recommended that the Service clarify that proposed § 29.21–8(c)(4) (now at § 29.20(c)(4) in this final rule) does not apply to communications facilities.

Our response: The Service supports collocation of wireless communications sites where possible and when compatible with refuge purposes. The proposed § 29.21–8(c)(4) contained contradictory text, and in this final rule we clarify at § 29.20(c)(4) that collocation is allowed but we require that each collocating entity obtain a right-of-way permit.

Comment (9): The WIA recommended that the Service clarify that, where tower or support infrastructure is owned and maintained by an organization separate from the entity operating the wireless communications equipment, the operator of the wireless communications equipment is responsible for complying with the applicable Federal rules and procedures for telecommunications sites.

Our response: The Service concurs that the requirements for communications facilities in § 29.20(g) in this final rule (formerly at § 29.21–8(g) in the proposed rule) should not apply to neutral host providers, also sometimes referred to as tower companies, who own and maintain towers or support infrastructure on Service-managed land but do not operate or maintain wireless communications equipment. We revised § 29.20(g) to clarify that requirements for communications facilities, including complying with the applicable Federal rules and procedures for telecommunications sites, apply to entities that operate or maintain wireless communications equipment.

Comment (10): The Red Cliff Band of Lake Superior Chippewa Indians and the Madison Office of the Great Lakes Indian Fish & Wildlife Commission requested that the Service include in its regulations a permit condition that ensures that the right-of-way permits it issues do not impede access to ceded ancestral Tribal lands or the exercise of court-affirmed treaty rights.

Our response: We concur that the right-of-way permits issued by the Service should not impede public access or the ability of Tribes to exercise court-affirmed treaty rights. Therefore, we revised proposed § 29.21–8(d), Terms and conditions required of most permit holders (now at § 29.20(d) in this final rule), to clarify that right-of-way permits issued by the Service will include language ensuring that Service-managed lands remain accessible to the public when access does not pose a threat to public safety or the environment.

Comment (11): The State of Alaska suggested that lands located within Alaska national wildlife refuges conveyed under the authority of ANILCA sections 103(c) and 906(o) are exempted from Service regulations by the interim management regulations for Alaska national wildlife refuges that published at 46 FR 31818–31834, on June 17, 1981.

Our response: The interim regulations promulgated in 1981 were repealed and superseded by the final rule promulgated in 1986 (51 FR 44791, December 12, 1986) and thus currently have no legal effect. Pursuant to 50 CFR 36.1, which sets forth the regulations for Alaska national wildlife refuges, the general National Wildlife Refuge System regulations in title 50 CFR are automatically applicable in their entirety to the federally owned lands within the boundaries of Alaska national wildlife refuges unless stated otherwise in those regulations or amended by ANILCA. We did not make any changes to the final rule as a result of these comments.

Comment (12): The State of Alaska requested that the Service exempt Alaska from this rule, based on the unique circumstances of Alaska's transportation and utility systems, such as the relatively undeveloped road system at the time of ANILCA passage, the need to develop roads and utilities across Alaska refuge lands to serve lands transferred to Native Corporations under the Alaska Native Claims Settlement Act (ANCSA), and pipeline right-of-way authorizations other than common carrier lines.

Our response: Pursuant to 50 CFR 36.1, which sets forth the regulations for

Alaska national wildlife refuges, the general National Wildlife Refuge System regulations in title 50 CFR are already applicable in their entirety to the federally owned lands within the boundaries of Alaska national wildlife refuges unless stated otherwise in those regulations or amended by ANILCA. As stated in § 29.21–1(b) in the proposed rules and § 29.11(b) in this final rule, requests for the transportation and utility system rights-of-way authorized under ANILCA must be submitted under the authority of 16 U.S.C. 3161 *et seq.* and follow the procedures set forth in 43 CFR part 36. The vast majority of rights-of-way requested from the Service in Alaska fall under ANILCA's definition of transportation and utility systems in 16 U.S.C. 3162(B) or are otherwise authorized under ANILCA; however, any rights-of-way not authorized under ANILCA are subject to the Administration Act and its implementing regulations in title 50 CFR. We did not make any changes to the final rule as a result of these comments.

Comment (13): The State of Alaska suggested that compatibility has a different standard under ANILCA, and, under that standard, set forth in 43 CFR 36.2(f), a title XI project is “compatible with the purposes for which the unit was established” if it “will not significantly interfere with or detract from the purposes for which the area was established” [emphasis added]. Therefore, the State suggests, the more restrictive compatibility determination and approval process described in 50 CFR 26.41(c) should not apply to these rights-of-way.

Our response: Consistent with 50 CFR 36.1, rights-of-way authorized under the Administration Act are subject to regulations in title 50 CFR including 50 CFR 25.21(b)(1) and 26.41. We did not make any changes to the final rule as a result of these comments.

Comment (14): The State of Alaska requested that the Service revise the regulation's definition of *National Wildlife Refuge System lands in Alaska* to include the list of the types of transportation and utility systems authorized in ANILCA section 1102(4)(B) and 43 CFR 36.2(p).

Our response: We revised the definition of *National Wildlife Refuge System lands in Alaska* in proposed § 29.21–1(b) (now at § 29.11 in this final rule) to reference the list of ANILCA-authorized transportation and utility systems in 16 U.S.C. 3162(B), which is the same list in ANILCA section 1102(4)(B) and 43 CFR 36.2(p).

Comment (15): The State of Alaska suggested that the Service revise

proposed § 29.21–2, Preapplication meeting, to impose an explicit timeframe for preapplication meetings.

Our response: The Service anticipates developing step-down policy for these regulations to provide guidance to Service employees on the appropriate timelines for preapplication meetings. Depending on the scope of the proposed use, multiple preapplication meetings may be appropriate. We did not make any changes to the rule as a result of this comment.

Comment (16): The State of Alaska requested that the Service expand the types of oil and gas pipelines that may be authorized by a Regional Director to include additional types of pipelines, such as contract carrier pipelines. The State also requested that the Service rephrase language in the preamble pertaining to ANILCA and the Wilderness Act, to avoid potential misunderstanding about where ANILCA allows commercial enterprises and permanent roads.

Our response: We incorporated the State's requested edits into the preamble description of the Wilderness Act and ANILCA, to clarify that ANILCA includes provisions that allow for transportation and utility systems within conservation system units, including designated wilderness. At this time, the Service is not prepared to expand the types of oil and gas pipelines that a Regional Director may authorize, so we did not make that suggested change.

Changes From the Proposed Rules

As discussed above under *Summary of Comments and Responses*, in this final rule we have made changes to the regulations in the proposed rules based on comments we received. Additionally, we made clarifying edits to several sections to eliminate potential sources of confusion.

In this final rule, in response to comments, we added to and updated several sections to make them consistent with the preamble of the proposed rule, which indicated that the regulations would have no impact on prior existing highway rights-of-way held by State and local units of government on Service-administered land. We added a new section, § 29.12, Preexisting uses, to clarify that these regulations have no impact on permanent rights-of-way in existence prior to acquisition by the United States, except that, consistent with Federal Highway Administration regulations in 23 CFR 645.205, activities not authorized by a prior existing highway right-of-way, as well as activities that fall outside the footprint of an existing right-of-way, are subject to

50 CFR 26.41 and the procedures in this final rule.

In response to public comments, and consistent with the preamble in the proposed rule, we revised and streamlined proposed § 29.21–3, Compatibility-determination requirement (now at § 29.13 in this final rule). Consistent with the Service's compatibility policy in the Service Manual at 603 FW 2, we clarified that the Service will not issue or renew a right-of-way permit across National Wildlife Refuge System land if the use would conflict with the goals or objectives in an approved refuge management plan (e.g., a comprehensive conservation plan). For brevity, we deleted proposed § 29.21–3's statutory citations and pointed applicants toward the Service's existing compatibility regulations in 50 CFR 25.21, which address compatible use determinations and reevaluations for rights-of-way permitted before and after November 17, 2000. Finally, in response to comments, we revised proposed § 29.21–3 to clarify that no compatibility determination is required for activities explicitly authorized by a permanent right or right-of-way obtained prior to acquisition by the United States.

The addition of a new section, § 29.12, Preexisting uses, in this final rule required the redesignations of proposed § 29.21–4 and the subsequent sections of the proposed rule.

We revised proposed § 29.21–4, Application procedures (now § 29.16, Right-of-way permit application, in this final rule), to clarify that the Service will not begin processing a right-of-way permit application until the agency has determined that the applicant has complied with application requirements. This provision was previously implied but not explicitly stated. The remainder of the section pertaining to application procedures follows what was previously included in the proposed rule with several revisions.

The most significant revision to proposed § 29.21–4 (now § 29.16), which we made in response to a public comment, is the elimination of the requirement that applicants include an environmental analysis with every application submission. An environmental analysis can be a time-consuming and expensive undertaking, and the Service agrees with a commenter that it is premature for an applicant to provide an environmental analysis suitable to satisfy NEPA requirements at the application submittal stage, and that the Service should first review other application

documentation before requesting a detailed environmental analysis.

We revised proposed § 29.21–4 (now § 29.16) to substitute supplemental environmental information for the environmental analysis in the list of documents that applicants must include with their application submission. This supplemental environmental information may include, but is not limited to, the anticipated impacts of the proposed use on air and water quality; scenic and aesthetic features; historic, architectural, archeological, and cultural features; and wildlife, fish, and marine life, including habitat connectivity and migratory routes.

Related to these changes, we revised proposed § 29.21–4 (now § 29.16) to require that applications include a description of proposed access routes and means of access for right-of-way construction and maintenance, and that the application's included maps identify proposed access points and routes (including uses of existing roads). This is information that would have otherwise been described in an environmental analysis, which, as explained above, the Service is no longer requiring as part of every right-of-way application submission.

We revised proposed § 29.21–4 (now § 29.16) to clarify that the preliminary site and facility construction plans listed on the SF–299 are required with application submission. Proposed § 29.21–4 identified preliminary site and facility construction plans as a post-application submission requirement, even though preliminary site and facility construction plans are a requirement of the SF–299, which is required with right-of-way application submission.

Finally, we revised proposed § 29.21–4 (now § 29.16) to indicate that an applicant may be required to provide proof of general liability insurance before the Service will issue a right-of-way permit. In the proposed rule, § 29.21–8(e) (now § 29.20(e)) stated that the Service may require a permit holder to maintain general liability insurance during the term of the permit, and, for transparency purposes, we copied this requirement to § 29.16(d)(4).

In this final rule, we have added a new section, § 29.15, General application procedures, summarizing steps an applicant must follow to request a right-of-way permit. These steps are described in more detail in other sections of the proposed rule and this final rule. This new section clarifies that the Service will deem a right-of-way application to be complete, and notify the applicant of such, after the Service has determined that the

information provided with an application is sufficient for the agency to make a compatibility determination and comply with NEPA. The section also states that the Service will notify the applicant if additional information is required for a complete application. These clarifications on application completeness are necessary given that the Service requires an environmental analysis to process many applications but is eliminating the proposed § 29.21–4 requirement that an environmental analysis be included with every application submission, to avoid situations where an applicant incurs an unnecessary expense to provide information the Service does not require.

In response to public comments, we revised proposed § 29.21–5 (now § 29.17) to be more flexible about the type of right-of-way location information the Service requires from an applicant before the agency may issue a right-of-way permit. The new paragraph under § 29.17(c) authorizes a licensed Service land surveyor to waive the requirement of a survey plat for a proposed right-of-way in a remote location if they determine that the GPS coordinates and supporting location information submitted by the applicant for inclusion in the right-of-way permit are adequate to locate the proposed right-of-way with minimal risk to the United States.

We revised proposed § 29.21–6 (now § 29.18) to clarify that the Service's required upfront payments for application processing will not include the cost of preparing environmental review documents to satisfy NEPA requirements when the applicant will pay for that work.

We revised proposed § 29.21–8(c)(4), under *Terms and conditions required for all permit holders*, to clarify that collocation of wireless facilities is allowed but requires that each collocating entity obtain a right-of-way permit. This revision corrects the contradictory language in proposed § 29.21–8(c)(4) that some may have interpreted as prohibiting collocation of wireless communications equipment, which the Service supports where possible and compatible with refuge purposes. The revised language appears in § 29.20(c)(4) in this final rule.

Although already common practice within the Service, we revised proposed § 29.21–8(d)(1), under *Terms and conditions required of most permit holders* (now at § 29.20(d)(1) in this final rule), to explicitly require that right-of-way permits issued by the Service include language ensuring that Service-managed public lands remain

accessible to the public when access does not pose a threat to public safety or the environment.

We revised proposed § 29.21–8(g) (now at § 29.20(g) in this final rule) to clarify that requirements for communications facilities, including complying with the applicable Federal rules and procedures for telecommunications sites, apply to entities that operate or maintain wireless communications equipment and are not applicable to owners of towers and support infrastructure who do not operate or maintain wireless communications equipment. This revision corrects the prior language at proposed § 29.21–8(g) that would have made owners of towers and support infrastructure responsible for ensuring collocated entities that operate or maintain wireless communications equipment meet regulatory requirements.

As indicated above, the Service requires that a company have a right-of-way permit to operate and maintain wireless telecommunications equipment on Service-managed land. In the situation where one company has a permitted tower or support infrastructure, and a second company will add their antennas and/or microwave dishes to the first company's tower or support infrastructure, and the second company will operate and maintain their equipment and be responsible for compliance with Federal rules and procedures, then the Service requires that the second company obtain a right-of-way permit and include with their right-of-way application proof of permission to collocate with the first company. Maps and the legal description for collocated use would match that of the permitted tower or infrastructure; however, the company seeking to install and operate the wireless communications equipment would identify their own operation and maintenance needs in their application. If collocating with another provider, the environmental analysis for the proposed additional use of an existing permitted tower or support infrastructure must address the cumulative impact of multiple collocated providers if that analysis was not performed as part of the permitting for the tower or support infrastructure.

In response to requests from the State of Alaska, we made minor clarifying edits to the preamble and the regulations in the sections referencing Alaska.

We revised a definition for a term we had proposed, *Regional Director*, and the proposed provisions for another term, *National Wildlife Refuge System*

lands—less than fee interest. We also replaced the term *right-of-way* with *right-of-way permit* and revised its definition.

- We revised the definition of *Regional Director* in proposed § 29.21 (§ 29.10 in this final rule) to eliminate the additional requirement that, when these regulations require the Regional Director's signature or written approval for a right-of-way, only the Regional Director or the person acting in the Regional Director's official capacity may sign. This change makes the definition of the term consistent with definitions found elsewhere in title 50 CFR and provides flexibility to allow a delegated representative of the Regional Director to sign. The Service will address delegations and signature requirements through the Service Manual rather than through this rulemaking action.

- We revised the provisions for *National Wildlife Refuge System lands—less than fee interest* in proposed § 29.21–1(d) (now at § 29.11(d) in this final rule) to clarify that, when the Service determines that a right-of-way will not affect a legal interest of the United States, a Regional Director will sign a letter to the applicant stating that the proposed right-of-way will not affect the interest of the United States and the Service has no objection to the fee owner allowing the right-of-way. The language in the proposed rule improperly stated that the Regional Director would send such a letter to an applicant when the Service determines that a right-of-way will not *adversely* affect a legal interest of the United States. In a situation where a proposed long-term use will affect a legal interest of the United States, regardless of how it impacts Service-managed lands, a right-of-way permit is required.

- We replaced the term *right-of-way* in proposed § 29.21 (§ 29.10 in this final rule) with the term *right-of-way permit* to be clearer and more specific about what may be authorized and to more closely align our definition with that of the National Park Service. The term “right-of-way permit” means a discretionary and revocable permit, issued by the Service to authorize the use of lands or waters within Refuge System units for the construction, operation, and maintenance of infrastructure.

We added several new definitions to better align our terminology with terminology being adopted by the National Park Service in their regulations.

- We add the term *Applicant* to mean an entity that has submitted an application for a right-of-way permit.

- We add the term *Permit holder* to mean an entity that holds a current, fully executed right-of-way permit.
- We add the term *Permitted area* to mean the area of land or water mapped, described, and authorized for use, including construction, operation, maintenance, as well as routes and means of access, in a right-of-way permit issued by the U.S. Fish and Wildlife Service.

We revise § 29.22, now § 29.26, Hearing and appeals procedures, to clarify how the Service handles appeals for rejections of new rights-of-way, renewals of previously authorized rights-of-way, and terminations of authorized rights-of-way. The language in the current regulation states that an appeal may be taken from any final disposition of the Regional Director to the Director of the U.S. Fish and Wildlife Service, and, except in the case of a denial of a right-of-way application, from the latter's decision to the Secretary of the Interior. Because this

language has caused confusion, we are revising the language in this section consistent with its meaning.

In this final rule, we clarify that denials of new requested rights-of-way, when the denial is based on a Service's determination that the proposed use is not compatible, may be appealed to the Regional Director and subsequently to the Director, but no further. In this respect, denials of requested rights-of-way are different than denials for all other proposed uses of Refuge System lands, which, in accordance with 50 CFR 25.45, cannot be appealed beyond the Regional Director. Service termination of an existing authorized right-of-way may be further appealed to the Secretary. We also clarify that a party with standing may appeal the Service's decision to issue a requested right-of-way to the Secretary. These revisions do not establish new policy or procedure but instead rephrase the existing language to make it more clear.

Finally, in this final rule, we add a section on severability in § 29.27. The Service intends the regulations in this rule to be severable. If any portion of this final rule were to be stayed or invalidated by a reviewing court, the remaining elements would continue to provide the Service with important and independently effective tools relating to the administration of its right-of-way permitting program. Hence, if a court prevents any provision of this rule from taking effect, that action should not affect the other regulations in the subpart. The remaining provisions would remain in force because they could still operate sensibly.

For convenience in comparing the organization of the regulations at 50 CFR part 29, subpart B, Rights-of-Way General Regulations, with the revised regulations in that subpart as of the effective date of this final rule, table 1 displays the previous and new section designations.

TABLE 1—PRIOR AND NEW SECTIONS IN 50 CFR PART 29, SUBPART B

Previous sections	New sections
§ 29.21 What do these terms mean?	§ 29.10 Definitions.
§ 29.21–1 Purpose and scope	§ 29.11 Purpose and scope.
§ 29.21–2 Application procedures	§ 29.12 Preexisting uses.
§ 29.21–3 Nature of interest granted	§ 29.13 Compatibility-determination requirement.
§ 29.21–4 Terms and conditions	§ 29.14 Preapplication meeting.
§ 29.21–5 Construction	§ 29.15 General application procedures.
§ 29.21–6 Disposal, transfer or termination of interest	§ 29.16 Right-of-way permit application.
§ 29.21–7 What payment do we require for use and occupancy of national wildlife refuge lands?	§ 29.17 Survey plat and legal description.
§ 29.21–8 Electric power transmission line rights-of-way	§ 29.18 Reimbursement of costs.
§ 29.21–9 Rights-of-way for pipelines for the transportation of oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced therefrom.	§ 29.19 Nature of interest granted.
	§ 29.20 Terms and conditions.
	§ 29.21 Construction.
	§ 29.22 Disposal, transfer, or termination of interest.
	§ 29.23 Required payment for use and occupancy of National Wildlife Refuge System land.
	§ 29.24 Electric power transmission line rights-of-way.
	§ 29.25 Rights-of-way for pipelines for the transportation of oil, natural gas, synthetic liquid, or gaseous fuels, or any refined product produced from these substances.
§ 29.22 Hearing and appeals procedures	§ 29.26 Hearing and appeals procedures.
	§ 29.27 Severability.

Required Determinations

As stated above, before issuing a right-of-way permit, the Service must assess the effects of the proposed use, as required by NEPA, the ESA, and the NHPA as well as other applicable laws and Executive orders. In regard to NEPA, we believe that this rulemaking action qualifies for a categorical exclusion as described in 43 CFR 46.210(i) for rulemaking actions that are primarily procedural in nature. As set forth in that regulation, under this rule, we will conduct NEPA analysis for individual permit applications.

Regulatory Planning and Review—Executive Orders 12866, 13563, and 14094

Executive Order (E.O.) 14094 amends E.O. 12866 and 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 and E.O. 13563. Regulatory analysis, as practicable and appropriate, shall recognize distributive impacts and equity, to the extent permitted by law. E.O. 13563 emphasizes further that regulations must be based on the best available

science and that the rulemaking process must allow for public participation and an open exchange of ideas. We developed this rule in a manner consistent with these requirements.

E.O. 12866, as reaffirmed by E.O. 13563 and amended and reaffirmed by 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 determined that this final rule is not significant.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.) generally requires

that Federal agencies prepare a regulatory flexibility analysis for rules subject to the notice-and-comment rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 500 *et seq.*), if the rule would have a significant economic impact, whether detrimental or beneficial, on a substantial number of small entities. See 5 U.S.C. 601–612. Congress enacted the RFA to ensure that Federal regulations do not unnecessarily or disproportionately burden small entities. Small entities include small businesses, small governmental jurisdictions, and small not-for-profit enterprises.

The Service reviewed the Small Business Size standards for the affected industries. We determined that a large share of the entities in the affected industries are small businesses as defined by the Small Business Act (15 U.S.C. 631 *et seq.*). However, the Service believes that the impact on the small entities is not significant, as the rule would impact a small number of small entities, and the Service does not believe that these effects would be economically significant.

This final rule will benefit small businesses by streamlining Service regulations for permitting rights-of-way and thereby reduce the amount of time that the Service requires to issue many right-of-way permits. The rule implements a requirement for a preapplication meeting to provide small businesses with information upfront about the Service's estimated time and cost to evaluate and process a right-of-way application, increasing regulatory certainty. Additionally, the rule eliminates the Service application fee previously required at § 29.21–2(a)(2) and provides the Service the flexibility to request only the documents that it requires to process a right-of-way application, thereby reducing the regulatory burden.

In summary, we have considered whether this rule would result in a significant economic impact on a substantial number of small entities. We certify that this rule will not have a significant economic impact on a substantial number of small entities. Therefore, a regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare statements of energy effects when undertaking certain actions. This rule will streamline and expedite

Service processing of industry requests for rights-of-way and modifications to rights-of-way that cross Service-managed lands, but it will not significantly affect energy supplies, distribution, or use. Moreover, this rule is not a significant regulatory action as determined by OIRA, and the OIRA administrator has not designated this rule as a significant energy action. Therefore, this action is not a significant energy action, and no statement of energy effects is required.

*Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*)*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501, *et seq.*), this rule will not significantly or uniquely affect small governments, and a small government agency plan is not required. Moreover, this rule will not produce a Federal requirement of \$100 million or greater in any year and is not a “significant regulatory action” under the Unfunded Mandates Reform Act.

Takings—Executive Order 12630

Under Executive Order 12630, this rule will not have significant takings implications as it applies only to Service permitting of rights-of-way across lands, and interests in land, owned by the United States. A takings implication assessment is not required.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this rule will not have significant federalism effects, as it waives right-of-way application processing costs and right-of-way monitoring costs for State or local governments when the right-of-way is for governmental purposes that benefit the general public, and all other application requirements are necessary for the Service to meet Improvement Act and NEPA requirements. A federalism summary impact statement is not required.

Civil Justice Reform—Executive Order 12988

In accordance with E.O. 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the order.

*Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*)*

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). OMB has previously approved

the information collection requirements associated with Service use of Common Form SF–299 and assigned OMB Control Number 0596–0249 (expires 01/31/2027). You may view the information collection request(s) at <https://www.reginfo.gov/public/do/PRAMain>. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretary's Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes.

This rule has no impact on Tribal lands, as it applies only to Service permitting of rights-of-way across lands, and interests in land, owned by the United States. Consistent with 512 DM 2 and Secretary's Order 3206, we sought comments from Tribes, and addressed the comments we received from Tribes concerning permitting of rights-of-way across lands, and interests in land, owned by the United States and managed by the Service.

List of Subjects in 50 CFR Part 29

Public lands mineral resources, Public lands rights-of-way, Wildlife refuges.

Regulation Promulgation

For the reasons given in the preamble, we hereby amend part 29, subchapter C of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 29—LAND USE MANAGEMENT

■ 1. The authority citation for part 29 continues to read as follows:

Authority: 5 U.S.C. 301; 16 U.S.C. 460k, 664, 668dd, 685, 690d, 715i, 725, 3161; 30

U.S.C. 185; 31 U.S.C. 3711, 9701; 40 U.S.C. 319; 43 U.S.C. 315a; 113 Stat. 1501A–140.

■ 2. Revise and republish subpart B to read as follows:

Subpart B—Rights-of-Way General Regulations

Sec.

- 29.10 Definitions.
- 29.11 Purpose and scope.
- 29.12 Preexisting uses.
- 29.13 Compatibility-determination requirement.
- 29.14 Preapplication meeting.
- 29.15 General application procedures.
- 29.16 Right-of-way permit application.
- 29.17 Survey plat and legal description.
- 29.18 Reimbursement of costs.
- 29.19 Nature of interest granted.
- 29.20 Terms and conditions.
- 29.21 Construction.
- 29.22 Disposal, transfer, or termination of interest.
- 29.23 Required payment for use and occupancy of National Wildlife Refuge System land.
- 29.24 Electric power transmission line rights-of-way.
- 29.25 Rights-of-way for pipelines for the transportation of oil, natural gas, synthetic liquid, or gaseous fuels, or any refined product produced from these substances.
- 29.26 Hearing and appeals procedures.
- 29.27 Severability.

§ 29.10 Definitions.

In this subpart, the following terms will have the meanings set forth in this section.

ANILCA means the Alaska National Interest Lands Conservation Act (16 U.S.C. 3101 *et seq.*).

Applicant means an entity that has submitted an application for a right-of-way permit.

Compatible use means a proposed or existing wildlife-dependent recreational use or any other use of a national wildlife refuge that, based on sound professional judgment, will not materially interfere with or detract from the fulfillment of the National Wildlife Refuge System mission or the purposes of the national wildlife refuge. The term “inconsistent” in section 28(b)(1) of the Mineral Leasing Act of 1920 (30 U.S.C. 185) means a use that is not compatible.

Department means the U.S. Department of the Interior unless otherwise specified.

National Fish Hatchery System land means lands and waters, and interests therein, administered by the Secretary to propagate and distribute fish and other aquatic animal life and managed for the protection of all species of wildlife.

National Wildlife Refuge System land means lands and waters, and interests therein, administered by the Secretary

under the National Wildlife Refuge System Administration Act (16 U.S.C. 668dd–668ee), as amended, including wildlife refuges, game ranges, wildlife management areas, conservation areas, waterfowl production areas, and other areas administered for the protection and conservation of fish, wildlife, and plant species.

Other lands mean all other lands, or interests therein, and waters administered by the Secretary through the U.S. Fish and Wildlife Service that are not included in the National Wildlife Refuge System or the National Fish Hatchery System, *e.g.*, administrative sites.

Permit holder means an entity that holds a current, fully executed right-of-way permit.

Permitted area means the area of land or water mapped, described, and authorized for use, including construction, operation, maintenance, as well as routes and means of access, in a right-of-way permit issued by the U.S. Fish and Wildlife Service.

Regional Director means the official in charge of a region of the U.S. Fish and Wildlife Service or an authorized representative of the Regional Director.

Right-of-way permit means a discretionary and revocable permit issued by the U.S. Fish and Wildlife Service to authorize a use on, under, or over Federal lands, excluding uses that are included in a contract for services to a Service facility and excluding uses requested by the Service to benefit the mission of the National Wildlife Refuge System or the National Fish Hatchery System. A right-of-way permit does not grant, convey, or imply transfer of title to any interest in, including a leasehold or easement interest in, the lands or waters authorized for use.

§ 29.11 Purpose and scope.

The regulations in this subpart prescribe the procedures for filing applications and the terms and conditions under which rights-of-way over and across the lands administered by the U.S. Fish and Wildlife Service may be permitted.

(a) *National Wildlife Refuge System lands except lands in Alaska.* Applications are submitted under authority of Public Law 89–669, as amended (80 Stat. 926; 16 U.S.C. 668dd), or for oil and gas pipelines under section 28 of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 181 *et seq.*), following the application procedures set out in § 29.15. The Service will not issue a right-of-way permit for a requested use that would conflict with the goals or objectives in an approved refuge management plan,

nor will the Service issue a right-of-way permit unless the use is a compatible use as described in § 29.13. See § 29.24 for additional requirements applicable to rights-of-way for electric power transmission lines and § 29.25 for additional requirements applicable to rights-of-way for pipelines for the transportation of oil, natural gas, synthetic liquid, or gaseous fuels, or any refined product produced from these substances.

(b) *National Wildlife Refuge System lands in Alaska.* Applications for rights-of-way authorized under ANILCA (see 16 U.S.C. 3162(B)) must be submitted under authority of 16 U.S.C. 3101 *et seq.* and follow the procedures and requirements set forth in 43 CFR part 36 and other applicable Refuge laws and regulations where they do not conflict with ANILCA. Applications for all other rights-of-way on or over lands in Alaska must be submitted under authority of 16 U.S.C. 668dd, as amended, or for oil and gas pipelines under section 28 of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 181 *et seq.*), following the application procedures set out in § 29.15, except that compatibility determinations for Alaska Native Claims Settlement Act 22(g) lands shall follow the procedures in § 25.21(b)(1) of this chapter.

(c) *National Fish Hatchery System lands.* Applications for rights-of-way across National Fish Hatchery System lands follow the same procedures as applications for rights-of-way across National Wildlife Refuge System lands in this section.

(d) *National Wildlife Refuge System lands—less than fee interest.* The Service requires permits for rights-of-way that affect a property interest acquired by the United States. If the requested right-of-way or regular maintenance of the requested right-of-way may affect the United States’ interest, then an application for a right-of-way permit must be submitted in accordance with procedures set forth in § 29.15, except those applications for rights-of-way authorized under ANILCA (see 16 U.S.C. 3162(B)) will follow the procedures set forth in 43 CFR part 36. If the Regional Director determines that the proposed right-of-way and regular maintenance of the proposed right-of-way will not affect the United States’ interest, then the Regional Director will sign a letter to the applicant stating that the proposed right-of-way will not affect the interest of the United States and the Service has no objection to the right-of-way.

(e) *Other lands outside the National Wildlife Refuge System and National Fish Hatchery System.* Rights-of-way on

or over other lands will be permitted in accordance with controlling authorities cited in 43 CFR part 2800, or for oil and gas pipelines under section 28 of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 181 *et seq.*). See § 29.24 for additional requirements applicable to rights-of-way for electric power transmission lines and § 29.25 for additional requirements applicable to rights-of-way for pipelines for the transportation of oil, natural gas, synthetic liquid, or gaseous fuels, or any other refined product produced from those substances. Applications must be submitted in accordance with procedures set out in § 29.15, except that the compatibility-determination requirement in § 29.13 does not apply to lands outside the National Wildlife Refuge System and National Fish Hatchery System.

§ 29.12 Preexisting uses.

The regulations in this subpart have no impact on permanent rights and rights-of-way in existence prior to acquisition by the United States, except those activities not explicitly authorized by a preexisting right-of-way, as well as activities that fall outside the footprint of such a right-of-way, are subject to § 26.41 of this chapter and the procedures in this subpart.

§ 29.13 Compatibility-determination requirement.

The Service will not issue or renew a right-of-way permit across National Wildlife Refuge System land if the use would conflict with the goals or objectives in an approved refuge management plan. The Service will not issue or renew a right-of-way permit across National Wildlife Refuge System land unless the agency determines that the use is a compatible use in accordance with the requirements and procedures of § 25.21 of this chapter. The requirements and procedures of § 26.41(c) of this chapter apply to any requested maintenance of or modifications to an existing right-of-way except as modified by any other prevailing provision of law. None of the requirements in this subpart apply to the access of privately owned minerals or to activities explicitly authorized by a permanent right or right-of-way obtained prior to acquisition by the United States, nor do they apply when access is required by any other prevailing provision of law. No compatibility determination is necessary to permit or renew a right-of-way across lands outside the National Wildlife Refuge System and National Fish Hatchery System.

§ 29.14 Preapplication meeting.

Before submitting an application for a new right-of-way permit or a modification of an existing right-of-way permit across lands managed by the Service, a potential applicant must contact the appropriate Regional Director to schedule a preapplication meeting with the Service. Contact information for the Service Regional Offices is available at <https://www.regulations.gov> in Docket No. FWS-HQ-NWRS-2019-0017. There is no fee for the preapplication meeting. During the meeting, the potential applicant may ask questions about the application process, provide information about the scope of the requested right-of-way permit and its location, and receive feedback. The Service will advise the potential applicant about documentation needed to make an application complete and provide the potential applicant with an expected timeline and potential costs to review and process the application.

§ 29.15 General application procedures.

(a) *Preapplication meeting.* To request the preapplication meeting required by § 29.14 for a new right-of-way or a modification of an existing right-of-way, contact the appropriate Service Regional Office, the geographic jurisdictions of which are listed at 50 CFR 2.2. Contact information for the Service Regional Offices is available at <https://www.regulations.gov> in Docket No. FWS-HQ-NWRS-2019-0017.

(b) *Application submission.* Applicants must submit an application that includes the completed form and required attachments as described in § 29.16. The Service will deem a right-of-way application to be complete, and notify the applicant of such, after the Service has determined that the provided information is sufficient for the agency to make a compatibility determination and comply with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). The Service will also notify the applicant if additional information is required for a complete application.

(c) *Payment for cost recovery.* After the Service has determined that an application is complete, the agency will notify the applicant and provide an updated estimate of application processing costs, as set forth at § 29.18(a). The Service will review and process a right-of-way permit application after it has requested and received payment for these costs.

(d) *Providing additional information for permit.* If the Service determines that the requested right-of-way is a compatible use, then the agency will

request additional information from the applicant necessary to draft a right-of-way permit document for applicant review. This includes but is not limited to the survey plat or Global Positioning System (GPS) location information described in § 29.17. The applicant must provide this information in order for the Service to develop the permit.

(e) *No guarantee of right-of-way permit.* Submitting a complete application and payment for application processing costs do not guarantee that the Service will issue or renew a right-of-way permit. Issuance or renewal of a right-of-way permit is contingent on a Service determination that the right-of-way is a compatible use. Permit issuance or renewal is also contingent on the applicant:

(1) Providing the information the Service requires to develop the right-of-way permit;

(2) Agreeing to the permit's terms and conditions; and

(3) Providing payment for use and occupancy of the land as well as for future right-of-way monitoring costs.

§ 29.16 Right-of-way permit application.

(a) *Complete application requirement.* The Service will not begin processing a right-of-way permit application until after the applicant has submitted a complete application with all required information. See paragraph (e) of this section for submission instructions.

(b) *Application form.* To request a new right-of-way permit, modifications to an existing right-of-way permit, or renewal of an existing right-of-way permit, applicants must submit a complete Standard Form 299, Application for Transportation, Utility Systems, Telecommunications and Facilities on Federal Lands and Property (SF-299), or the applicable common form approved by the General Services Administration at the time of the application, including all materials required in the SF-299 and the regulations in this subpart. The SF-299 must be signed by the applicant or applicant's authorized representative.

(c) *Required application attachments.* In addition to a completed and signed SF-299, an application for a right-of-way permit must include the attachments described in this section.

(1) *Map(s).* The map(s) must show a general view of the proposed right-of-way and a detailed view of the proposed project area in relation to the Service unit boundary. If the proposed right-of-way is within a Public Land Survey System area, the map(s) must show the section(s), township(s), and range(s) within which the proposed right-of-way

would be located. The maps must identify:

(i) The area proposed to be included in the right-of-way permit, including the placement of proposed infrastructure; and

(ii) Proposed access points and routes (including uses of existing roads), and other areas associated with the requested right-of-way.

(2) *Preliminary site and facility construction plans.* These plans, which are listed as an attachment to SF-299, are required for applications for rights-of-way or renewals of rights-of-way where construction is required. The plans must show all proposed construction work and include a list of equipment to be used in construction and a proposed construction timeline.

(3) *Proposed access.* The application must include a description of proposed access routes and means of access for construction and maintenance of the requested right-of-way.

(4) *Supplemental environmental information.* In addition to the basic environmental information on the SF-299, the applicant must provide supplemental information on the environmental impact of the proposed right-of-way that is suitable for the Service to determine whether the proposed use is compatible with the mission of the Refuge System and the purpose(s) of the refuge. This supplemental information may include, but is not limited to, anticipated impacts of the proposed use on air and water quality; scenic and aesthetic features; historic, architectural, archeological, and cultural features; and wildlife, fish, and marine life, including habitat connectivity and migratory routes. The supplemental information also may describe proposed design measures that will minimize or avoid resource impacts. The Service will review the provided supplemental environmental information to determine what additional information, if any, the agency requires from the applicant to determine whether the proposed use is compatible with the mission of the Refuge System and the purpose(s) of the refuge.

(d) *Other required documents.* During the preapplication meeting or in a subsequent communication, the Service will inform the applicant when the agency requires the following information and other information to prepare a right-of-way permit, which the applicant must provide before the Service may issue a right-of-way permit.

(1) *Survey plat and legal description.* See § 29.17 for requirements.

(2) *Detailed environmental analysis.* To comply with the National

Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an environmental assessment or environmental impact statement must be prepared in accordance with section 102(2)(C) of the National Environmental Policy Act and comply with the requirements of the Migratory Bird Treaty Act of 1918 (16 U.S.C. 703–712), the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*), the Wilderness Act of 1964 (16 U.S.C. 1131 *et seq.*), the Wild and Scenic Rivers Act of 1968 (16 U.S.C. 1271 *et seq.*), and the National Historic Preservation Act of 1966 (54 U.S.C. 300101 *et seq.*). The environmental assessment or environmental impact statement may be prepared by the Service, another Federal agency, the applicant, or the applicant's contractor; however, in all cases, this documentation must be prepared in consultation with the Regional Director.

(i) If the environmental assessment or environmental impact statement will be prepared by the Service or another Federal agency, rather than the applicant or the applicant's contractor, the applicant must provide sufficient data to enable the Service or the other agency to satisfy the requirements in this paragraph (d)(2) and reimburse the Service for its costs as described in § 29.18.

(ii) For renewals of existing rights-of-way permitted that involve no changes to the permitted use, the environmental analysis need address only the impacts, including the cumulative effects, of the ongoing operation and maintenance of the right-of-way. The environmental analysis must also address any statutory requirements not in place when the original permit was issued and therefore not previously considered.

(3) *Proposed vegetation management plan.* A proposed vegetation management plan is required for a requested right-of-way permit or permit renewal where there will be disturbance of vegetation resulting from the construction, operation, or maintenance of the right-of-way. The plan must be prepared in consultation with the Regional Director's designee and must describe:

(i) Vegetation clearing that may occur as part of structural construction, maintenance, and removal.

(ii) Routine vegetation management that may occur, including a description of all physical and mechanical methods that will be used, how equipment will be cleaned before and after entry to the right-of-way, and how the spread of nonnative species by equipment and activities will be minimized.

(iii) Any pesticides, herbicides, or other chemicals proposed for use, as

well as the actions the applicant will take to minimize the adverse impacts of pesticides, herbicides, and other chemicals on native species including pollinators present in or adjacent to the right-of-way.

(iv) Any revegetation and restoration activities, including how the applicant will incorporate regionally appropriate native seeds and plants, particularly those that provide breeding, feeding, and sheltering habitat for native species present in the area, including but not limited to native pollinators.

(4) *Financial assurance and liability insurance.* As appropriate to the proposed right-of-way, the Service may require proof of acceptable financial assurance and liability insurance.

(e) *Submission instructions.*

Applicants may submit applications for rights-of-way through electronic filing or certified mail.

(1) *Electronic filing.* Applications submitted through electronic filing (E-file) must include a digital copy of the SF-299, the map(s), the preliminary site and facility construction plans, and the supplemental environmental information, as well as any other attachments that the Regional Director requires for application processing. The Service may provide additional instructions at the preapplication meeting.

(2) *Certified mail.* Application submissions through certified mail must include one printed copy of the SF-299, the map(s), the preliminary site and facility construction plans, and the supplemental environmental information, as well as any other attachments that the Regional Director requires for application processing. Applicants must send all documents by certified mail to the Regional Director for the region where the proposed right-of-way is located. Addresses for the Service Regional Offices are provided at 50 CFR 2.2. Mailing envelopes should be clearly marked "Attn: NWRS Realty Right-of-Way Permit Processing."

§ 29.17 Survey plat and legal description.

(a) Before the Service will issue or renew a right-of-way permit, the applicant must provide a final survey plat and legal description that shows and describes the right-of-way in such detail that the Service can accurately locate the right-of-way on the ground.

(b) Survey plats and legal descriptions of the right-of-way area must be stamped and signed by a licensed professional land surveyor or other professional licensed or authorized by the State to carry out land-surveying activities.

(1) Survey plats must meet the following standards:

(i) Survey plats must be geodetically referenced to the current State or national datum. In some cases, new geodetic control points will need to be set within or near the right-of-way area.

(ii) Survey plats must show ties to the monuments marking the boundaries of the Service-owned land that the right-of-way would affect, or from which those boundaries are calculated. In cases such as road construction that involve allowing full control of the right-of-way area, a boundary survey is required.

(iii) The points where the right-of-way enters and leaves Service land must be annotated on the survey with distance ties to the nearest boundary monuments.

(iv) For a linear strip right-of-way, the courses and distances of the center line and the width of the right-of-way on each side of the center line must be annotated.

(v) If the right-of-way or site is located wholly within Service land, a minimum of two ties to boundary corners or geodetic control points that can be readily recovered must be shown.

(vi) Survey plats must show the existing or proposed facilities in sufficient detail that an average person can determine the nature and extent of the proposed use.

(vii) Survey plats must include all uses of Service-managed land required as part of the right-of-way, including access roads.

(viii) Survey plats must show the location of any other right-of-way areas in the vicinity.

(ix) Survey plats must show major natural or cultural features such as roads, rivers, fences, etc., required for orientation and intelligent interpretation.

(x) The acreage contained within the right-of-way area must be shown.

(xi) Letter-sized plats are preferred, but larger format plats, such as the right-of-way plan sets prepared for highway and utility projects, are acceptable if they meet the other requirements.

(xii) A digital version of the plat in AutoCAD, ArcGIS, or similar format must be submitted along with a signed paper or document prepared in Adobe Acrobat or similar process.

(2) The legal description must:

(i) Be in metes-and-bounds, aliquot parts, or linear strip format;

(ii) Conform to and reference the survey plat;

(iii) Be tied to the controlling monuments shown on the plat;

(iv) Reference the geodetic coordinates of the point of beginning or point of commencement, and have a

clearly documented basis of bearing; and

(v) For linear corridor projects, use a "strip description" format, based on a geometrically defined centerline. For example: "All that portion of [land unit description] lying within the following described strip of land."

(c) A licensed Service land surveyor may waive the requirement of a survey plat for a proposed right-of-way in a remote location if they determine that the GPS coordinates and supporting location information submitted by the applicant for inclusion in the right-of-way permit are adequate to locate the proposed right-of-way with minimal risk to the United States.

§ 29.18 Reimbursement of costs.

(a) *Application evaluation and processing activities.* (1) Unless reimbursement is waived as provided under paragraph (c) of this section, the applicant for a right-of-way permit must reimburse the United States for the costs the Service incurs in evaluating and processing the application, even if the result of this evaluation is a denial of the application.

(i) These costs may include, but are not limited to, the Service's costs to review the application and related materials, conduct surveys of the proposed permit area, prepare a compatibility determination, obtain an appraisal, draft correspondence, and draft the permit.

(ii) If the applicant or the applicant's contractor will prepare the environmental assessment or environmental impact statement necessary to comply with the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and other applicable laws, then the Service shall require no reimbursement for National Environmental Policy Act compliance with exception to the costs the Service incurs to ensure that the materials meet agency requirements.

(2) If requested by the applicant during or after the required preapplication meeting, the Regional Director will provide the applicant a preliminary estimate of the Service's application evaluation and processing costs using the information provided by the applicant during or after the preapplication meeting.

(3) After receiving a complete application, the Regional Director will estimate the Service's application evaluation and processing costs using the information the applicant provided in the application and during or after the preapplication meeting.

(4) Unless reimbursement is waived as provided under paragraph (c) of this

section, the applicant must submit a payment to reimburse the Service for its estimated costs before the Service will evaluate and process the right-of-way permit application.

(5) If the Service's cost to evaluate and process the right-of-way application exceeds the estimated amount, the Regional Director will promptly notify the applicant of the deficient amount, and the applicant must submit payment for the deficient amount before the Service will issue a right-of-way permit. The Regional Director will refund any overpayments at the request of the applicant.

(b) *Monitoring activities.* (1) By accepting a permit under this subpart, the permit holder agrees to reimburse the Service for the costs incurred for all monitoring activities, which include monitoring the construction, operation, maintenance, and termination of facilities, to ensure compliance with the terms, conditions, and stipulations of the right-of-way permit.

(2) The Regional Director will estimate the total costs the Service expects to incur for monitoring activities over the permit term using the information the applicant provided in the application and during or after the preapplication meeting.

(3) At the discretion of the Regional Director, the Service may require reimbursement for its estimated monitoring costs in a lump-sum payment before the Service issues a right-of-way permit, or at periodic intervals, not to exceed 5 years, specified in the permit.

(4) When reimbursement for costs for monitoring activities is required at periodic intervals specified in the permit, the Regional Director will review the amount of reimbursement not more than every 5 years after the issuance of the permit. The Regional Director will provide the permit holder with written notice of intent to impose new charges to reflect current monitoring costs commencing with the ensuing charge year. The revised charges will be effective unless the permit holder files an appeal in accordance with § 29.26.

(c) *Waiver of reimbursement for Service costs.* (1) No reimbursement for Service costs for right-of-way application evaluation and processing activities and monitoring activities will be required of:

(i) State or local governments or agencies or related instrumentalities;

(ii) Federal Government agencies; or

(iii) Private individuals or organizations when the proposed right-of-way contributes to the Service's operation or maintenance of the refuge

or fish hatchery as certified in writing by the Regional Director.

(2) Additionally, the Regional Director has the discretion to waive reimbursement for Service costs for right-of-way application evaluation and processing activities and monitoring activities so long as there are appropriated funds for these activities.

(3) When reimbursement for Service costs for monitoring activities is waived during the permit term, the permit will contain a statement to that effect.

(4) Reimbursement of costs is required and cannot be waived for any right-of-way permit issued under section 28 of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 181 *et seq.*).

(d) *Service use of payments received for reimbursement of costs.* Payments received by the Service to reimburse the United States for the costs incurred in evaluating and processing applications, and for monitoring, will be deposited into the United States Treasury until such time that any provision of law allows these payments to supplement the Service's appropriation.

§ 29.19 Nature of interest granted.

(a) Where the land administered by the Service is owned in fee by the United States and the right-of-way is compatible with the objectives of the area, the Service may issue a permit after it is approved in writing by the Regional Director.

(b) For rights-of-way permitted under authority of section 28 of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 181 *et seq.*), for pipelines for the transportation of oil, natural gas, synthetic liquid, or gaseous fuels, or any refined product produced from these substances:

(1) The permit term may not exceed 30 years.

(2) The right-of-way may not exceed 50 feet in width, plus the area occupied by the pipeline and its related facilities, unless the Regional Director finds, and records in writing the reasons for the finding based on the analysis in a compatibility determination, that a wider right-of-way is necessary for operation and maintenance after construction and to protect the environment or public safety. "Related facilities" include but are not limited to valves, pump stations, supporting structures, bridges, monitoring and communication devices, surge and storage tanks, and terminals.

(c) For rights-of-way other than those referred to in paragraph (b) of this section, the permit term may be up to 50 years when the Regional Director deems it appropriate, or a lesser term.

(d) The Service may issue a temporary permit supplementing a right-of-way for additional land needed during construction, operation, maintenance, or termination of the pipeline, or to protect the natural environment or public safety.

(e) Unless otherwise provided, no interest granted shall give the grantee any right whatsoever to remove any material, earth, or stone for construction or other purpose, except that stone or earth necessarily removed from the right-of-way in the construction of a project may be used elsewhere along the same right-of-way in the construction of the same project.

§ 29.20 Terms and conditions.

(a) *Prior rights.* Any right-of-way permit issued will be subject to rights reserved, if any, by a prior owner, and rights held, if any, by a third party.

(b) *Agreement of terms and conditions.* An applicant, by accepting a permit, agrees to such terms and conditions as may be prescribed by the Regional Director, including special stipulations required to ensure the permitted use is compatible with the mission of the Refuge System and the purpose(s) of the refuge. (See § 29.24 for specific requirements for electric powerlines and § 29.25 for specific requirements for oil and gas pipelines.)

(c) *Terms and conditions required for all permit holders.* In addition to any terms and conditions prescribed by the Regional Director, the permit holder must agree to all of the following terms and conditions:

(1) The permit is for the specific use described and may not be construed to authorize any other use within the permit area unless approved in writing by the Regional Director upon determination by the Service project manager that the additional use is a compatible use.

(2) The permit may be amended only by a written instrument signed and executed by the Regional Director and the permit holder.

(3) The permit holder may not transfer or assign the permit to another party without obtaining the Regional Director's prior written approval.

(4) The permit holder may not allow another party to collocate equipment or activities on their infrastructure or right-of-way unless the other party first obtains a right-of-way permit from the Service. Any entity that wants to collocate equipment or activities must apply for its own Service right-of-way permit by following the procedures set forth in § 29.15.

(5) The permit holder is responsible for ensuring that its officers, employees,

representatives, agents, contractors, and subcontractors are familiar with the permit and comply with its terms and conditions.

(6) The permit holder must provide the Service project manager with current contact information (company address, points of contact, telephone numbers, email addresses, etc.) for both routine and emergency communications, and, in the case of corporations, of the address of its principal place of business and the names and addresses of its principal officers.

(7) Authorized representatives of the United States have the right to enter and inspect the permitted area at any time without providing prior notice to the permit holder.

(8) The Regional Director may suspend or terminate all or any portion of the issued permit for failure of the permit holder to comply with any or all of the terms or conditions of the permit, or for abandonment.

(i) A rebuttable presumption of abandonment is raised by deliberate failure of the permit holder to use the permit, for any continuous 2-year period, for the purpose for which the permit was issued or renewed. In the event of noncompliance or abandonment, the Regional Director will notify the permit holder in writing of any intention to suspend or terminate the permit 60 days from the date of the notice and state the reasons, unless prior to that time the holder completes such corrective actions as are specified in the notice. The Regional Director may allow an extension of time within which to complete corrective actions if the Regional Director believes that extenuating circumstances, not within the permit holder's control, such as adverse weather conditions, disturbance to wildlife during breeding periods or periods of peak concentration, or other compelling reasons, warrant an extension.

(ii) Should the holder of a right-of-way permit issued under authority of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 181 *et seq.*), fail to take corrective action within the 60-day period, the Regional Director will provide for an administrative proceeding, pursuant to 5 U.S.C. 554, prior to a final departmental decision to suspend or terminate the permit. In the case of all other right-of-way permit holders, failure to take corrective action within the 60-day period will result in a determination by the Regional Director to suspend or terminate the permit.

(iii) No administrative proceeding is required in cases in which the permit terminates under its terms.

(9) The permit holder must prevent the disturbance or removal of any public land survey monument or project boundary monument unless and until the permit holder has requested and received from the Regional Director written approval of measures that the permit holder will take to perpetuate the location of the monument.

(10) The permit holder must conduct operations, including by setting their time and location, in a manner that avoids or minimizes impacts to fish and wildlife or their habitats, including, but not limited to, impacts caused by exposure to physical and chemical hazards, disruption of hydrologic processes, lighting and visual disturbance, and duration and frequency of noise.

(11) The permit holder must comply with State and Federal laws and regulations that are applicable to the project within which the permit is issued and to the lands that are included in the right-of-way.

(i) The permit holder must comply with the Archaeological Resources Protection Act (16 U.S.C. 470aa *et seq.*). The disturbance of archaeological or historical sites and the removal of artifacts from Federal land are prohibited.

(ii) The permit holder must comply with the applicable requirements of the Migratory Bird Treaty Act of 1918 (16 U.S.C. 703–712), the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*), the Wilderness Act of 1964 (16 U.S.C. 1131 *et seq.*), the Wild and Scenic Rivers Act of 1968 (16 U.S.C. 1271 *et seq.*), and the National Historic Preservation Act of 1966 (54 U.S.C. 300101 *et seq.*).

(iii) The permit holder must immediately suspend all activities and notify the Service project manager upon the discovery of any threatened or endangered species or archeological, paleontological, or historical resources within or near the permitted area. All natural and cultural resources discovered in the permitted area are the property of the United States.

(12) The permit holder must clear and keep clear the lands within the permit area to the extent and in the manner directed by the Service project manager in charge; and to dispose of all vegetative and other material cut, uprooted, or otherwise accumulated during the construction and maintenance of the project so as to decrease the fire hazard and also in accordance with any instructions that the Service project manager specifies.

(13) The permit holder must do everything reasonably within the permit holder's power, both independently and

on request of any duly authorized representative of the United States, to prevent and suppress fires on or near the permitted area, including making available such construction and maintenance resources that are reasonably obtainable for the suppression of such fires.

(14) After the expiration or termination of the permit, the permit holder must remove all facilities and equipment from the permitted area and restore the permitted area to its pre-permit condition as directed and approved by the Service project manager. Any facilities or equipment not removed within 6 months, unless more time is deemed necessary for conservation purposes by the Regional Director, will be deemed abandoned and will be disposed of in accordance with applicable Federal law. In that event, the permit holder will be liable to the Service for all of its costs in disposing of the facilities or equipment and restoring the permitted area.

(15) In accordance with applicable Federal law, in the construction, operation, and maintenance of the project, the permit holder will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin and must require an identical provision to be included in all subcontracts.

(16) The permit holder must pay the United States the full value for all damages to the lands or other property of the United States caused by the permit holder or that person's employees, contractors, or agents of the contractors.

(i) In cases in which the permit is issued to a State or other governmental agency that has no legal power to assume such a liability with respect to damages caused to lands or property, that agency will repair all such damages.

(ii) In cases in which the permit involves lands that are under the exclusive jurisdiction of the United States, the permit holder or his or her employees, contractors, or agents of the contractors will be liable to third parties for injuries incurred in connection with the permit area.

(17) The permit holder will indemnify and hold harmless the United States and its officers, employees, agents, and representatives from and against all liability of any sort whatsoever arising out of the permit holder's activities under the permit. This agreement to indemnify and hold harmless from and against all liability includes liability under Federal or State environmental laws, including but not limited to the

Comprehensive Environmental Response, Compensation, and Restoration Act, as amended (42 U.S.C. chapter 103); the Resource Conservation and Recovery Act, as amended (42 U.S.C. 6901 *et seq.*); and what is commonly known as the Clean Water Act, as amended (33 U.S.C. 1251–1387). This agreement to indemnify and hold harmless will survive the permit's termination or expiration.

(18) The Regional Director may require permit modifications at any future date to ensure that the permitted use is compatible with the Refuge System mission and the purpose(s) of the refuge. Required permit modifications could include but are not limited to changes to permit conditions and/or additional stipulations that a Regional Director deems necessary based on new information.

(d) *Terms and conditions required of most permit holders.* The permit holder must also agree to the following terms and conditions, which are required unless the Regional Director determines they are not relevant to the proposed use:

(1) The permit holder may not restrict public access to any portion of the permitted area unless the Service project manager concurs in writing that making the area accessible to the public would pose a threat to public safety or the environment.

(2) The permit holder must notify the Service project manager in writing at least 5 business days before conducting any maintenance or nonemergency repair work within the permitted area. The written notice must describe the location of the proposed work, the equipment to be used, and the size of work crews anticipated to be working on Service land. The Service project manager may require an onsite meeting before any maintenance or nonemergency repair work commences and may assign a site monitor to be present during such work. Except in emergencies, all work in the permitted area must be conducted during normal business hours. To respond to an emergency, the permit holder may enter the permitted area at other times to conduct repair work after calling the Service project manager.

(3) The permit holder must erect and maintain appropriate warning signs, barricades, or other warning devices during all periods when the permit holder is using the permitted area, including periods of maintenance or repair.

(4) The permit holder must rebuild and repair such roads, fences, structures, and trails as may be

destroyed or injured by construction work.

(5) Notwithstanding the issuance of the permit, the Service may establish trails, roads, or other improvements across, over, on, or through the permitted area for use by the Service, by visitors, or by others.

(6) Upon request by the Regional Director, the permit holder must build and maintain necessary and suitable crossings for all roads and trails that intersect the works constructed, maintained, or operated under the right-of-way.

(7) The permit holder must take any soil and resource conservation and protection measures, including weed control, on the land covered by the permit that the Service project manager in charge requests.

(8) The permit holder must provide for habitat connectivity on the land covered by the permit to the maximum extent possible, for example through use of wildlife-friendly fencing, perches or perch deterrents for birds, fish-passable culverts, vegetative screening or hiding cover, that the Service project manager in charge requests.

(9) The permit holder must promptly notify the Service project manager in charge of the amount of merchantable timber, if any, that will be cut, removed, or destroyed in the construction and maintenance of the project, and to pay the United States in advance of construction such sum of money that the project manager determines to be the full stumpage value of the timber to be cut, removed, or destroyed.

(10) Issuance of the permit is subject to the express condition that the exercise of the permit will not unduly interfere with the management, administration, or disposal by the United States of the land to be affected. The permit holder agrees and consents to the occupancy and use by the United States, or its grantees, permittees, or lessees, of any part of the permit area not actually occupied for the purpose of the permitted rights to the extent that the use does not unreasonably interfere with the permit holder's use of the permitted area.

(11) Any facility constructed on the permit area will be modified or adapted, if modification is found by the Regional Director to be necessary, without liability or expense to the United States, so that the facility will not conflict with the use and occupancy of the land for any authorized works that may be constructed on the land under the authority of the United States. The modification will be planned and scheduled so as not to interfere unduly with or to have minimal effect upon

continuity of energy and delivery requirements for Service facilities.

(e) *General liability insurance.* The Service may require the permit holder to procure and maintain in force and effect during the term of the permit commercial general liability insurance to protect against claims arising out of the acts or omissions of the permit holder or its officers, employees, agents, or representatives while conducting the activities authorized by the permit. The insurance policy must also provide coverage for discharges or escapes of pollutants or contaminants into the environment, including sudden or accidental discharges or escapes. The Regional Director will determine the minimum amount of coverage per occurrence and in the aggregate. The policy must be issued by a company duly licensed to do business in the State where the project is located and must name the United States of America as an additional insured. Before the Regional Director executes the permit, the applicant must provide the Service with a copy of its certificate of insurance showing the required coverage.

(f) *Bonds.* The Service may require a bond for a permit when the Regional Director determines that the Service is likely to incur reclamation costs during or after the term of the right-of-way due to the construction, operation, or maintenance of the right-of-way. The Service also may require a bond for a permit when the Service is likely to incur reclamation costs if the right-of-way is abandoned or terminated.

(1) No bond will be required of a Federal, State, or local government or its agent or instrumentality, except those that are:

(i) Using the facility, system, space, or any part of the right-of-way area for commercial purposes; or

(ii) A municipal utility or cooperative whose principal source of revenue is customer charges.

(2) When the Service requires a bond, the permit holder must agree to the following terms and conditions: Before the permit's effective date, the permit holder must file with the Service a performance bond payable to the Service, issued by a surety satisfactory to the Service, to guarantee its compliance with all terms and conditions of the permit and with all applicable laws and regulations. The Regional Director will determine the amount of the bond and with whom it must be filed.

(g) *Communications facilities.* If the permit is for a communications facility as defined by the Mobile Now Act (47 U.S.C. 1455(d)(1)), and the permit holder will operate or maintain wireless

communications equipment, then they must also agree to the following terms and conditions. These terms and conditions are not applicable to neutral host providers, sometimes referred to as tower companies, that own and maintain tower or support structures but do not operate or maintain wireless communications equipment on those structures.

(1) The permit holder agrees that use of wireless communications equipment is contingent upon the possession of a valid Federal Communications Commission (FCC) or National Telecommunications and Information Administration (NTIA) authorization/license (if required), and the operation of the equipment is in strict compliance with applicable requirements of FCC or NTIA. A copy of each applicable license or authorization must be maintained at all times by the permit holder for each transmitter being operated. The permit holder must provide the Service project manager, when requested, with current copies of all licenses for equipment in or on facilities covered by the permit.

(2) The permit holder must, at the permit holder's sole cost and expense, take all necessary actions to comply with all applicable FCC radio frequency (RF) exposure regulations and requirements, and take reasonable precautions so that neither workers nor the public are subject to RF exposures above the FCC specific levels.

(3) The permit holder agrees that the provisions of 18 U.S.C. 431 (contracts by Member of Congress) and 41 U.S.C. 6306 (prohibition on Members of Congress making contracts with the Federal Government) apply to the permit, as if set forth in full.

§ 29.21 Construction.

(a) If construction is not commenced within 2 years after the date of the right-of-way grant, the right-of-way may be canceled by the Director of the U.S. Fish and Wildlife Service.

(b) Upon completion of construction, the applicant shall file a certification of completion with the Regional Director.

§ 29.22 Disposal, transfer, or termination of interest.

(a) *Change in jurisdiction over and disposal of lands.* The final disposal by the United States of any tract of land traversed by a right-of-way shall not be construed to be a revocation of the right-of-way in whole or in part, but such final disposition shall be deemed and taken to be subject to such right-of-way unless it has been specifically canceled.

(b) *Transfer of permit.* Any proposed transfer, by assignment, lease, operating agreement or otherwise, of a permit

must be filed with the Regional Director and must be supported by a stipulation that the transferee agrees to comply with and be bound by the terms and conditions of the original permit. A \$100 nonrefundable service fee must accompany the proposal. No transfer will occur unless and until approved in writing by the Regional Director.

(c) *Disposal of property on termination of right-of-way.* In the absence of any agreement to the contrary:

(1) The holder of the right-of-way must, within 6 months after termination of the right-of-way, remove all property or improvements placed there by the holder, other than a road and usable improvements to a road.

(2) After 6 months, all property and improvements in the right-of-way area become the property of the United States.

(3) The Regional Director may use discretion to extend this timeframe.

§ 29.23 Required payment for use and occupancy of National Wildlife Refuge System land.

(a) Payment for use and occupancy of lands under the regulations of this subpart is required for the fair market value or fair market rental value as determined by the Regional Director using any method approved by the Department of the Interior to determine those values.

(1) At the discretion of the Regional Director, the payment may be a fair market rental payment, paid annually, or a lump-sum payment, made before permit issuance.

(2) If any Federal, State, or local agency is exempt from payment under any other provision of Federal law, the agency must inform the Service of the applicable Federal law during the preapplication meeting required by § 29.14. The agency must also otherwise compensate the Service by any other means acceptable to the Regional Director, including, but not limited to, making other land available or loaning of equipment or personnel, except that any such compensation must relate to, and be consistent with, the mission of the National Wildlife Refuge System. For agencies exempted from payment by law, the Regional Director may waive the requirement for other compensation upon finding this requirement to be impracticable or unnecessary.

(b) The terms of the permit will specify the amount of the lump sum paid by the applicant for use and occupancy during the current permit term, or, if applicable, the initial annual rental payment amount for use and occupancy of the permitted area.

(c) When annual rental payments are used, the Regional Director will periodically review and adjust the charges to reflect fair market value. The Regional Director will provide the permit holder with written notice of intent to impose new charges to reflect fair market value commencing with the ensuing charge year. The revised charges will be effective unless the permit holder files an appeal in accordance with § 29.26.

(d) Payments received by the Service for use and occupancy of rights-of-way on Refuge lands and interests in land will be deposited into the Migratory Bird Conservation Fund to carry out the land-acquisition provisions of the Migratory Bird Conservation Act (16 U.S.C. 715 *et seq.*) and the Migratory Bird Hunting Stamp Act (16 U.S.C. 718 *et seq.*). Payments received for use and occupancy of rights-of-way on other Service-managed lands and interests in land will be deposited into the National Wildlife Refuge Fund, to make payments annually to counties and other units of local government in accordance with regulations in 50 CFR part 34.

§ 29.24 Electric power transmission line rights-of-way.

By accepting a right-of-way for a power transmission line, the applicant thereby agrees and consents to comply with and be bound by the following terms and conditions, except those which the Secretary may waive in a particular case, in addition to those specified in § 29.20.

(a) To protect in a workmanlike manner, at crossings and at places in proximity to the transmission lines on the right-of-way authorized, in accordance with the rules prescribed in the National Electric Safety Code, all Government and other telephone, telegraph, and power transmission lines from contact and all highways and railroads from obstruction and to maintain the transmission lines in such manner as not to menace life or property.

(b) Neither the privilege nor the right to occupy or use the lands for the purpose authorized shall relieve the applicant of any legal liability for causing inductive or conductive interference between any project transmission line or other project works constructed, operated, or maintained by the applicant on the servient lands, and any radio installation, telephone line, or other communication facilities now or hereafter constructed and operated by the United States or any agency thereof.

§ 29.25 Rights-of-way for pipelines for the transportation of oil, natural gas, synthetic liquid, or gaseous fuels, or any refined product produced from these substances.

(a) *Application procedure.* (1) Applications for pipelines and related facilities under this section are to be filed in accordance with § 29.15 with the following exception: When the right-of-way or proposed facility will occupy Federal land under the control of more than one Federal agency or more than one bureau or office of the Department of the Interior, a single application must be filed with the appropriate State Director of the Bureau of Land Management in accordance with regulations in 43 CFR part 2800.

(2) Any portion of the facility occupying land of the National Wildlife Refuge System is subject to the provisions of the regulations in this part.

(b) *Right-of-way permits.* Right-of-way permits issued under this section are subject to the special requirements of section 28 of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 181 *et seq.*). Gathering lines and associated structures used solely in the production of oil and gas under valid leases on the lands administered by the Service are excepted from the provisions of this section.

(1) *Pipeline safety.* Right-of-way permits issued under this section will include requirements that will protect the safety of workers and protect the public from sudden ruptures and slow degradation of the pipeline. An applicant must agree to design, construct, and operate all proposed facilities in accordance with the provisions of 49 CFR part 192 or 195 and in accordance with the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*) and any future amendments to that act.

(2) *Environmental protection.* An application for a right-of-way must contain environmental information required by § 29.16(c)(4). The applicant must also provide a plan of construction, operation, and rehabilitation of the proposed facilities. In addition to terms and conditions imposed under § 29.20, the Regional Director will impose any stipulations required to ensure:

(i) Restoration, revegetation, and curtailment of erosion of the surface;

(ii) That activities in connection with the right-of-way or permit will not violate applicable air- and water-quality standards in related facilities siting standards established by law;

(iii) Control or prevention of damage to the environment, including damage to fish and wildlife habitat, public or

private property, and public health and safety; and

(iv) Protection of the interests of individuals living in the general area of the right-of-way who rely on the fish, wildlife, and biotic resources of the area for subsistence purposes.

(c) *Disclosure.* Applicants that are a partnership, corporation, association, or other business entity must disclose the identity of all participants. Such disclosure will include where applicable:

(1) The name and address of each partner;

(2) The name and address of each shareholder owning 3 percent or more of the shares, together with the number and percentage of any class of voting shares that the shareholder is authorized for voting purposes; and

(3) The name and address of each affiliate of the entity, together with, in the case of an affiliate controlled by the entity, the number of shares and the percentage of any class of voting stock of that affiliate owned, directly or indirectly, by that entity, and in the case of an affiliate that controls the entity, the number of shares and the percentage of any class of voting stock of the entity owned, directly or indirectly, by the affiliate.

(d) *Technical and financial capability.* The Regional Director may require a financial statement and will issue or renew a right-of-way permit under this section only when satisfied that the applicant has the technical and financial capability to construct, operate, maintain, and terminate the facility.

(e) *Reimbursement of costs.* (1) In accordance with § 29.18, the holder of a right-of-way permit must reimburse the Service for the cost incurred in monitoring the construction, operation, maintenance, and termination of any pipeline or related facilities as determined by the Regional Director.

(2) Payments received by the Service to reimburse the United States for the costs incurred in monitoring the construction, operation, maintenance, and termination of any pipeline or related facilities will be deposited into the United States Treasury until such time that any provision of law allows these payments to supplement the Service's appropriation.

(f) *Public hearing.* The Regional Director will give notice to Federal, State, and local government agencies and the public of the opportunity to comment on right-of-way applications under this section. A notice will be published in the **Federal Register**, and a public hearing may be held where appropriate.

(g) *Bonding.* Where appropriate, the Regional Director will require the holder of a right-of-way permit to furnish a bond or other satisfactory financial assurance to secure all or any of the obligations imposed by the terms and conditions of the right-of-way permit or by any rule or regulation, not to exceed the period of construction plus 1 year or a longer period if necessary for the pipeline to stabilize or for any reclamation or restoration requirements to be met.

(h) *Suspension of right-of-way.* If the project manager determines that an immediate temporary suspension of activities within a right-of-way permit area is necessary to protect public health and safety or the environment, the project manager may issue an emergency suspension order to abate such activities prior to an administrative proceeding. The Regional Director must make a determination and notify the permit holder in writing within 15 days from the date of suspension as to whether the suspension should continue and list actions needed to terminate the suspension. The suspension will remain in effect for only so long as an emergency condition continues.

(i) *Joint use of rights-of-way.* Each right-of-way permit will reserve to the Regional Director the right to issue additional right-of-way permits for compatible uses on or adjacent to permitted rights-of-way areas after giving notice to the permit holder and an opportunity to comment.

(j) *Common carriers.* Pipelines and related facilities used for the transportation of oil, natural gas, synthetic liquid, or gaseous fuels, or any refined product made from these substances will be constructed, operated, and maintained as common carriers.

(1) The owners or operators of pipelines subject to the regulations in this subpart will accept, convey, transport, or purchase without discrimination all oil or gas delivered to the pipeline without regard to whether such oil or gas was produced on Federal or non-Federal lands.

(2) In the case of oil or gas produced from Federal lands or from the resources on the Federal lands in the vicinity of the pipelines, the Secretary may, after a full hearing following due notice to the interested parties and a proper finding of facts, determine the proportionate amounts to be accepted, conveyed, transported, or purchased.

(3) The common carrier provisions of this section will not apply to any natural gas pipeline operated by any person subject to regulation under the

Natural Gas Act (15 U.S.C. ch. 15B, sec. 717 *et seq.*) or by any public utility subject to regulation by a State or municipal regulatory agency having jurisdiction to regulate the rates and charges for the sale of natural gas to consumers within the State or municipality.

(4) The owners or operators of pipelines will purchase, without discrimination, any natural gas produced in the vicinity of the pipeline that is offered for sale unless that natural gas is subject to State regulatory or conservation laws governing its purchase by owners or operators of pipelines.

(k) *Required information.* The Regional Director will require, prior to issuing or renewing a right-of-way permit, that the applicant submit and disclose all plans, contracts, agreements, or other information or material that the Regional Director deems necessary to determine whether to issue or renew the right-of-way permit or the terms and conditions that should be included in the permit. That information may include, but is not limited to:

(1) Conditions for and agreements among owners or operators regarding the addition of pumping facilities, looping, or otherwise increasing the pipeline or terminal's throughput capacity in response to actual or anticipated increases in demand;

(2) Conditions for adding or abandoning intake, offtake, or storage points or facilities; and

(3) Minimum shipment or purchase tenders.

(l) *State standards.* The Regional Director will take into consideration, and to the extent practical comply with, applicable State standards for right-of-way construction, operation, and maintenance, taking into account any additional standards necessary to protect refuge resources.

(m) *Congressional notification.* The Secretary will promptly notify the Committee on Natural Resources of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate upon receipt of an application for a right-of-way for pipeline 24 inches or more in diameter, and no right-of-way permit for such a pipeline will be issued until a notice of intention to permit the right-of-way, together with the Secretary's detailed findings as to the terms and conditions the Secretary proposes to impose, has been submitted to those committees.

§ 29.26 Hearing and appeals procedures.

(a) *Application for a right-of-way.* When denial of an application for a

right-of-way permit is based on a determination that the proposed use is not compatible with the purposes for which the area was established, the denial may be appealed to the Regional Director and subsequently to the Director, but no further.

(b) *Existing authorized right-of-way.* The termination of an existing authorized right-of-way permit may be appealed to the Regional Director and subsequently to the Director and then further appealed to the Secretary.

(c) *Grant of a requested right-of-way.* A party with standing may appeal the Service's decision to issue a requested right-of-way permit to the Regional Director, subsequently to the Director, and finally to the Secretary.

(d) *Appeals to the Secretary.* Appeals to the Secretary must follow the applicable regulations in 43 CFR part 4.

§ 29.27 Severability.

If a court holds any provisions of the regulations in this subpart or their

applicability to any person or circumstance invalid, the remainder of the regulations in this subpart and their applicability to other people or circumstances will not be affected.

Shannon Estenoz,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2024-28367 Filed 12-10-24; 8:45 am]

BILLING CODE 4333-15-P

Proposed Rules

Federal Register

Vol. 89, No. 238

Wednesday, December 11, 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 THE TREASURY

Office of the Comptroller of the Currency

12 CFR Chapter I

[Docket ID OCC–2023–0016]

FEDERAL RESERVE SYSTEM

12 CFR Chapter II

[Docket No. OP–1828]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Chapter III

RIN 3064–ZA39

Regulatory Publication and Review Under the Economic Growth and Regulatory Paperwork Reduction Act of 1996

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury; Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC).

ACTION: Regulatory review; request for comments.

SUMMARY: Pursuant to the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA), the OCC, Board, and FDIC (collectively, the agencies) are reviewing agency regulations to identify outdated or otherwise unnecessary regulatory requirements on insured depository institutions and their holding companies. Over approximately two years, the agencies will publish four **Federal Register** documents requesting comment on multiple categories of regulations. This third **Federal Register** document requests comment on regulations in the categories of Rules of Procedure; Safety and Soundness; and Securities.

DATES: Written comments must be received no later than March 11, 2025.

ADDRESSES: Comments should be directed to:

OCC: Commenters are encouraged to submit comments through the Federal eRulemaking Portal. Please use the title “Regulatory Publication and Review Under the Economic Growth and Regulatory Paperwork Reduction Act of 1996” to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal—Regulations.gov:*

Go to <https://regulations.gov/>. Enter “Docket ID OCC–2023–0016” in the Search Box and click “Search.” Public comments can be submitted via the “Comment” box below the displayed document information or by clicking on the document title and then clicking the “Comment” box on the top-left side of the screen. For help with submitting effective comments, please click on “Commenter’s Checklist.” For assistance with the *Regulations.gov* site, please call 1–866–498–2945 (toll free) Monday–Friday, 9 a.m.–5 p.m. eastern time (ET), or email regulationshelpdesk@gsa.gov.

- *Mail:* Chief Counsel’s Office, Attention: Comment Processing, Office of the Comptroller of the Currency, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

Instructions: You must include “OCC” as the agency name and “Docket ID OCC–2023–0016” in your comment. In general, the OCC will enter all comments received into the docket and publish the comments on the *Regulations.gov* website without change, including any business or personal information provided such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this action by the following method:

- *Viewing Comments Electronically—Regulations.gov:*

Go to <https://regulations.gov/>. Enter “Docket ID OCC–2023–0016” in the

Search Box and click “Search.” Click on the “Dockets” tab and then the document’s title. After clicking the document’s title, click the “Browse All Comments” tab. Comments can be viewed and filtered by clicking on the “Sort By” drop-down on the right side of the screen or the “Refine Comments Results” options on the left side of the screen. Supporting materials can be viewed by clicking on the “Browse Documents” tab. Click on the “Sort By” drop-down on the right side of the screen or the “Refine Results” options on the left side of the screen checking the “Supporting & Related Material” checkbox. For assistance with the *Regulations.gov* site, please call 1–866–498–2945 (toll free) Monday–Friday, 9 a.m.–5 p.m. ET, or email regulationshelpdesk@gsa.gov.

The docket may be viewed after the close of the comment period in the same manner as during the comment period.

Board: You may submit comments, identified by Docket No. OP–1828 by any of the following methods:

- *Agency Website:* <https://www.federalreserve.gov>. Follow the instructions for submitting comments at <https://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm>.

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments.

- *Email:* regs.comments@federalreserve.gov. Include the docket number in the subject line of the message.

- *Fax:* 202–452–3819 or 202–452–3102.

- *Mail:* Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

Public Inspection: In general, all public comments will be made available on the Board’s website at www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm as submitted, and will not be modified to remove confidential, contact or any identifiable information. Public comments may also be viewed electronically or in paper in Room M–4365A, 2001 C Street NW, Washington, DC 20551, between 9 a.m. and 5 p.m. during Federal business weekdays. For security reasons, the Board requires that visitors make an appointment to inspect comments by calling (202) 452–3684. Upon arrival,

visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments. For users of TTY-TRS, please call 711 from any telephone, anywhere in the United States.

FDIC: Interested parties are invited to submit written comments, identified by RIN 3064-ZA39, by any of the following methods:

- **Agency Website:** <https://www.fdic.gov/resources/regulations/federal-register-publications/>. Follow instructions for submitting comments on the FDIC's website.

- **Email:** comments@FDIC.gov. Include "EGRPRA" in the subject line of the message.

- **Mail:** James P. Sheesley, Assistant Executive Secretary, Attention: Comments—RIN 3064-ZA39, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

- **Hand Delivery:** Comments may be hand-delivered to the guard station at the rear of the 550 17th Street NW building (located on F Street NW) on business days between 7 a.m. and 5 p.m. ET.

Public Inspection: Comments received, including any personal information provided, may be posted without change to <https://www.fdic.gov/resources/regulations/federal-register-publications/>. Commenters should submit only information that the commenter wishes to make available publicly. The FDIC may review, redact, or refrain from posting all or any portion of any comment that it may deem to be inappropriate for publication, such as irrelevant or obscene material. The FDIC may post only a single representative example of identical or substantially identical comments, and in such cases will generally identify the number of identical or substantially identical comments represented by the posted example. All comments that have been redacted, as well as those that have not been posted, that contain comments on the merits of this document will be retained in the public comment file and will be considered as required under all applicable laws. All comments may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT:

OCC: Allison Hester-Haddad, Special Counsel, Daniel Amodio, Counsel, or John Cooper, Counsel, Chief Counsel's Office (202) 649-5490, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219. If you are deaf, hard of hearing, or have a speech disability, please dial 7-1-1 to access telecommunications relay services.

Board: Katie Ballintine, Assistant Director, (202) 452-2555, and Colton Hamming, Financial Institution Policy Analyst III, (202) 452-3932, Division of Supervision and Regulation; Mandie Aubrey, Senior Counsel, (202) 452-2595, Division of Consumer and Community Affairs; Dafina Stewart, Deputy Associate General Counsel, (202) 452-2677, David Cohen, Counsel, (202) 452-5259, and Vivien Lee, Attorney, (202) 452-2029, Legal Division, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551. For users of TTY-TRS, please call 711 from any telephone, anywhere in the United States.

FDIC: Karen J. Currie, Chief, Policy & Program Development Section, (202) 898-3981, Division of Risk Management Supervision; or William Piervincenzi, Supervisory Counsel, (202) 898-6957, Legal Division.

I. Introduction

Section 2222 of EGRPRA¹ requires that not less frequently than once every 10 years, the Federal Financial Institutions Examination Council (FFIEC)² and the agencies³ conduct a review of their regulations to identify outdated or otherwise unnecessary regulatory requirements imposed on insured depository institutions. In conducting this review, the FFIEC or the agencies will (a) categorize their regulations by type and (b) at regular intervals, provide notice and solicit public comment on categories of regulations, requesting commenters to identify areas of regulations that are outdated, unnecessary, or unduly burdensome.⁴

¹ 12 U.S.C. 3311.

² The FFIEC is an interagency body empowered to prescribe uniform principles, standards, and report forms for the Federal examination of financial institutions and to make recommendations to promote uniformity in the supervision of financial institutions. The FFIEC does not issue regulations that impose burden on financial institutions and, therefore, we have not separately captioned the FFIEC in this document.

³ The FFIEC is comprised of the OCC, Board, FDIC, National Credit Union Administration (NCUA), Consumer Financial Protection Bureau (CFPB), and State Liaison Committee. Of these, only the OCC, Board, and FDIC are statutorily required to undertake the EGRPRA review. The NCUA elected to participate in the first and second EGRPRA reviews, and the NCUA Board again has elected to participate in this review process.

Consistent with its approach during the first and second EGRPRA reviews, the NCUA will separately issue documents and requests for comment on its rules. The CFPB is required to review its significant rules and publish a report of its review no later than five years after they take effect. See 12 U.S.C. 5512(d). This process is separate from the EGRPRA process.

⁴ Insured depository institutions are also subject to regulations that are not reviewed under the

EGRPRA also requires the FFIEC or the agencies to publish in the **Federal Register** a summary of the comments received, identifying significant issues raised and commenting on those issues. It also directs the agencies to eliminate unnecessary regulations, as appropriate. Finally, the statute requires the FFIEC to submit a report to Congress that summarizes any significant issues raised in the public comments and the relative merits of those issues. The report also must include an analysis of whether the agencies are able to address the regulatory burdens associated with such issues or whether those burdens must be addressed by legislative action.

II. The EGRPRA Review's Targeted Focus

The EGRPRA regulatory review provides an opportunity for the public and the agencies to evaluate groups of related regulations and to identify opportunities for burden reduction.⁵ For example, the EGRPRA review may facilitate the identification of statutes and regulations that share similar goals or complementary methods where one or more agencies could eliminate the overlapping regulatory requirements. Alternatively, commenters may identify regulations or statutes that impose requirements that are no longer consistent with current business practices and may warrant revision or elimination.

The EGRPRA review also provides the agencies and the public with an opportunity to consider how to reduce the impact of regulations on community banks or their holding companies. The agencies are aware of the role that these institutions play in providing consumers and businesses across the nation with essential financial services and access to credit. The agencies are especially concerned about the impact of requirements on these smaller institutions. The agencies understand that when a new regulation is issued or a current regulation amended, smaller institutions may have to devote a significant amount of their resources to determine if and how the regulation will affect them. Through the public comment process, the EGRPRA review can help the agencies identify and target

EGRPRA process because they were not prescribed by the agencies. Examples include rules for which rulemaking authority was transferred to the CFPB and anti-money laundering regulations issued by the Department of the Treasury's Financial Crimes Enforcement Network, among others. If, during the EGRPRA process, the agencies receive a comment about a regulation that is not subject to the EGRPRA review, we will forward that comment to the appropriate agency.

⁵ See *supra* note 1.

regulatory changes to reduce impacts on those smaller institutions.

Burden reduction must be compatible with consumer protection and the safety and soundness of insured depository institutions, their affiliates, and the financial system as a whole. Burden reduction also must be consistent with the agencies' statutory mandates, many of which require the issuance of regulations. EGRPRA recognizes that effective burden reduction may require statutory changes. Accordingly, as part of this review, the agencies specifically ask the public to comment on the relationship among burden reduction, regulatory requirements, policy objectives, and statutory mandates. The agencies also seek quantitative data about the impact of rules, where available.

The agencies note that they must consider regulatory burden each time an agency proposes, adopts, or amends a rule. For example, under the Paperwork Reduction Act of 1995⁶ and the Regulatory Flexibility Act,⁷ the agencies assess each rulemaking with respect to the burdens the rule might impose. The agencies also invite the public to comment on proposed rules as required by the Administrative Procedure Act.⁸

III. The EGRPRA Review Process

Taken together for purposes of the EGRPRA review process, the agencies' regulations covering insured depository institutions encompass more than 100 subjects.⁹ Consistent with the EGRPRA statute and past practice, the agencies have grouped these regulations into the following 12 categories listed in alphabetical order: Applications and Reporting; Banking Operations; Capital; Community Reinvestment Act; Consumer Protection;¹⁰ Directors, Officers and Employees; International Operations; Money Laundering; Powers and Activities; Rules of Procedure; Safety and Soundness; and Securities. These categories were used during the prior EGRPRA reviews. The agencies determined the categories by sorting the regulations by type and sought to have

no category be too large or broad. These categories remain useful for the review, and the agencies have not modified the categories for purposes of this review.

To carry out the EGRPRA review, the agencies plan to publish four **Federal Register** documents with each addressing one or more categories of rules. Each **Federal Register** document will have a 90-day comment period. On February 6, 2024, the agencies published the first document, addressing the following categories of regulations: Applications and Reporting; Powers and Activities; and International Operations.¹¹ On August 1, 2024, the agencies published a second document, addressing Consumer Protection; Directors, Officers and Employees; and Money Laundering.¹² Today the agencies are publishing the third document addressing the categories of Rules of Procedure; Safety and Soundness; and Securities. The agencies invite the public to identify outdated, unnecessary, or unduly burdensome regulatory requirements imposed on insured depository institutions and their holding companies in these three categories.

To assist the public's understanding of how the agencies have organized the EGRPRA review, the agencies have prepared a chart that lists the categories of regulations for which the agencies are requesting comments. The chart's left column divides the categories into specific subject-matter areas. The headings at the top of the chart identify the types of institutions affected by the regulations.

The agencies will review the comments received and determine whether further action is appropriate with respect to the regulations. The agencies will consult and coordinate with each other and expect generally to make this determination jointly, as appropriate, in the case of rules that have been issued on an interagency basis. Similarly, as appropriate, the agencies will coordinate to amend or repeal those rules on an interagency basis. For rules issued by a single agency, the issuing agency will review the comments received and independently determine whether amendments to or repeal of its rules are appropriate.

Further, as part of the EGRPRA review, the agencies are holding a series of public outreach meetings to provide an opportunity for bankers, consumer and community groups, and other interested parties to present their views directly to senior management and staff

of the agencies. More information about the outreach meetings can be found on the agencies' EGRPRA website, <https://egrpra.ffiec.gov>.

IV. Request for Comments on Regulations in the Rules of Procedure, Safety and Soundness, and Securities Categories

The agencies are requesting comment on regulations in the Rules of Procedure; Safety and Soundness; and Securities categories to identify outdated, unnecessary, or unduly burdensome requirements imposed on insured depository institutions and their holding companies. The agencies will solicit comment on all rules finalized by the agencies before the publication of the last EGRPRA document in the series. In addition to comments on regulations in these categories generally, the agencies are requesting comments on certain specific regulations described below within these categories issued since the last EGRPRA review. Where possible, the agencies ask commenters to cite to specific regulatory language or provisions. The agencies also welcome suggested alternative provisions or language in support of a comment, where appropriate. The agencies will consider comments submitted anonymously.

Specific Issues for Commenters To Consider

The agencies specifically invite comment on the following issues as they pertain to the agencies' Rules of Procedure; Safety and Soundness; and Securities rules addressed in this document. The agencies will ask these same questions for each document issued in connection with the EGRPRA process and invite comments on these questions for the categories in the previous EGRPRA documents.

- *Need and purpose of the regulations.*

- *Question 1:* Have there been changes in the financial services industry, consumer behavior, or other circumstances that cause any regulations in these categories to be outdated, unnecessary, or unduly burdensome? If so, please identify the regulations, provide any available quantitative analyses or data, and indicate how the regulations should be amended.

- *Question 2:* Do any of these regulations impose burdens not required by their underlying statutes? If so, please identify the regulations and indicate how they should be amended.

- *Overarching approaches/flexibilities.*

⁶ 44 U.S.C. 3501–3521.

⁷ 5 U.S.C. 610.

⁸ 5 U.S.C. 551–559.

⁹ Consistent with EGRPRA's focus on reducing burden on insured depository institutions, the agencies have not included their internal, organizational, or operational regulations in this review. These regulations impose minimal, if any, burden on insured depository institutions.

¹⁰ The agencies are seeking comment only on consumer protection regulations for which they retain rulemaking authority for insured depository institutions and holding companies under the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010) (Dodd-Frank Act).

¹¹ 89 FR 8084.

¹² 89 FR 62679.

○ *Question 3:* With respect to the regulations in these categories, could an agency use a different regulatory approach to lessen the burden imposed by the regulations and achieve statutory intent?

○ *Question 4:* Do any of these rules impose unnecessarily inflexible requirements? If so, please identify the regulations and indicate how they should be amended.

- *Cumulative effects.*

○ *Question 5:* Looking at the regulations in a category as a whole, are there any requirements that are redundant, inconsistent, or overlapping in such a way that taken together, impose an unnecessary burden that could potentially be addressed? If so, please identify those regulations, provide any available quantitative analyses or data, and indicate how the regulations should be amended.

○ *Question 6:* Have the agencies issued similar regulations in the same area that should be considered together as bodies of regulation, when assessing the cumulative effects on an insured depository institution or holding company? If so, please identify the regulations, why they should be considered together, and any available analyses or data for the agencies' consideration.

○ *Question 7:* Could any regulations or category of regulation be streamlined or simplified to reduce unduly burdensome or duplicative regulatory requirements?

- *Effect on competition.*

○ *Question 8:* Do any of the regulations in these categories create competitive disadvantages for one part of the financial services industry compared to another or for one type of insured depository institution compared to another? If so, please identify the regulations and indicate how they should be amended.

- *Reporting, recordkeeping, and disclosure requirements.*

○ *Question 9:* Do any of the regulations in these categories impose outdated, unnecessary, or unduly burdensome reporting, recordkeeping, or disclosure requirements on insured depository institutions or their holding companies?

○ *Question 10:* Could an insured depository institution or its holding company fulfill any of these requirements through new technologies (if they are not already permitted to do so) and experience a burden reduction? If so, please identify the regulations and indicate how they should be amended.

- *Unique characteristics of a type of institution.*

○ *Question 11:* Do any of the regulations in these categories impose requirements that are unwarranted by the unique characteristics of a particular type of insured depository institution or holding company? If so, please identify the regulations and indicate how they should be amended.

- *Clarity.*

○ *Question 12:* Are the regulations in these categories clear and easy to understand?

○ *Question 13:* Are there specific regulations for which clarification is needed? If so, please identify the regulations and indicate how they should be amended.

- *Impact to community banks and other small, insured depository institutions.*

○ *Question 14:* Are there regulations in these categories that impose outdated, unnecessary, or unduly burdensome requirements on a substantial number of community banks, their holding companies, or other small, insured depository institutions or holding companies?

○ *Question 15:* Have the agencies issued regulations pursuant to a common statute that, as applied by the agencies, create redundancies or impose inconsistent requirements?

○ *Question 16:* Should any of these regulations issued pursuant to a common statute be amended or repealed to minimize this impact? If so, please identify the regulations and indicate how they should be amended.

○ *Question 17:* Have the effects of any regulations in these categories changed over time that now have a significant economic impact on a substantial number of small, insured depository institutions or holding companies? If so, please identify the regulations and indicate how they should be amended. The agencies seek information on (1) the continued need for the rule; (2) the complexity of the rule; (3) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and (4) the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

- *Scope of rules.*

○ *Question 18:* Is the scope of each rule in these categories consistent with the intent of the underlying statute(s)?

○ *Question 19:* Could the agencies amend the scope of a rule to clarify its applicability or reduce the burden, while remaining faithful to statutory intent? If so, please identify the regulations and indicate how they should be amended.

Specific Interagency Regulations Issued Since the Last EGRPRA Review

- *Rules of Practice and Procedure:* On December 28, 2023, the agencies along with NCUA published updated rules of practice and procedure, including both joint uniform rules and agency-specific local rules, to govern administrative proceedings.¹³ The updated rules are effective as of April 1, 2024. The new rules recognize the use of electronic communications in administrative hearings and make various technical and conforming changes to increase the efficiency and fairness of administrative adjudications. The rules also apply 12 CFR part 19 to Federal savings associations and remove the current administrative practice and procedure-related rules for Federal savings associations. The agencies jointly amended the uniform rules, and the OCC, Federal Reserve, and FDIC also amended their local rules.

- *Appraisals for Higher-Priced Mortgage Loans Exemption Threshold:* The OCC, FRB, and CFPB finalized amendments to the official interpretations for their regulations that implement section 129H of the Truth in Lending Act (TILA). Section 129H of TILA establishes special appraisal requirements for “higher-risk mortgages,” termed “higher-priced mortgage loans” or “HPMLs” in the agencies’ regulations.¹⁴ The agencies amended the regulations to adjust the related Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) exemption threshold for certain loan types, effective January 1, 2024. The OCC joined other agencies in issuing corresponding regulations for each year between 2014 and 2022.¹⁵

- *Real Estate Appraisals:* The agencies adopted a final rule to amend their regulations requiring appraisals of real estate for certain transactions. The final rule increases the threshold level at or below which appraisals are not required for commercial real estate transactions from \$250,000 to \$500,000.¹⁶ The final rule defines a commercial real estate transaction as a real estate-related financial transaction that is not secured by a single 1-to-4 family residential property. It excludes all transactions secured by a single 1-to-4 family residential property, and, thus, construction loans secured by a single 1-

¹³ 88 FR 89820 (Dec. 28, 2023).

¹⁴ 88 FR 83311 (Nov. 29, 2023).

¹⁵ 87 FR 63663 (Oct. 20, 2022); 86 FR 67843 (Nov. 30, 2021); 85 FR 79385 (Dec. 10, 2020); 84 FR 58013 (Oct. 30, 2019); 83 FR 59272 (Nov. 23, 2018); 82 FR 51973 (Nov. 9, 2017); 81 FR 86250 (Nov. 30, 2016); 80 FR 73943 (Nov. 27, 2015); 79 FR 78296 (Dec. 30, 2014).

¹⁶ 83 FR 15019 (April 9, 2018).

to-4 family residential property are excluded. For commercial real estate transactions exempted from the appraisal requirement as a result of the revised threshold, regulated institutions must obtain an evaluation of the real property collateral that is consistent with safe and sound banking practices.

- *Real Estate Appraisals:* The agencies adopted a final rule to amend the agencies' regulations requiring appraisals of real estate for certain transactions. The final rule increases the threshold level at or below which appraisals are not required for residential real estate transactions from \$250,000 to \$400,000.¹⁷ The final rule defines a residential real estate transaction as a real estate-related financial transaction that is secured by a single 1-to-4 family residential property. For residential real estate transactions exempted from the appraisal requirement as a result of the revised threshold, regulated institutions must obtain an evaluation of the real property collateral that is consistent with safe and sound banking practices. The final rule makes a conforming change to add to the list of exempt transactions those transactions secured by residential property in rural areas that have been exempted from the agencies' appraisal requirement pursuant to the Economic Growth, Regulatory Relief, and Consumer Protection Act. The final rule requires evaluations for these exempt transactions. The final rule also amends the agencies' appraisal regulations to require regulated institutions to subject appraisals for federally related transactions to appropriate review for compliance with the Uniform Standards of Professional Appraisal Practice.

- *Net Stable Funding Ratio:* The agencies adopted a final rule to implement a stable funding requirement, known as the net stable funding ratio (NSFR), for certain large banking organizations. The final rule established a quantitative metric, the NSFR, to measure the stability of the funding profile of certain large banking organizations and requires these banking organizations to maintain minimum amounts of stable funding to support their assets, commitments, and derivatives exposures over a one-year time horizon. The final rule applied to certain large U.S. depository institution holding companies, depository institutions, and U.S. intermediate holding companies of foreign banking organizations, each with total consolidated assets of \$100 billion or more, together with certain depository

institution subsidiaries (together, covered companies). The final rule also amended certain definitions in the agencies' liquidity coverage ratio rule that are also applicable to the NSFR.¹⁸

Specific OCC Regulations Issued Since the Last EGRPA Review

- *National Bank and Federal Savings Association Payment System Memberships:* In December 2020, the OCC adopted a rule addressing national bank and Federal savings association membership in payment systems.¹⁹ The rule includes a notice requirement and safety and soundness reviews.

- *Permissible Derivatives Activities for National Banks:* In December 2020, the OCC adopted a rule governing permissible derivative activities for national banks.²⁰ The rule delineates the types of derivative activities that are permissible and includes notice and safety and soundness requirements.

- *Collective Investment Funds:* In January 2017, the OCC amended 12 CFR 9.18(b)(1) to require that a national bank make a copy of the investment fund plan available to the public either at its main office or on its website.²¹ The rule also permits a national bank to satisfy the requirement to provide a copy of the plan to any person who requests it by providing it in either written or electronic form. The OCC amended 12 CFR 9.18(c)(2) to increase the asset threshold for mini-funds to \$1,500,000, with an annual adjustment for inflation. In March 2020, the OCC revised the OCC's short-term investment fund rule (STIF Rule) for national banks acting in a fiduciary capacity.²² The OCC amended the rule to add a reservation of authority provision that addresses the rule's limits on weighted average portfolio maturity, weighted average portfolio life maturity, and the method for determining those limits. In August 2020, the OCC issued a rule to codify the standard withdrawal period for a collective investment fund and to provide that a national bank that requires a prior notice period for withdrawals generally must withdraw an account within the prior notice period or, if permissible under the collective investment fund's written plan, within one year after prior notice was required.²³ The rule also creates a limited exception that allows a national bank, with OCC approval, to withdraw an account from the collective

investment fund up to one year beyond the standard withdrawal period, with opportunities for further extensions, provided that certain conditions are satisfied.

- *Municipal Securities Dealers:* In March 2014, the OCC updated its headquarters mailing address.²⁴ In January 2017, the OCC codified an existing requirement for Federal savings associations that act as municipal securities dealers to file certain forms with the OCC. The OCC also made minor technical changes to 12 CFR part 10.²⁵

- *Securities Exchange Act Disclosure Rules:* In January 2017, the OCC adopted a rule designed to update certain relevant existing rules in accordance with a review of the EGRPA.²⁶ The rule treats Federal savings associations similar to national banks under the rule with regard to their periodic reporting obligations under the Exchange Act. In addition, the updates permit the electronic filing of periodic reporting requirements, and provide the ability to make technical, non-substantive edits and clarifications.

- *Recordkeeping and Confirmation Requirements for Securities Transactions (National Banks):* In January 2017, the OCC adopted a rule designed to update certain relevant existing rules in accordance with a review of the EGRPA.²⁷ The rule clarifies that national banks may use a third-party service provider for recordkeeping and storage. The rule also aligns customer notification requirements for national banks and Federal savings associations and allows for the use of electronic communications. In October 2018, the OCC and FDIC adopted a rule to shorten the standard settlement cycle for securities purchased or sold by national banks.²⁸ The rule requires banks to settle most securities transactions within the number of business days followed by registered broker dealers in the United States.

- *Recordkeeping and Confirmation Requirements for Securities Transactions (Federal Savings Associations):* In January 2017, the OCC adopted a rule designed to update certain relevant existing rules in accordance with a review of the EGRPA.²⁹ The rule treats Federal savings associations the same as national banks by reducing records

¹⁸ 86 FR 9120 (Feb. 11, 2021).

¹⁹ 85 FR 83686 (Dec. 22, 2020).

²⁰ 85 FR 83686 (Dec. 22, 2020).

²¹ 82 FR 8082 (Jan. 23, 2017).

²² 85 FR 16888 (Mar. 25, 2020).

²³ 85 FR 49229 (Aug. 13, 2020).

²⁴ 79 FR 15639 (Mar. 21, 2014).

²⁵ 82 FR 8082 (Jan. 23, 2017).

²⁶ 82 FR 8082 (Jan. 23, 2017).

²⁷ 82 FR 8082 (Jan. 23, 2017).

²⁸ 83 FR 26347 (Jun. 7, 2018).

²⁹ 82 FR 8082 (Jan. 23, 2017).

¹⁷ 84 FR 53579 (Oct. 8, 2019).

maintenance and storage requirements. The rule also reduces the frequency of statements that must be sent to a customer when a Federal savings association receives remuneration from any source. In October 2018, the OCC and FDIC adopted a rule to shorten the standard settlement cycle for securities purchased or sold by Federal savings associations.³⁰ The rule requires Federal savings associations to settle most securities transactions within the number of business days followed by registered broker dealers in the United States.

- *Securities Offering Disclosure Rules:* In January 2017, the OCC made amendments to 12 CFR part 16 as part of the EGRPRA process to integrate Federal savings associations into 12 CFR part 16 and delete former 12 CFR part 197, which previously applied to the securities activities of Federal savings associations.³¹ These amendments also took provisions from former 12 CFR part 197 pertaining to electronic filings and adapted them in 12 CFR part 16 to enable electronic filings under the latter. The OCC made further technical amendments in July 2020 regarding the form and content of registration statements and requests for interpretative advice and no-objection letters.³²

- *Applications for Stay or Review of Disciplinary Actions Imposed by Registered Clearing Agencies:* As part of the OCC's reorganization of the 12 CFR part 19 local rules, 12 CFR 19.135, "Applications for stay or review of disciplinary actions imposed by registered clearing agencies," was redesignated as 12 CFR 19.121(d). There was no change to the substance of the provision.

- *Securities and Borrowings:* The OCC has made minor revisions regarding provisions relating to Federal savings association securities and borrowing several times. The OCC removed certain provisions in 2015 as part of the integration of national bank and Federal savings association rules.³³ The OCC made technical and conforming edits in 2019 and 2020.³⁴

- *Federal Savings Association Financial Management Policies:* In

January 2017, as a result of the previous EGRPRA review, OCC revised its regulations for Federal savings associations for financial derivatives to clarify the rule.³⁵

- *Recovery Planning Guidelines:* In 2016, the OCC published enforceable standards for insured national banks, Federal savings associations, and Federal branches of foreign banks with \$50 billion or more in average total consolidated assets.³⁶ In 2018, the OCC increased this threshold to \$250 billion or more.³⁷ In 2024, the OCC adjusted the threshold to \$100 billion or more, incorporated a testing standard, and clarified the role of non-financial (operational and strategic) risk in recovery planning.³⁸ The guidelines provide a comprehensive framework for evaluating the financial effects of severe stress that may affect a covered institution and options it may take to remain viable under such stress. The OCC also made technical changes to 12 CFR part 30 when it issued these guidelines.

- *Voluntary Liquidation:* The OCC integrated the provisions related to national bank and Federal savings association voluntary liquidation.³⁹ The OCC made minor updates to this regulation in January 2017,⁴⁰ as part of the previous EGRPRA review, and December 2020.⁴¹

- *Other Real Estate Owned:* The OCC integrated its regulations for national banks and Federal savings associations.⁴²

- *Legal Lending Limits:* The OCC revised 12 CFR part 32 to make technical conforming amendments to certain definitions and provisions to make 12 CFR part 32 consistent with the capital framework,⁴³ integration of Federal savings associations into OCC regulations relating to policies and procedures,⁴⁴ implementation of the current expected credit losses methodology (CECL),⁴⁵ the community bank leverage ratio framework,⁴⁶ and the standardized approach for counterparty credit risk (SA-CCR).⁴⁷ In addition, the OCC revised 12 CFR part 32 to conform with and clarify

applicability of certain limits in Call Report instructions.⁴⁸

- *Affiliates Transactions:* As part of the previous EGRPRA review, the OCC integrated its regulations and added provisions for national banks and Federal savings association to request exemptions.⁴⁹

- *Federal Savings Association Financial Management Policies:* In response to the last EGRPRA review, the OCC revised its regulations for Federal savings associations for financial derivatives to clarify the rule.⁵⁰

Specific Board Regulations Issued Since the Last EGRPRA Review

- *Financial Market Utilities:* The Board issued a final rule amending the requirements relating to operational risk management in the Board's Regulation HH, which applies to certain financial market utilities (FMUs) that have been designated as systemically important (designated FMUs) by the Financial Stability Oversight Council (FSOC) under title VIII of the Dodd-Frank Act. The amendments updated, refined, and added specificity to the operational risk management requirements in Regulation HH to reflect changes in the operational risk, technology, and regulatory landscape in which designated FMUs operate. The final rule also required specific incident-notification requirements.⁵¹

- *Enhanced Prudential Standards:* The Board established risk-based categories for determining prudential standards for large U.S. banking organizations and foreign banking organizations, consistent with section 165 of the Dodd-Frank Act, as amended by the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA), and with the Home Owners' Loan Act. The rule amended certain prudential standards, including standards relating to liquidity, risk management, and single-counterparty credit limits, to reflect the risk profile of banking organizations under each category; applied prudential standards to certain large savings and loan holding companies using the same categories; and made corresponding changes to reporting forms.⁵²

- *Single-Counterparty Credit Limits:* The Board established single-counterparty credit limits for bank holding companies and foreign banking organizations with \$250 billion or more

³⁵ 82 FR 8110 (Jan. 23, 2017).

³⁶ 81 FR 66800 (Sep. 29, 2016).

³⁷ 83 FR 66607 (Dec. 27, 2018).

³⁸ 89 FR 84255 (Oct. 22, 2024).

³⁹ 80 FR 28346 (May 18, 2015).

⁴⁰ 82 FR 8082 (Jan. 23, 2017).

⁴¹ 85 FR 80404 (Dec. 11, 2020).

⁴² 84 FR 56369 (Oct. 22, 2019).

⁴³ 79 FR 11300 (February 28, 2014).

⁴⁴ 80 FR 28346 (May 18, 2015).

⁴⁵ 84 FR 4222 (February 14, 2019).

⁴⁶ 84 FR 61776 (November 13, 2019); 84 FR 69296 (December 18, 2019).

⁴⁷ 85 FR 4362 (January 24, 2020).

⁴⁸ 85 FR 42630 (July 14, 2020); 85 FR 61809 (October 1, 2020).

⁴⁹ 82 FR 8082 (Jan. 23, 2017).

⁵⁰ 82 FR 8110 (Jan. 23, 2017).

⁵¹ 89 FR 18749 (March 15, 2024).

⁵² 84 FR 59032 (Nov. 1, 2019).

³⁰ 83 FR 26347 (Jun. 7, 2018).

³¹ 82 FR 8082 (Jan. 23, 2017).

³² 85 FR 42630 (Jul. 14, 2020).

³³ 80 FR 28480 (May 18, 2015). In addition, the OCC issued a technical correction relating to offers and sales of securities at an office of a Federal savings association in 2015. 80 FR 79460 (Dec. 22, 2015).

³⁴ 84 FR 56376 (Oct. 22, 2019); 84 FR 64193 (Nov. 21, 2019) (amendment of effective date and correction); 84 FR 71735 (Dec. 30, 2019) (technical amendments, correction); 85 FR 42630 (Jul. 14, 2020).

in total consolidated assets, including any U.S. intermediate holding company of such a foreign banking organization with \$50 billion or more in total consolidated assets, and any bank holding company identified as a global systemically important bank holding company under the Board's capital rules. The final rule implemented section 165(e) of the Dodd-Frank Act, which requires the Board to impose limits on the amount of credit exposure that such a bank holding company or foreign banking organization can have to an unaffiliated company in order to reduce the risks arising from the company's failure.⁵³

- *Extensions of Credit by Federal Reserve Banks:* The Board revised provisions in its Regulation A regarding the establishment of the primary credit rate in a financial emergency and deleted the provisions relating to the use of credit ratings for collateral for extensions of credit under the former Term Asset-Backed Securities Loan Facility.⁵⁴

- *Qualified Financial Contracts:* The Board issued a rule imposing certain restrictions on firms with respect to qualified financial contracts. The rule applied to global systemically important banking organization and certain subsidiaries.⁵⁵

- *Resolution Plans:* The Board and FDIC issued a rule implementing the resolution planning requirements under Dodd Frank. The rule also established risk-based categories for determining the application of the resolution planning requirement to certain U.S. and foreign banking organizations. The final rule also extended the default resolution plan filing cycle, allowed for more focused resolution plan submissions, and improved certain aspects of the resolution planning rule.⁵⁶

Specific FDIC Regulations Issued Since the Last EGRPRA Review

- *Resolution Plans:* The FDIC issued a rule to require the submission of resolution plans by insured depository institutions (IDIs) with \$100 billion or more in total assets and informational filings by IDIs with at least \$50 billion but less than \$100 billion in total assets. The rule modified the content and timing of full resolution submissions, as well as interim supplements to those submissions provided to the FDIC. The rule also enhanced how the credibility of full resolution submissions will be assessed, expanded expectations

regarding engagement and capabilities testing, and explained expectations regarding the FDIC's review, feedback, and enforcement of IDIs' compliance with the rule.⁵⁷

- *Recordkeeping for Timely Deposit Insurance Determination:* In 2019, the FDIC amended its rules in 12 CFR part 370 to clarify its requirements for recordkeeping for timely deposit insurance determination, to better align the burdens of the rule with the benefits, and to make technical corrections.⁵⁸

- *Recordkeeping Requirements for Qualified Financial Contracts:* The FDIC amended its regulations regarding recordkeeping requirements for qualified financial contracts (QFCs) in 2017 to augment the scope of QFC records required to be maintained by an IDI that is subject to the FDIC's recordkeeping requirements and that has total consolidated assets equal to or greater than \$50 billion or is a consolidated affiliate of a member of a corporate group with one or more members of which are subject to the QFC recordkeeping requirements set forth in the regulations adopted by the Department of the Treasury (a "full scope entity"); for all other IDIs subject to the FDIC's QFC recordkeeping requirements, added and deleted a limited number of data requirements and made certain formatting changes with respect to the QFC recordkeeping requirements; required full scope entities to keep QFC records of certain of their subsidiaries; provided an exemption process; and included certain other changes, including changes that provided additional time for certain IDIs in a troubled condition to comply with the regulations.⁵⁹

- *Limited Exception for a Capped Amount of Reciprocal Deposits from Treatment as Brokered Deposits:* In 2019, the FDIC amended its regulations on brokered deposits and interest rate restrictions to conform with changes to section 29 of the Federal Deposit Insurance Act made by section 202 of the EGRPCA related to reciprocal deposits. The FDIC also made conforming amendments to the FDIC's regulations governing deposit insurance assessments.⁶⁰

- *Unsafe and Unsound Banking Practices Relating to Brokered Deposits and Interest Rate Restrictions:* In 2021, the FDIC revised regulations relating to the brokered deposits and interest rate

restrictions that apply to less than well capitalized IDIs. For brokered deposits, the FDIC issued a rule to establish a new framework for analyzing certain provisions of the "deposit broker" definition, including "facilitating" and "primary purpose." For the interest rate restrictions, the FDIC amended its methodology for calculating the national rate, the national rate cap, and the local market rate cap.⁶¹

- *Registration of Securities Transfer Agents:* The FDIC issued a rule in 2016 to amend its regulations requiring insured State nonmember banks, or subsidiaries of such banks, and insured State savings associations and subsidiaries of such State savings associations, that act as transfer agents for qualifying securities under section 12 of the Securities Exchange Act of 1934 to register with the FDIC. The rule also revised the definition of qualifying securities to reflect statutory changes to the Securities and Exchange Act of 1934.⁶²

V. The Agencies' Review of Regulations Under Section 610 of the Regulatory Flexibility Act (RFA)

Consistent with past practice, the agencies will use the EGRPRA review to satisfy their respective obligations under section 610 of the RFA.⁶³ To that end, for each rule that has a significant impact on a substantial number of small entities issued in the last 10 years, the agencies invite comment on (1) the continued need for the rule; (2) the complexity of the rule; (3) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and (4) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule. The purpose of the

⁶¹ 86 FR 6742 (Jan. 22, 2021).

⁶² 81 FR 27295 (May 6, 2016).

⁶³ Section 610 of the Regulatory Flexibility Act, 5 U.S.C. 610, imposes a continuing obligation on the agencies to review regulations that may have a significant economic impact upon a substantial number of small entities within 10 years after a final rulemaking is published. A subset of the rules the agencies will review under EGRPRA will also be reviewed under the section 610 review criteria. The agencies will indicate which rules are subject to section 610 review. The factors the agencies consider in evaluating a rule under 5 U.S.C. 610 are (1) the continued need for the rule; (2) the nature of complaints or comments received concerning the rule from the public; (3) the complexity of the rule; (4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and (5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

⁵³ 83 FR 38460 (Aug. 6, 2018).

⁵⁴ 83 FR 21167 (May 9, 2018).

⁵⁵ 82 FR 42882 (Sept. 12, 2017).

⁵⁶ 84 FR 59194 (Nov. 1, 2019).

⁵⁷ 89 FR 56620 (July 9, 2024).

⁵⁸ 84 FR 37020 (July 30, 2019).

⁵⁹ 82 FR 35584 (July 31, 2017).

⁶⁰ 84 FR 1346 (Feb. 4, 2019); 84 FR 15095 (April 15, 2019).

review will be to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic

impact of the rules upon a substantial number of such small entities.

The agencies have not identified any rules pertaining to Rules of Procedure; Safety and Soundness; and Securities that would have a significant impact on a substantial number of small entities.⁶⁴ The agencies will consider public

comments submitted through the EGRPRA review process and agency experience to identify regulations where the agencies can reduce burdens that have a significant impact on a substantial number of small, insured depository institutions.⁶⁵

Subject	National banks	State member banks	State non-member banks	Federal savings associations	State savings associations	BHCs & FHCs — — — — SLHCs
Rules of Procedure:	Interagency Regulations:					
Uniform Rules of Practice and Procedure.	12 CFR part 19	12 CFR part 263 ..	12 CFR part 308 ..	12 CFR part 19	12 CFR part 308 ..	12 CFR part 263.
OCC Regulations						
Voluntary Liquidation of a National Bank or Federal Savings Association.	12 CFR 5.48 .....	.....	.....	12 CFR 5.48.		
FDIC Regulations ¹						
Resolution and Receivership Rules.	12 CFR part 360 ..	12 CFR part 360 ..	12 CFR part 360 ..	12 CFR part 360 ..	12 CFR part 360.	
Recordkeeping for Timely Deposit Insurance Determination.	12 CFR part 370 ..	12 CFR part 370 ..	12 CFR part 370 ..	12 CFR part 370 ..	12 CFR part 370.	
Recordkeeping Requirements for Qualified Financial Contracts.	12 CFR part 371 ..	12 CFR part 371 ..	12 CFR part 371 ..	12 CFR part 371 ..	12 CFR part 371.	
Restrictions on Sale of Assets by the Federal Deposit Insurance Corporation.	12 CFR part 340 ..	12 CFR part 340 ..	12 CFR part 340 ..	12 CFR part 340 ..	12 CFR part 340.	
Safety and Soundness:	Interagency Regulations:					
Minimum Security Procedures.	12 CFR part 21, subpart A.	12 CFR 208.61 [Reg. H].	12 CFR part 326, subpart A.	12 CFR part 168 ..	12 CFR part 326, subpart A.	
Appraisal Standards for Federally Related Transactions.	12 CFR part 34, subpart C.	12 CFR 208.50 [Reg. H]; 12 CFR part 225, subpart G [Reg. Y].	12 CFR part 323 ..	12 CFR part 34, subpart C.	12 CFR part 323	12 CFR part 225, subpart G [Reg. Y].
Real Estate Lending Standards.	12 CFR part 34, subpart D.	12 CFR part 208, appx. C [Reg. H].	12 CFR part 365, subpart A.	12 CFR 160.101 ..	12 CFR part 365, subpart A.	
Appraisals: Higher-Priced Mortgages.	12 CFR part 34, subpart G.	12 CFR 226.43; 12 CFR part 226, appx. N and O, and supp. I [Reg. Z].	12 CFR part 1026 [Reg. Z].	12 CFR part 34, subpart G.	12 CFR part 1026 [Reg. Z].	12 CFR 226.43; 12 CFR part 226, appx. N and O, and supp. I [Reg. Z].
						12 CFR 226.43; 12 CFR part 226, appx. N and O, and supp. I [Reg. Z].
Appraisal Management Company Minimum Standards.	12 CFR part 34, subpart H.	12 CFR part 225, subpart M [Reg. Y].	12 CFR part 323, subpart B.	12 CFR part 34, subpart H.	12 CFR part 323, subpart B.	
Credit Risk Retention	12 CFR part 43	12 CFR part 244 [Reg. RR].	12 CFR part 373 ..	12 CFR part 43	12 CFR part 373	12 CFR part 244 [Reg. RR].
						12 CFR part 244 [Reg. RR].
Frequency of Safety and Soundness Examination.	12 CFR 4.6–7	12 CFR 208.64 [Reg. H].	12 CFR 337.12	12 CFR 4.6 (See also: 12 CFR 163.170).	12 CFR 337.12.	
Liquidity Risk	12 CFR part 50	12 CFR part 249 [Reg. WW].	12 CFR part 329 ..	12 CFR part 50	12 CFR part 329	12 CFR part 249 [Reg. WW].
						12 CFR part 249 [Reg. WW].
Mandatory Contractual Requirements for Qualified Financial Contracts.	12 CFR part 47	12 CFR part 252, subpart I [Reg. YY].	12 CFR part 382 ..	12 CFR part 47	12 CFR part 382	12 CFR part 252, subpart I [Reg. YY].

⁶⁴ The FDIC certified that the Unsafe and Unsound Banking Practices Relating to Brokered Deposits and Interest Rate Restrictions rule issued in 2021 would not have a significant economic effect on a substantial number of small entities, after conducting a full Final Regulatory Flexibility

Act analysis. Because some expected effects were hard to assess or accurately quantify, the FDIC published a small entity compliance guide.

⁶⁵ The review will be consistent with the requirements of a Regulatory Flexibility Act, section 610 review. The agencies will determine whether

particular rules should be continued without change, amended, or rescinded, consistent with the objectives of applicable statutes, to minimize any significant economic impact of the rules on a substantial number of small, insured depository institutions.

Subject	National banks	State member banks	State non-member banks	Federal savings associations	State savings associations	BHCs & FHCs — — — — — SLHCs
Resolution Plans	12 CFR 360.10	12 CFR 360.10	12 CFR 360.10	12 CFR 360.10	12 CFR 360.10	12 CFR part 381; 12 CFR part 243 [Reg. QQ].
Safety and Soundness Standards.	12 CFR part 30 generally; 12 CFR part 30, appx. A.	12 CFR part 208, appx. D–1 [Reg. H].	12 CFR part 364, appx. A.	12 CFR part 30 generally; 12 CFR part 30, appx. A.	12 CFR part 364, appx. A.	
Transactions with Affiliates ...	12 CFR part 223 [Reg. W]; 12 CFR part 31.	12 CFR part 223 [Reg. W].	12 CFR part 223 [Reg. W].	12 CFR part 223 [Reg. W]; 12 CFR part 31.	12 CFR part 223 [Reg. W].	
OCC Regulations:						
Heightened Standards Guidelines.	12 CFR part 30, appx. D.	.....	.....	12 CFR part 30, appx. D.		
Lending Limits	12 CFR part 32 ....	.....	.....	12 CFR part 32	12 CFR part 32.	
Recovery Planning Guidelines.	12 CFR part 30, appx. E.	.....	.....	12 CFR part 30, appx. E.		
Other Real Estate Owned	12 CFR part 34, subpart E.	.....	.....	12 CFR part 34, subpart E.		
Federal Savings Association Financial Management Policies.	.....	.....	.....	12 CFR part 163, subpart F.		
Federal Savings Association Lending and Investment — Additional Safety and Soundness Limitations.	.....	.....	.....	12 CFR part 160 ..	12 CFR part 160.	
Board Regulations:						
Appraisals: Appraiser Independence.	.....	12 CFR 226.42; 12 CFR part 226, supp. I [Reg. Z].	12 CFR part 1026 [Reg. Z].	.....	.....	12 CFR 226.42; 12 CFR part 226, supp. I [Reg. Z].
						12 CFR 226.42; 12 CFR part 226, supp. I [Reg. Z].
Definitions related to the Financial Stability Oversight Council.	.....	.....	.....	.....	.....	12 CFR part 242 [Reg. PP].
Enhanced Prudential Standards Risk Committee Requirement (for certain BHCs) Standards for BHCs with consolidated assets \$50 billion or more and less than \$100B.	.....	.....	.....	.....	.....	12 CFR part 252, subpart C [Reg. YY].
Enhanced Prudential Standards Risk Committee Requirement (for certain BHCs) Standards for BHCs with consolidated assets \$100 billion or more.	.....	.....	.....	.....	.....	12 CFR part 238, subpart M [Reg. LL].
Extensions of Credit by Federal Reserve Banks.	12 CFR part 201 [Reg. A].	12 CFR part 201 [Reg. A].	12 CFR part 201 [Reg. A].	12 CFR part 201 [Reg. A].	12 CFR part 201 [Reg. A].	12 CFR 252.33 [Reg. YY].
Financial Market Utilities	12 CFR part 234 [Reg. HH].	12 CFR part 234 [Reg. HH].	12 CFR part 234 [Reg. HH].	12 CFR part 234 [Reg. HH].	12 CFR part 234 [Reg. HH].	12 CFR 238.122 [Reg. LL].
Limitations on Interbank Liabilities.	12 CFR part 206 [Reg. F].	12 CFR part 206 [Reg. F].	12 CFR part 206 [Reg. F].	12 CFR part 206 [Reg. F].	12 CFR part 206 [Reg. F].	12 CFR part 234 [Reg. HH].
Securities Holding Companies.	.....	.....	.....	.....	.....	12 CFR part 241 [Reg. OO].
Single Counterparty Credit Limit.	.....	.....	.....	.....	.....	12 CFR part 252, subparts H and Q [Reg. YY].
FDIC Regulations:						
Annual Independent Audits and Reporting Requirements.	12 CFR part 363 ..	12 CFR part 363 ..	12 CFR part 363 ..	12 CFR part 363 ..	12 CFR part 363.	
Unsafe and Unsound Banking Practices (Standby Letters of Credit).	.....	.....	12 CFR 337.2.			
Unsafe and Unsound Banking Practices (Brokered Deposits).	12 CFR 337.6	12 CFR 337.6	12 CFR 337.6	12 CFR 337.6	12 CFR 337.6.	
Securities:						
Interagency Regulations:						
Banks as Registered Clearing Agencies.	12 CFR 19.135	12 CFR 208.32–33 [Reg. H].	12 CFR part 308, subpart S.			
Banks as Securities Transfer Agents.	12 CFR 9.20	12 CFR 208.31 [Reg. H].	12 CFR part 341.			
Government Securities Sales Practices.	12 CFR part 13	12 CFR 208.37 [Reg. H].	12 CFR part 368.			

Subject	National banks	State member banks	State non-member banks	Federal savings associations	State savings associations	BHCs & FHCs — — — — SLHCs
Recordkeeping and Confirmation of Securities Transactions Effected by Banks.	12 CFR part 12	12 CFR 208.34 [Reg. H].	12 CFR part 344 ..	12 CFR part 151 ..	12 CFR part 344.	
Reporting Requirements for Reported Securities Under the Securities Exchange Act of 1934.	12 CFR part 11	12 CFR 208.36 [Reg. H].	12 CFR part 335 ..	12 CFR part 11	12 CFR part 335; 12 CFR part 390, subpart Q; 12 CFR part 390, subpart W.	
Securities Offerings	12 CFR part 16 ....	.....	12 CFR part 335 ..	12 CFR part 16	12 CFR part 335; 12 CFR part 390, subpart Q; 12 CFR part 390, subpart W.	
OCC Regulations: Municipal Securities Dealer Activities of Banks.	12 CFR part 10 ....	.....	.....	12 CFR part 10.		
Federal Savings Associations Proxies.	.....	.....	.....	12 CFR part 169 ..	12 CFR part 169.	
Federal Savings Associations Rules on the Issuance and Sale of Institution Securities.	.....	.....	.....	12 CFR 163.5; 12 CFR part 163, subpart C.		
Board Regulations: Credit by Banks and Persons Other than Brokers or Dealers for the Purpose of Purchasing or Carrying Margin Stock.	12 CFR part 221 [Reg. U].	12 CFR part 221 [Reg. U].	12 CFR part 221 [Reg. U].	12 CFR part 221 [Reg. U].	12 CFR part 221 [Reg. U].	12 CFR part 221 [Reg. U].
Credit by Brokers and Dealers.	.....	.....	.....	.....	.....	12 CFR part 221 [Reg. U]. 12 CFR part 220 [Reg. T].

¹ The Orderly Liquidation Authority subject was included in the chart published on Feb. 6, 2024 (89 FR 8084) but FDIC staff has further reviewed the regulations, 12 CFR part 380, and believes that these rules are not subject to EGRPRA. This subject has been removed from the chart.

Michael J. Hsu,
Acting Comptroller of the Currency.
By order of the Board of Governors of the Federal Reserve System.
Ann E. Misback,
Secretary of the Board.
Federal Deposit Insurance Corporation.
By order of the Board of Directors.
Dated at Washington, DC, on November 20, 2024.
James P. Sheesley,
Assistant Executive Secretary.
[FR Doc. 2024–28939 Filed 12–10–24; 8:45 am]
BILLING CODE 4810–33–P; 6210–01–P; 6714–01–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Chapter II

[Docket No. DOT–OST–2024–0062]

RIN 2105–AF20

Airline Passenger Rights

AGENCY: Office of the Secretary (OST), Department of Transportation (DOT).
ACTION: Advanced notice of proposed rulemaking (ANPRM).

SUMMARY: The U.S. Department of Transportation (Department or DOT) seeks public comment on a rulemaking to ensure consumers experiencing

significant flight disruptions are taken care of and protected from financial losses. Specifically, the Department is considering imposing requirements on airlines to provide affected passengers cash compensation, free rebooking, and amenities such as meals, lodging for overnight delays, and transportation to and from lodging. The Department also seeks comment on whether some protections should be provided during any type of disruption, how to determine whether a cancellation or delay is within an airline’s control, and how to ensure that passengers receive the correct information from the airline in a timely manner. Additionally, the Department solicits comments on how to ensure that the process for passengers to receive compensation and amenities is clear, simple, straightforward, and prompt, and whether to require certain aspects of the process to be automatic. Further, the Department seeks comment on whether it should require airlines to offer free rebooking on the same or partner airline to a passenger with a disability and others in the same travel party when one or more accessibility feature needed by the person with disability is unavailable.

DATES: Comments should be filed by February 10, 2025. Late-filed comments will be considered to the extent practicable.

ADDRESSES: You may file comments identified by the docket number DOT–OST–2024–0062 by any of the following methods:

- *Federal eRulemaking Portal:* go to <https://www.regulations.gov> and follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Ave. SE, Washington, DC, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

Instructions: You must include the agency name and docket number DOT–OST–2024–0062 or the Regulatory Identification Number (RIN 2105–AF20) for the rulemaking at the beginning of your comment. All comments received will be posted without change to <https://www.regulations.gov>, including any personal information provided.

Privacy Act: Anyone is able to search the electronic form of all comments received in any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). For information on DOT’s compliance with

the Privacy Act, please visit <https://www.transportation.gov/privacy>.

Docket: For access to the docket to read background documents and comments received, go to <https://www.regulations.gov> or to the street address listed above. Follow the online instructions for accessing the docket.

FOR FURTHER INFORMATION CONTACT:

Heather Filemyr, John Wood, or Blane A. Workie, Office of Aviation Consumer Protection, U.S. Department of Transportation, 1200 New Jersey Ave. SE, Washington, DC 20590, 202–366–9342, 202–366–7152 (fax), heather.filemyr@dot.gov, john.wood@dot.gov, or blane.workie@dot.gov (email).

SUPPLEMENTARY INFORMATION:

A. Background and Overview of Existing Requirements

The Department's regulation at 14 CFR 259.5 requires U.S. and foreign airlines to have and adhere to a customer service plan that identifies the services that an airline provides to mitigate passenger hardships resulting from flight cancellations and misconnections. Under this regulation, airlines are free to choose the services to provide passengers affected by flight disruptions. In 2022, after an unacceptable level of flight delays and cancellations, the Department carefully reviewed these plans to determine how U.S. airlines were caring for their passengers and found that the airlines' commitments in these plans did not guarantee adequate services even for flight delays and cancellations within the airline's control. However, after a two-year DOT push to improve the passenger experience, today, almost all of the largest U.S. airlines voluntarily commit in their customer service plan to provide services such as meals, lodging, and free rebooking to passengers impacted by cancellations and lengthy delays when airlines are responsible.¹ While the Department had also urged U.S. airlines to voluntarily commit to compensating passengers experiencing significant flight disruptions due to circumstances within the airline's control, no U.S. airline currently guarantees cash compensation, and only

three airlines guarantee compensation in credits or frequent flyer miles for airline-caused delays and cancellations.

The ability of airlines to choose the services that they provide to mitigate passenger inconveniences resulting from flight disruptions under current U.S. law contrasts with consumer protection regimes in other jurisdiction like the European Union (EU) and Canada, where airlines are required to provide compensation and assistance to consumers affected by flight disruptions. In the EU, airlines must provide compensation to consumers facing cancellations or lengthy delays unless the airline proves that the cancellation or delay is "caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken."² Under that regime, airlines must also provide services, including meals, hotels, and ground transportation to and from the hotel (for overnight cancellations and delays) to passengers facing lengthy delays or cancellations and rebooking to passengers whose flights are cancelled, regardless of the cause of the delay or cancellation and whether it is unavoidable by the airline.³ United Kingdom regulations impose similar requirements and also use the "extraordinary circumstances" construct for compensation, with compensation amounts established in pounds.⁴ Current Canadian Air Passenger Protection Regulations (APPRs) require airlines to provide compensation for lengthy delays and cancellations that are controllable by the airline and not required for safety purposes and to provide services,

including meals, overnight accommodations, and ground transportation to and from the hotel (for overnight cancellations and delays), to passengers for lengthy delays and cancellations that are controllable by the airline, regardless of whether the controllable delay or cancellation is required for safety.⁵ Brazilian regulations also contain similar protections for air passengers, including a right to compensation, meals, and hotel accommodations for cancellations and lengthy flight delays.⁶

In developing this ANPRM, Department staff met with individuals from the Canadian Transportation Agency (CTA) on June 1, 2023, and the European Commission (EC) on June 12, 2023, to better understand the requirements under those existing regulatory regimes. On July 19, 2023, at the request of the International Air Transport Association (IATA) and Airlines for America (A4A), Department staff met with representatives of those groups to hear their perspective on compensation and assistance to passengers in the event of flight delays and cancellations. On May 10, 2024, at the request of AirHelp, Department staff met with representatives from that organization about its experience filing claims on behalf of passengers with airlines covered by compensation requirements in foreign jurisdictions, including the EU. On September 10, 2024, Department staff attended a panel discussion moderated by the National Consumers League, supported by a grant from AirHelp, and featuring speakers from the Travel Technology Association, U.S. Public Interest Research Group, the White House, and AirHelp, at which those groups discussed this contemplated rulemaking. Senator Edward Markey also gave remarks at that event. All documents submitted to the Department pertaining to these meetings and a summary of the panel discussion have been added to the rulemaking docket.⁷

B. Need for Rulemaking

(1) Data Indicates Controllable Cancellations and Lengthy Flight Delays Affect Millions of Passengers

Cancellations and lengthy flight delays pose significant inconvenience,

¹ All ten of the largest U.S. airlines guarantee meals and rebooking without charge on the ticketed airline, and nine of the 10 guarantee hotel accommodation and ground transportation to and from the hotel for passengers affected by controllable overnight delays and cancellations. Six of the 10 guarantee fee-free rebooking on a partner airline or another airline with which it has an agreement for controllable cancellations and five do so for lengthy, controllable delays. See <https://www.transportation.gov/airconsumer/airline-customer-service-dashboard>.

² See EC No 261/2004, Article 5; see also Joined Cases C–402/07 and C–432/07, *Sturgeon v. Air France*, 2009 E.C.R. I–10923, ¶ 69 (applying EU compensation requirements to delays of three hours or more).

³ See EC No 261/2004, Articles 5.1, 6.1, 8.1; see also European Commission Notice: Interpretative Guidelines on Regulation (EC) No 261/2004 of the European Parliament and of the Council Establishing Common Rules on Compensation and Assistance to Passengers in the Event of Denied Boarding and of Cancellation or Long Delay of Flights and on Council Regulation (EC) No 2027/97 on Air Carrier Liability in the Event of Accidents as Amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council ("EU Interpretive Guidelines") (June 15, 2016) at C 214/13 ("According to the Regulation, the air carrier is obliged to fulfil the obligation of care even when the cancellation of a flight is caused by extraordinary circumstances, that is to say circumstances which could not have been avoided even if all reasonable measures had been taken"), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XC0615\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XC0615(01)).

⁴ See <https://www.caa.co.uk/passengers/resolving-travel-problems/delays-and-cancellations/> and <https://www.caa.co.uk/passengers/resolving-travel-problems/delays-and-cancellations/cancellations/>.

⁵ APPRs, ¶¶ 12, 19. Under the Canadian Regulations, airlines must also provide rebooking for cancellations and lengthy delays that are either within or outside the airline's control. See APPRs, ¶¶ 17, 18. As discussed later in this ANPRM, the Canadian Transportation Agency has initiated a consultation to revise the APPRs.

⁶ See ANAC Resolution No. 400 (Dec. 13, 2016).

⁷ Docket available at <https://www.regulations.gov/docket/DOT-OST-2024-0062/>.

stress, and financial cost to impacted passengers. Such delays and cancellations cause passengers to lose time, may disrupt other reservations (such as hotel reservations), and may cause passengers to miss important events.⁸ Flight cancellations, delays, and missed connections occurred in significant numbers as airlines adjusted their operations to meet the post-COVID pandemic air travel demand and have been the subject of a large number of the complaints about airlines that consumers have submitted to the Department since then.⁹

According to flight performance data reported by the largest U.S. carriers to the Department's Bureau of Transportation Statistics (BTS), in calendar year 2022, the carriers combined cancelled 190,038 domestic scheduled passenger flights (approximately 2.7 percent of their total domestic scheduled passenger flights), and over 1.4 million of their domestic scheduled passenger flights (more than 20 percent of their total domestic scheduled passenger flights) were delayed in arriving by 15 minutes or more.¹⁰ Of the more than 1.4 million delayed flights, 85,892 (approximately 6.1 percent) were delayed three hours or more.¹¹

In calendar year 2023, these carriers combined cancelled 93,897 domestic scheduled passenger flights (approximately 1.3 percent of their total domestic scheduled passenger flights).¹² Further, more than 1.4 million of the

carriers' domestic scheduled passenger flights (approximately 20 percent of their total domestic scheduled passenger flights) were delayed 15 minutes or more that year.¹³ Of the more than 1.4 million delayed flights, 95,024 of them were delayed three hours or more, which was approximately 6.8 percent of total flights delayed that year.¹⁴

A significant percentage of the domestic cancellations that air carriers reported to BTS in 2022 and 2023 were reported as "air carrier"-caused and most of the domestic delays of three hours or more that air carriers reported to BTS listed "air carrier" as a cause of the delay. Carriers reported to BTS that 38 percent of their domestic scheduled passenger flight cancellations were "air carrier"-caused in calendar year 2022, and 28 percent of their domestic scheduled passenger flight cancellations were "air carrier"-caused in calendar year 2023.¹⁵ For domestic scheduled passenger flight delays of three hours or more, the carriers reported to BTS that 65 percent of those delays included an "air carrier" cause of delay in 2022, and 62 percent included an "air carrier" cause of delay in 2023.¹⁶ These delay percentages do not include additional delays that were reported by carriers as caused by "late arriving aircraft." Such delays are not reported as "air carrier"-caused even when the reason for the "late arriving aircraft" was within the carrier's control.

In April 2023, the U.S. Government Accountability Office (GAO) published a report describing its examination of controllable cancellations and delays following the initial disruption to air transportation in 2020 due to the global COVID pandemic and documented concerns with the gap in consumer protections available to passengers facing cancellations and lengthy delays.¹⁷ GAO reviewed data from the Department's BTS and concluded that as airlines recovered in 2021 and 2022 "[s]ustained cancellation events, or a series of days where an airline cancelled a large percentage of daily flights, lasted longer and became more common as travel demand increased."¹⁸ GAO

estimated that flight cancellations from July 2021 through April 2022 potentially affected over 15 million passengers, and flight delays during that time period potentially affected over 116 million passengers.¹⁹ The 2023 GAO report also concluded that: "[b]eyond DOT's requirement for airlines to provide cash refunds to passengers for cancelled or significantly changed flights, airline compensation to passengers is generally limited. Airlines are not required to provide accommodations for flight disruptions unless specified in an airline's contract of carriage or customer service plan, although airlines may provide additional accommodations in certain circumstances. As we have previously reported, airline assistance to affected passengers can vary significantly. Flight disruptions, particularly if they are long lasting, can significantly inconvenience passengers."²⁰

The Department's Office of Aviation Consumer Protection investigates large-scale and sustained disruptive events that impact large numbers of passengers to ensure compliance with aviation consumer protection requirements. At times, these investigations can also reveal gaps in protections for aviation consumers, such as the importance for consumers to know whether a cancellation or delay is considered controllable and would entitle them to promised services and amenities. For example, from late December 2022 through early January 2023, Southwest Airlines cancelled 16,900 flights and stranded over two million passengers, reporting most of the cancelled flights to BTS as due to circumstances within the carrier's control.²¹ In July 2024, following a global information technology (IT) systems issue, Delta Air Lines cancelled more than 5,550 flights over a five-day period.²² The

period in 2018, and 42.9 percent more than in the first 4 months of 2019. There were 12.6 percent fewer scheduled flights during the relevant 2022 time period as compared to the same time period in 2019.").

¹⁹ *Id.* at 17.

²⁰ *Id.* at 9.

²¹ In December 2023, the Department assessed a \$140 million civil penalty against Southwest Airlines for numerous violations of consumer protection laws during and after its operational failures between December 2022 through January 2023. The penalty was 30 times larger than any previous DOT penalty for consumer protection violations. The majority of the penalty will go towards compensating future Southwest passengers affected by cancellations or significant delays caused by the airline. See *Southwest Airlines Co.*, DOT Order No. 2023-12-11, Consent Order (Dec. 15, 2023).

²² Bureau of Transportation Statistics, *Arrival Performance by Carrier*, July 19-24, 2024, available at <https://www.regulations.gov/docket/DOT-OST-2024-0062/>.

⁸ See *Airline Passenger Protections: Observations on Flight Delays and Cancellations, and DOT's Efforts to Address Them*, GAO-23-105524 ("2023 GAO Report"), at 22 (Apr. 2023), available at <https://www.gao.gov/assets/gao-23-105524.pdf>.

⁹ Of the 49,958 air travel service complaints that the Department received in calendar year 2021, 13 percent concerned flight problems. See <https://www.transportation.gov/individuals/aviation-consumer-protection/february-2022-air-travel-consumer-report>. Of the 77,656 air travel service complaints that the Department received in calendar year 2022, 32 percent concerned flight problems. See <https://www.transportation.gov/resources/individuals/aviation-consumer-protection/february-2023-air-travel-consumer-report>. While the Department does not have complaint data available for calendar year 2023 because of revisions in how it processes consumer complaints for efficiency, it estimates that it received 88,136 complaints based on receiving 96,853 submissions that year and complaints making up an average of 91 percent of submissions over the past three years. See <https://www.transportation.gov/resources/individuals/aviation-consumer-protection/june-december-2023-and-2023-annual-consumer>. The percentage of complaints that concern flight problems in calendar year 2023 is not known.

¹⁰ Bureau of Transportation Statistics, *On-Time Performance, Marketing Carrier Flight Delays and Cancellations 2022 and 2023*, available at <https://www.regulations.gov/docket/DOT-OST-2024-0062/>.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 2023 GAO Report.

¹⁸ See *id.* at 13 ("In the last half of 2021, there were 6.3 percent more sustained cancellation events than during the same time period in 2018, and 12.2 percent more than in 2019, despite 14 percent fewer scheduled flights compared to 2019. In the first 4 months of 2022, the number of sustained cancellation events increased even more substantially, with 56.9 percent more events in this time period compared to the same 4-month time

Department immediately notified U.S. carriers that it considers the flight disruptions resulting from the IT outage to be “controllable” since the issue is a computer outage of the carrier’s equipment and informed carriers that DOT expected the carriers to make good on the commitments that they voluntarily made to customers affected by controllable cancellations and delays. Notably, the Department saw a significant uptick in consumer complaints following each of these events, reflecting significant consumer harm, including financial harm from these controllable cancellations and delays.

(2) Inconsistency in How Airlines Determine Controllable Cancellations and Delays

The Department is exploring in this ANPRM how to determine which delays and cancellations are controllable such that airlines are held responsible for free rebooking, compensation, and payment for services such as meals, lodging, or transportation to and from lodging. Currently, when a flight disruption involves more than one cause, airlines determine whether the event was or was not controllable in different ways. For example, one airline might look at the first cause, another the longest cause, and another may use yet a different method to deem a multi-factor event controllable or not controllable, potentially ignoring factors that were within their control that caused or exacerbated consumer harm.

At the December 2021 meeting of the Department’s Aviation Consumer Protection Advisory Committee (ACPAC), presentations by a representative of the Arizona Attorney General’s Office (AAG) and representatives of A4A, among others, addressed the causes of cancellation and delay when weather is involved. The AAG representative explained that airlines have incentive to blame delays on weather because, when a delay is attributed to weather, the airline would not have to provide vouchers, meals, or hotels, and other amenities, if guaranteed in its customer service plan or contract of carriage for controllable events, and air travelers likely are more understanding about weather delays than delays due to mismanagement or short staffing. Also at that meeting, representatives of A4A explained that a weather event can affect multiple areas of airline planning in a scope and scale unique to each circumstance, including scheduling, flight planning, crew planning, aircraft routing, maintenance planning, gate sequencing, and aircraft and passenger support. One A4A

representative stated that FAA data indicates that 70 percent of all air traffic delays are caused by weather, which in the representative’s view explains why airlines often described weather as the root cause of a delay. The representative asserted that there is no clear demarcation of when a weather event stops being the original or primary factor for a delay associated with a flight or sequence of flights. An additional A4A representative added that some airlines’ contracts of carriage, to the extent they provide for amenities for flight irregularities, exclude delays or cancellations where the cause is outside the airline’s control, such as weather. He said that if weather is the original or primary factor, an airline’s contractual obligation to provide amenities may not apply based on the wording of the contract of carriage.

Section 512 of the FAA Reauthorization Act of 2024 (2024 FAA Act) requires the Department to direct certain air carriers “to establish policies regarding reimbursement for lodging, transportation between such lodging and the airport, and meal costs incurred due to a flight cancellation or significant delay directly attributable to the air carrier.” The statute does not further describe what “directly attributable” to the air carrier means, including when multiple causal factors are involved in a flight disruption. A regulation would be necessary to require air carriers to establish policies under section 512. The regulation could also clarify which cancellations and delays are directly attributable to a carrier.

(3) Challenges Remain for Passengers Seeking Rebooking, Compensation, Notifications, and Services Such as Meals, Lodging, and Transportation to and From Lodging

As previously discussed, current Department regulations do not require an airline to provide compensation, services, notifications of services due, or reimbursements to passengers impacted by cancellations and lengthy delays that are within its control unless the airline voluntarily commits to do so. Many airlines, including foreign airlines, have not made voluntary guarantees in their customer service plans to provide needed services and compensation to their customers affected by controllable cancellations or delays. In addition, airlines that have made enforceable commitments to their customers for controllable flight cancellations and lengthy controllable delays, including those reflected on the Department’s

Airline Customer Service Dashboard,²³ can remove these commitments from their customer service plan at any time. Further, the competition encouraged by the Dashboard has not resulted in any U.S. airline committing to provide cash compensation to passengers for controllable flight cancellations and lengthy controllable flight delays. Also, while many U.S. airlines have committed to providing free rebooking on partner airlines, meals, hotels for passengers affected by overnight cancellations or delays, and transportation to and from the hotel, not all U.S. airlines have, demonstrating a potential need for protections in this area.

In addition, on May 16, 2024, the President signed the 2024 FAA Act into law.²⁴ Section 512 of the 2024 FAA Act requires the Department to “direct all air carriers providing scheduled passenger interstate or intrastate air transportation to establish policies regarding reimbursement for lodging, transportation between such lodging and the airport, and meal costs incurred due to a flight cancellation or significant delay directly attributable to the air carrier.” Before the 2024 FAA Act was passed by Congress, the Executive Office of the President released a Statement of Administration Policy explaining that the Act “include[d] key consumer protection provisions on airline reimbursement for incurred costs due to controllable disruptions . . . that would set a floor that the Department of Transportation could build on as deemed appropriate by the Secretary of Transportation.”²⁵

This ANPRM requests public comment to assist the Department in its consideration of what regulations may be needed to implement the requirements of section 512 of the 2024 FAA Act, ensure that airlines do not engage in unfair or deceptive practices or unfair methods of competition by establishing minimum requirements for when and how airlines must compensate passengers and make relevant reimbursements and services available to them, ensure that these protections are not subject to removal at an airline’s discretion, and ensure passengers are protected from financial loss whether scheduled to be on a domestic or international flight that is cancelled or significantly delayed due to

²³ See <https://www.transportation.gov/airconsumer/airline-customer-service-dashboard>.

²⁴ Public Law 118–63.

²⁵ See Statement of Administration Policy, Senate Substitute Amendment to H.R. 3935—FAA Reauthorization Act of 2024 (May 8, 2024), available at <https://www.whitehouse.gov/wp-content/uploads/2024/05/SAP-SSA-HR3935.pdf>.

circumstances within an airline's control.

The Department is also issuing this ANPRM to assist its consideration of what regulations may be needed to ensure that passengers receive timely notifications of available compensation, rebooking, and services such as meals, lodging, and transportation to and from lodging. Some airlines currently condition service guarantees in their customer service plans on affirmative requests by consumers for those services.²⁶ Many passengers may not know the intricacies of airlines' customer service plan guarantees, and, even when passengers are aware of an airline's commitments, they may not know that a particular cancellation or delay is within the airline's control and so a service is owed.

The Department's ACPAC recently considered the quality and quantity of information on the causes of air carrier delays and cancellations provided to passengers adversely affected by an airline cancellation or delay, focusing on whether it is an unfair or deceptive practice for an air carrier to inform a passenger that a flight is delayed or cancelled due to weather alone when other factors are involved. At the December 2021 ACPAC meeting, a representative of the AAG and representatives of A4A, among others, presented to the ACPAC on the topic. The AAG stated that consumers need accurate information about the reasons for a delay so that they can exercise their rights and make an informed decision about their options at the time and whether to use that airline in the future. Also at that meeting, an A4A representative stated that he did not find withholding information on cause of delay meets the Department's test for unfair or deceptive practices in air transportation. The representative stated that the Department's regulation that requires airlines to provide passengers flight status notification in the event of a known delay, cancellation, or diversion, 14 CFR 259.8, is sufficient to inform consumers of the material information. The representative noted that the current regulation does not require airlines to provide the cause of a flight disruption but addresses material information, such as information that would assist the

passenger in deciding when to go to the airport or when to request a refund or rebooking on another flight. The representative added that some airlines' contracts of carriage, to the extent they provide for amenities for flight irregularities, exclude delays or cancellations where the cause is outside the airline's control, such as weather. He said that if weather is the original or primary factor, an airline's contractual obligation to provide amenities may not apply based on the wording of the contract of carriage. The representative raised concern should airlines be required to provide real-time detailed explanations of all subsidiary factors contributing to the delay that was fundamentally caused by weather, stating that airlines may be compelled to publish unsubstantiated information that the airlines lacked adequate time to confirm, which he believed would be a disservice to consumers.

At the December 2022 ACPAC meeting, the ACPAC deliberated on the topic of information provided to consumers adversely affected by airline delays or cancellations. The ACPAC member representing consumers asked that the ACPAC consider recommending that airlines notify passengers when a service or amenity becomes available due to a controllable delay or controllable cancellation. This member stated that his proposal reflected concern that, without such notifications, passengers would be required to understand an airline's customer service plan or contract of carriage and affirmatively request amenities from the airline. The member representing airlines opposed the recommendation, noting that information about services and amenities is available through the Department's Airline Customer Service Dashboard, and expressed concern about whether an airline would have contact information for the passenger to provide a notification for tickets sold through ticket agents. The member representing consumers responded that the Dashboard is useful to consumers, but some may not know about the Dashboard and those who do would be unsure whether the commitments apply to them because they would not know the cause of the delay or cancellation. After discussion, the ACPAC adopted a recommendation that the Department issue a regulation requiring airlines to notify affected consumers of the availability of services and amenities for controllable delays and cancellations, with the member representing airlines voting against the recommendation.

(4) Harm to Consumers, Including Passengers With Disabilities, When Free Rebooking Is Not Provided

In April 2024, the Department published a final rule, Refunds and Other Consumer Protections, codifying and clarifying its longstanding interpretation that, under 49 U.S.C. 41712, airlines must provide refunds to passengers for flights that are cancelled or significantly changed, regardless of whether the cancellation or change is within the airline's control.²⁷ In August 2024, the Department issued a second final rule, Refunds and Other Consumer Protections (2024 FAA Reauthorization) to implement the refund-related provisions of the 2024 FAA Act.²⁸ These final rules (collectively "Refund Rules") provide, among other things, that passengers are entitled to an automatic refund if their flight is cancelled and they do not accept any alternatives offered. The Refund Rules also provide that passengers are entitled to an automatic refund if they decide not to travel on a changed itinerary when the change results in a flight departing from the origination airport three hours or more for domestic itineraries and six hours or more for international itineraries earlier or later than the original scheduled departure time, or results in the flight departing from a different origination airport or arriving at a different destination airport.²⁹

In addition, under the Department's Refund Rules, an airline must provide an automatic refund to an individual with a disability (and others in that individual's reservation) upon notification that the individual decides not to travel on a changed itinerary because: (1) the individual with a disability is downgraded to a lower class of service that results in one or more accessibility features needed by the individual becoming unavailable, (2) the airline changes the aircraft to a substitute aircraft on which one or more accessibility features needed by the individual are unavailable, or (3) the airline changes the flight to schedule the passenger to travel through one or more connecting airports different from the original itinerary.³⁰

The Department's recent Refund Rules provide important new refund protections for passengers who are negatively impacted by a change in an airline itinerary. Those rules, however, do not require airlines to accommodate

²⁶ See, e.g., American Airlines Customer Service Plan (updated July 19, 2024), available at <https://www.aa.com/i18n/customer-service/support/customer-service-plan.jsp>, and Southwest Airlines Customer Service Plan (revised April 23, 2024), available at <https://www.southwest.com/assets/pdfs/corporate-commitments/customer-service-plan.pdf?clk=7396032> (guaranteeing meals and hotel accommodations "upon request" by the passenger).

²⁷ 89 FR 32760.

²⁸ 89 FR 65534.

²⁹ 14 CFR 260.2 (see definition of *significantly delayed or changed flight* at paragraphs (1) and (2)), 260.6(a).

³⁰ 14 CFR 260.6(b)(1) through (3).

passengers by offering rebooking to meet the passenger's needs, including the accessibility needs of passengers with disabilities. In the rulemaking on Refunds and Other Consumer Protections, the Paralyzed Veterans of America submitted a comment requesting the Department require airlines to "expeditiously locate and offer alternative transportation that meets the specific needs of the passenger with a disability," explaining that a "refund is purposeless if the passenger is stranded."

The Department is using this ANPRM to assist in its assessment of whether it should require airlines to provide rebooking without charge to a passenger when the airline makes a significant change to the passenger's itinerary. This includes an assessment of whether an airline should be required to provide rebooking without charge to a passenger with a disability, and others in the same travel party, when the carrier makes changes that result in the unavailability of an accessibility feature needed by the passenger with a disability or when the carrier makes other significant changes to the itinerary of an individual with a disability, like a change in the origination or destination airport or cancels a flight.

C. Statutory Authority

The Department's rulemaking would be based on several statutory authorities.

(1) *Unfair and Deceptive Practices and Unfair Methods of Competition*

Section 41712 of title 49 of the U.S. Code authorizes the Department to prohibit unfair and deceptive practices and unfair methods of competition by air carriers, foreign air carriers, and ticket agents in air transportation and the sale of air transportation. The Department's rule at 14 CFR 399.79 outlines its policies related to unfair and deceptive practices and defines the terms "unfair" and "deceptive." A practice is "unfair" to consumers if it causes or is likely to cause substantial injury, which is not reasonably avoidable, and the harm is not outweighed by benefits to consumers or competition.³¹ A practice is "deceptive" to consumers if it is likely to mislead a consumer, acting reasonably under the circumstances, with respect to a material matter.³² A matter is material if it is likely to have affected the consumer's conduct or decision with respect to a product or service.³³ Proof

of intent is not necessary to establish unfairness or deception.³⁴ The Department elaborated further on the elements of "unfair" and "deceptive" in a 2022 guidance document.³⁵

The Department may address unfair and deceptive practices under 49 U.S.C. 41712 and 49 U.S.C. 40113(a), which authorizes the Secretary to "take action the Secretary . . . considers necessary to carry out [part A of chapter 49 of the U.S. Code, which contains section 41712], including . . . prescribing regulations, standards, and procedures."

The Department is exploring through this ANPRM whether requirements for services such as rebooking, meals, lodging, and transportation to and from lodging or reimbursements for those services, or compensation are needed to prevent unfair and deceptive practices or unfair methods of competition in the event of cancellations and lengthy delays that are within the airline's control. The Department is also examining whether notifications by airlines to passengers of available services, reimbursements, and compensation when such services are due are necessary to address unfair and deceptive practices. Additionally, the Department is considering whether it may be an unfair or deceptive practice for an airline to fail to provide free rebooking for significant changes, including changes applicable to passengers with disabilities and others in the same travel party when a change in class of service or aircraft affects available accessibility features or a change in airport occurs. Finally, the Department is weighing whether any other unfair methods of competition should be addressed in this rulemaking. If the Department decides to propose regulations declaring a practice unfair or deceptive, then notice and an opportunity to petition the Department for a hearing will be provided in accordance with procedures found in 14 CFR 399.75.

(2) *FAA Reauthorization Act of 2024*

As described previously, section 512 of the 2024 FAA Act requires the Department to "direct all air carriers providing scheduled passenger interstate or intrastate air transportation to establish policies regarding reimbursement for lodging, transportation between such lodging and the airport, and meal costs incurred due to a flight cancellation or significant delay directly attributable to the air carrier." This ANPRM explores how the

Department should implement this statutory requirement.

In addition, section 505 of the 2024 FAA Act requires that certain air carriers must maintain, without charge and available at all times: (1) a customer service telephone line staffed by live agents, (2) a customer chat option that allows for customers to speak to a live agent within a reasonable time, to the greatest extent practicable, or (3) a monitored text messaging number that enables customers to communicate and speak with a live agent directly. Section 505 authorizes DOT to issue such rules as may be necessary to carry out the requirement and provides that airlines must comply with section 505's requirements "without regard to whether the Secretary has promulgated any rules to carry out" section 505. This ANPRM explores whether the Department should propose provisions regarding the manner and timeliness of airline customer service during flight disruptions, whether controllable or not, under this statutory requirement.

(3) *Safe and Adequate Interstate Air Transportation*

This ANPRM also involves topics related to air carriers³⁶ that may involve the Secretary's authority under 49 U.S.C. 41702, which states that "[a]n air carrier shall provide safe and adequate interstate air transportation."³⁷ The Civil Aeronautics Board (CAB), the predecessor to the Department, had the authority to ensure that air carriers provide "safe and adequate service, equipment and facilities" under section 404(a) of the Federal Aviation Act of 1958, which was later codified in 49 U.S.C. 41702.³⁸ The CAB relied on section 404(a) to adopt a regulation that restricted smoking on flights by dividing aircraft cabins into smoking and nonsmoking sections. The CAB reasoned that its authority to require air carriers to provide "adequate service" under section 41702 includes ensuring

³⁶ Pursuant to 49 U.S.C. 40102(a)(2), an "air carrier" means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.

³⁷ Pursuant to 49 U.S.C. 40102(a)(25) "interstate air transportation" means the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft—(A) between a place in—(i) a State, territory, or possession of the United States and a place in the District of Columbia or another State, territory, or possession of the United States; (ii) Hawaii and another place in Hawaii through the airspace over a place outside Hawaii; (iii) the District of Columbia and another place in the District of Columbia; or (iv) a territory or possession of the United States and another place in the same territory or possession; and (B) when any part of the transportation is by aircraft.

³⁸ Codification was effectuated in Public Law 103–272 (enacted July 5, 1994).

³¹ 14 CFR 399.79(b)(1).

³² 14 CFR 399.79(b)(2).

³³ *Id.*

³⁴ 14 CFR 399.79(c).

³⁵ 87 FR 52677 (Aug. 28, 2022).

that the service does not cause passenger discomfort.³⁹ The CAB's regulation and interpretation of "adequate service" was later challenged by a passenger, but the U.S. Court of Appeals for the Fifth Circuit found that "adequate service" referred both to the number of flights provided by an air carrier and the quality of service provided to passengers.⁴⁰

More recently, the Department relied on its authority to provide safe and adequate interstate transportation in section 41702 in its 2016 final rule prohibiting the use of e-cigarettes on-board aircraft.⁴¹ In that final rule, the Department reasoned that it had the authority to rely on the "adequate" prong in section 41702 to ban the use of e-cigarettes. The Department argued that discomfort from e-cigarettes was like the discomfort described by the CAB when it chose to restrict smoking on aircraft in 1973.⁴²

Through this ANPRM, the Department is exploring whether providing rebooking, meals, lodging, and transportation to and from lodging during flight disruptions is necessary to ensure that passengers are provided with adequate interstate transportation. In addition, the Department is exploring whether an airline is failing to provide adequate interstate air transportation when it doesn't offer and, if accepted, provide free rebooking to passengers when there is a significant change to the flight itinerary, including to passengers with disabilities and others in the same travel party when a change in airport, class of service, or aircraft affects available accessibility features.

(4) Air Carrier Access Act

The Department's questions in this ANPRM about rebooking for passengers with disabilities, and individuals in the same travel party, relate to the Department's authority under the Air Carrier Access Act (ACAA), in addition to the other authorities previously discussed.⁴³ The ACAA prohibits discrimination in airline service because of disability by U.S. and foreign air carriers. When it enacted the ACAA,

³⁹ "[T]he extent and depth of passenger discomfort and annoyance from unsegregated and unregulated smoking on aircraft compels the conclusion that service which does not provide for the effective separation of smokers constitutes neither adequate service nor reasonable practice and cannot be permitted under the act." 38 FR 12209 (May 10, 1973).

⁴⁰ See *Diefenthal v. Civil Aeronautics Bd.*, 681 F.2d 1039 (5th Cir. 1982) (adequate service can refer both to the number of flights scheduled as well as the quality of service provided).

⁴¹ 81 FR 11415 (Mar. 4, 2016).

⁴² *Id.* at 11421.

⁴³ 49 U.S.C. 41705.

Congress directed the Department "to promulgate regulations to ensure non-discriminatory treatment of qualified handicapped individuals consistent with safe carriage of all passengers on air carriers."⁴⁴ The Department responded by issuing a final rule that required carriers to provide nondiscriminatory service to individuals with disabilities.⁴⁵ The Department is exploring in this ANPRM whether imposing rebooking requirements on airlines is necessary to ensure individuals with disabilities are not denied reasonable access to air transportation when a change in class of service or aircraft affects available accessibility features or when a change in airport occurs.

(5) Reporting and Recordkeeping

The Department is considering whether to impose any reporting requirements under 49 U.S.C. 41708 or recordkeeping requirements under 49 U.S.C. 41709. Among other things, section 41708(b) authorizes the Secretary to require U.S. and foreign air carriers to file annual, monthly, periodical, and special reports in the form and way prescribed by the Secretary and to provide specific answers to questions on which the Secretary considers information to be necessary. Section 41709 authorizes the Secretary to prescribe the form of records to be kept by an air carrier.

(6) Other Authorities

In carrying out aviation economic programs, the Department is required to consider the factors identified in 49 U.S.C. 40101 as being in the public interest and consistent with public convenience and necessity. Among other things, under 49 U.S.C. 40101(a)(4), the Department is required to consider the availability of a variety of adequate, economic, efficient, and low-priced services without unreasonable discrimination or unfair or deceptive practices as being in the public interest. Under section 40101(a)(9), it is also in the public interest to prevent unfair, deceptive, predatory, or anticompetitive practices in air transportation. The Department is also required by section 40101(a)(12) to consider as being in the public interest encouraging, developing, and maintaining an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices.

⁴⁴ Public Law 99-435, sec. 3, 100 Stat. 1080, 1080 (1986).

⁴⁵ 55 FR 8008 (Mar. 6, 1990).

D. Request for Data, Analysis, Views, Recommendations, and Other Comments

(1) Scope

(a) Covered Entities

Which carriers should be covered if DOT were to issue a rule requiring compensation, services such as meals or lodging, or reimbursements for such services when there are controllable cancellations and lengthy, controllable delays? As its primary option, the Department is considering covering certificated carriers, commuter carriers, and foreign air carriers operating to, from, or within the United States, conducting scheduled passenger service with at least one aircraft having a designed seating capacity of 30 or more seats. This would ensure the requirements would apply to substantially all scheduled passenger air traffic to, from, or within the United States.⁴⁶ This coverage would be consistent with the carriers currently required to have a customer service plan under 14 CFR 259.5, which addresses the services airlines voluntarily commit to provide their passengers to mitigate passenger inconveniences resulting from flight cancellations or misconnections.⁴⁷

Alternatively, should the Department exclude from coverage carriers that exclusively provide air transportation with aircraft of a designed seating capacity of 60 seats or less and who are considered small businesses for purposes of the Regulatory Flexibility Act?⁴⁸ Or should any requirements cover all certificated air carriers, commuter air carriers, and foreign air carriers, regardless of size? Rather than excluding only the smallest carriers entirely, should the Department impose less stringent requirements on U.S. carriers who comprise less than 10 percent of the domestic scheduled passenger revenue⁴⁹ or foreign air

⁴⁶ The largest 15 U.S. air carriers accounted for more than 95 percent of domestic scheduled passenger air transportation in 2023. Bureau of Transportation Statistics, *Transtats, T-100 Market Data*, available at <https://www.regulations.gov/docket/DOT-OST-2024-0062/>. Each of these airlines operate an aircraft of 30 or more seats. Bureau of Transportation Statistics, *Part 241 Financial Data, Form B-43*, available at <https://www.regulations.gov/docket/DOT-OST-2024-0062/>.

⁴⁷ See 14 CFR 259.5(b)(14).

⁴⁸ Under the Regulatory Flexibility Act carriers that exclusively provide air transportation with aircraft originally designed to have a maximum passenger capacity of 60 seats or less or a maximum payload capacity of 18,000 pounds or less are small entities. See 14 CFR 399.73.

⁴⁹ Four U.S. carriers, American Airlines, Delta Air Lines, United Airlines, and Southwest Airlines, comprised 10 percent or more of domestic scheduled passenger revenue in 2023, all with over

carriers who have fewer than two million total enplanements to and from the United States?⁵⁰ That approach would be like current Canadian regulations discussed further in the following sections, which impose requirements for flight cancellations and delays, and have modified rebooking and compensation requirements for small carriers based on the number of passengers transported.⁵¹ What, if any, other approaches should the Department consider when determining airline coverage requirements?

The Department also seeks information about whether it may be necessary and appropriate to impose any requirements on ticket agents or indirect air carriers. For example, should the Department require ticket agents or indirect air carriers to notify consumers of available services, reimbursements, or compensation provided by airlines for controllable delays or cancellations or refund the fare to consumers if the ticket agent or indirect air carrier is the merchant of record and the passenger elects to return to his or her origination point after the passenger is delayed at a connecting airport?

(b) Covered Flights

To which flights should any requirements apply? The Department is considering as its primary option applying any requirements to flight itineraries to, from, or within the United States, including itineraries with brief and incidental stopover(s) at a foreign point without a break in the journey.

The Department is considering defining break in journey consistent with the Department's recently issued Refund Rules.⁵² Under those rules, a "break in journey" is any deliberate interruption by a passenger of a journey between a point in the United States

and a point in a foreign country where there is a stopover at a foreign point that is scheduled to exceed 24 hours. If the stopover at a foreign point is 24 hours or less, those rules specify that whether the stop is a break in journey would depend on various factors, such as whether the segment between two foreign points and the segment between a foreign point and the United States were purchased in a single transaction and as a single ticket/itinerary, whether the segment between two foreign points is operated or marketed by a carrier that has no codeshare or interline agreement with the carrier operating or marketing the segment to or from the United States, and whether the stopover at a foreign point involves the passenger picking up checked baggage, leaving the airport, and continuing the next segment after a substantial amount of time.

Should the Department impose requirements on airlines to provide services and compensation to consumers experiencing significant flight disruptions to, from, or within the United States? If so, should those requirements apply to itineraries with brief and incidental stopover(s) at a foreign point without a break in the journey like the Refund Rules? Under that approach, delays or cancellations to flight segments not initiated by the passenger, whether controllable by the airline or not, would not result in a break in journey as only deliberate interruptions by the passenger would constitute a break in journey. The Department solicits comment on whether there is any reason not to cover brief stopovers at a foreign point without a break in the journey. The Department also asks whether there are flight segments or itineraries involving a point in the United States that should be excluded from coverage for any areas being contemplated by this rulemaking. If so, why? Alternatively, should the Department consider establishing a bright line rule on coverage of flights with a break in journey of less than 24 hours rather than relying on a multi-factor test if airlines would be required to promptly offer to provide rebooking and reimbursements? If so, why?

(c) Multiple Entities Involved

Which carrier should bear responsibility for providing compensation or services such as meals or hotels if required during a controllable cancellation or delay when one carrier "sold" the airline ticket (*i.e.*, the merchant of record for the ticket

transaction),⁵³ but the flight is operated by a different carrier? What if the merchant of record is a ticket agent? Which option would be the easiest and clearest for the consumer? Based on comments provided by the American Society of Travel Advisors in the Department's Refund Rule, it is the Department's understanding that the ticket agent's name appears as the merchant of record in five to eight percent of all airline ticket transactions by credit cards facilitated by ticket agents, the majority of which involve group bookings, air-inclusive tour packages, or resale of consolidated fares.⁵⁴

Should the Department consider requiring the merchants of record to be responsible for providing compensation for controllable delays and cancellations? How would the Department account for situations where the merchant of record is a ticket agent with no control on whether a flight is delayed or canceled? The Department requires merchants of record to be responsible for providing required refunds for airline ticket transactions because they have direct visibility of the passengers' payment instruments information and the total amounts paid for the itineraries. Does that rationale apply to compensation?

One option under consideration is for the operating carrier to be responsible for compliance. Would holding the operating carrier responsible ensure that the carrier that is making the operational decisions that affect the flight's performance is accountable? Are there reasons the "marketing carrier" should be responsible? For example, do "marketing carriers" often make planning decisions such as which flights are cancelled? Should responsibility be tied to consumer perception of which carrier is in control? Do consumers associate branded codeshare partners and their marketing partners, for example SkyWest operating as United Express, or Jazz Aviation operating as Air Canada Express, as the same carrier? If the operating carrier were responsible, should the operating carrier be allowed to rely on their marketing codeshare partner to issue compensation to consumers or assist in providing services such as meals or hotels to consumers on their behalf? The

15 percent. No other carrier comprised more than six percent of domestic scheduled passenger revenue. See docket at <https://www.regulations.gov/docket/DOT-OST-2024-0062/>.

⁵⁰ Eighteen foreign carriers exceeded two million total enplanements to and from the United States in 2023. See *id.*

⁵¹ Air Passenger Protection Regulations, SOR/2019-150, ¶¶ 17, 19. Canadian regulations define small carrier to mean any carrier that has not transported a worldwide total of two million passengers or more during each of the two preceding calendar years. *Id.* ¶ 2. The CTA has initiated a consultation to amend its regulations, including improving the rebooking obligations for passengers of small airlines but proposed to continue to apply reduced compensation requirements and less stringent rebooking obligations to small carriers. See Consultation Paper: Proposed Changes to Clarify, Simplify and Strengthen the Air Passenger Protection Regulations at 10, available at https://otc-cta.gc.ca/sites/default/files/consultation_paper_-_july_2023.pdf.

⁵² See 89 FR 32833.

⁵³ A merchant of record means the entity responsible for processing payments for the airfare, as shown in the consumer's financial charge statements such as debit or credit card charge statements.

⁵⁴ See comment at 4, available at <https://www.regulations.gov/comment/DOT-OST-2022-0089-5192>.

Department notes that the assignment of responsibility to the operating carrier would be consistent with carrier responsibility for providing compensation and services under the EU and Canadian regulations.⁵⁵ Please provide any relevant information regarding the EU or Canadian regulations that the Department should consider.

Should the Department consider assigning responsibility differently, such as by assigning joint responsibility to carriers with certain arrangements? If so, under what carrier arrangements would joint responsibility be appropriate for domestic or foreign air carriers, and what would be the appropriate terminology to describe the relationship for which joint responsibility would apply (e.g., fee-for-service arrangements, branded codeshare partnerships, or another terminology)? Should carrier responsibility vary depending on the service, reimbursement, or compensation owed? For example, should the operating carrier be responsible for providing any rebooking, while the marketing carrier bears responsibility for compensation and reimbursements, which the carrier could have more time to provide? Should the Department require joint and several liability in some or all circumstances? Should any special considerations apply to the assignment of responsibility for multi-carrier itineraries? Should the final airline in a multi-carrier itinerary be responsible for any compensation requirements, similar to how airlines have generally handled responsibility for mishandled baggage traveling on multi-carrier itineraries?

(2) Definition of Controllable

The Department is considering defining “controllable” cancellations or delays to be those due in whole or in part to any circumstance within the control of the airline. Under this approach, the requirements of any rule would apply if a delay or cancellation involves any factors or event within the control of the airline, including its operating partner, and their employees, subcontractors, or other persons working on their behalf. This approach is being considered to create a standard that can be applied consistently across carriers. It could also address concerns that were noted by a State AG office at the December 2021 ACPAC public

meeting that airlines may choose to attribute a delay to weather when the delay is also directly attributable to an airline. This approach is also consistent with the requirements of section 512 of the 2024 FAA Act, which instructs the Department to direct air carriers to establish policies for reimbursements for costs of meals, lodging, and transportation to and from that lodging that are due to flight cancellations and significant delays *directly attributable* to the air carrier.

The Department seeks comment on whether this approach for consideration is the most appropriate or whether it should adopt any alternatives. How should the Department treat cancellations or delays with multiple causes, including when some airline cause is involved? The Department’s Bureau of Transportation Statistics (BTS), which requires U.S. carriers that account for at least 0.5 percent of the domestic scheduled-passenger revenues to report monthly on the causes of delayed and cancelled flights, allows multiple causes to be reported for delays but requires one cause to be reported for a cancellation.⁵⁶ Generally, airlines report on the predominant cause of a cancellation when there are multiple causes for a cancellation. As such, instead of treating a delay or cancellation as controllable if any cause is within the airline’s control, should the Department treat a delay or cancellation as controllable only if the predominant cause of the delay or cancellation is within the airline’s control? If so, how should the Department define predominant cause? What effect, if any, would each of those approaches likely have on airline performance?

Also, BTS requires airlines to report on the causes of delayed flights in five broad categories—air carrier, extreme weather, National Aviation System, security, and late arriving aircraft.⁵⁷ Airlines may use the reporting category of “late arriving aircraft” even if the cause of the late arriving aircraft was due to a circumstance within control of the air carrier. How should the Department treat a delay caused by a late arriving aircraft for the purposes of determining which delays are controllable under any rule? Should the Department consider the root cause of any late arriving aircraft for the purposes of determining whether a delay resulting from an aircraft arriving late is controllable? Flight disruptions occurring early in the day can disrupt multiple flights using the same aircraft

downline. If attributing the root cause of a late arriving aircraft is appropriate, should there be a cut-off point at which a root cause should not be considered for down-line delays? “Late arriving aircraft” is not available as a causal category to airlines when reporting causes for cancellations to BTS.⁵⁸ U.S. carriers are required to report causes of cancellations to BTS in four broad categories—air carrier, extreme weather, National Aviation System, and security.⁵⁹

The Department is of the tentative view that it would not be sufficient to define controllable cancellations or delays without providing examples of the delay and cancellation causes that it believes are within the control of the carrier. It is considering basing these examples on a non-exclusive list used by BTS as a guide for the type of occurrences that should be reported as “air carrier delay or cancellation” when U.S. carriers categorize delays and cancellations of domestic scheduled passenger flights and report these delays to BTS. This list is available in the latest comprehensive BTS reporting directive discussing causal reporting dated December 12, 2018.⁶⁰ The BTS reporting categories, which were first developed by the Department in 2002 through notice-and-comment rulemaking, are further explained in reporting directives issued by BTS.⁶¹

Under the December 2018 BTS directive, the following events are considered air carrier-caused, or in other words, due to circumstances within air carrier control: aircraft cleaning, aircraft damage (except bird strikes, lightning/hail damage), airport curfew, awaiting the arrival of connecting passengers or crew, awaiting alcohol test, awaiting gate space, baggage loading, cabin servicing, cargo loading, catering, computer outages involving carrier equipment, crew legality (pilot or attendant rest), damage by hazardous goods, engineering inspection, public health, flight paperwork, fueling, gate congestion, government forms not properly completed (INS, FAA, Agriculture),

⁵⁸ 14 CFR 234.4(h).

⁵⁹ *Id.*

⁶⁰ BTS has clarified that the Department’s list of air carrier caused delays and cancellations developed under 14 CFR 234.4 “should not be considered a complete list.” BTS Technical Reporting Directive #31—On-Time Performance (Dec. 12, 2018) at 27, available at https://www.bts.gov/sites/bts.dot.gov/files/docs/explore-topics-and-geography/topics/airlines-and-airports/224571/technical-directive-no-31-time-2019_1.pdf.

⁶¹ Reporting the Causes of Airline Delays and Cancellations, 67 FR 70535 (Nov. 25, 2002); see, e.g., BTS Technical Reporting Directive #31—On-Time Performance (Dec. 12, 2018).

⁵⁵ See EC No 261/2004, Article 3.5; APPRs ¶ 2; see also Canadian Transportation Agency, Application of the Air Passenger Protection Regulations: A Guide at 7, available at https://otc-cta.gc.ca/sites/default/files/application_of_the_air_passenger_protection_regulations_a_guide.pdf.

⁵⁶ 14 CFR part 234.

⁵⁷ 14 CFR 234.4(i).

ground equipment out of service, hot brakes restriction, last minute passenger, late mail from post office, late crew, lavatory servicing, maintenance, medical emergency, out of service aircraft, oversales, positive passenger baggage match, passenger services, potable water servicing, pre-flight check, ramp congestion (blocked by another aircraft under carrier's control), ramp service, removal of unruly passenger, revised weight sheet, shortage of ramp equipment, slow boarding or seating, snow removal (when it is a carrier ramp service function), stowing carry-on baggage, and weight and balance delays.⁶² While not currently listed in the BTS directive, the Department is also considering clarifying that delays and cancellations caused by labor strikes of airline personnel are controllable because the Department believes airlines are best capable of addressing or mitigating such delays and cancellations through effective labor management. The Department invites comment on this issue.

Section 511 of the 2024 FAA Act instructed BTS to revise its regulation covering the "air carrier" category for the purposes of airline reporting to BTS under 14 CFR 234.4. Section 511 further provides a list of causes of delay that shall not be included in the "air carrier" reporting category in the revised BTS reporting regulation: (1) aircraft cleaning necessitated by the death of a passenger; (2) aircraft damage caused by extreme weather, foreign object debris, or sabotage; (3) a baggage or cargo loading delay caused by an outage of a bag system not controlled by a carrier or its contractor; (4) cybersecurity attacks (provided that the air carrier is in compliance with applicable cybersecurity regulations); (5) a shutdown or system failure of government systems that directly affects the ability of an air carrier to safely conduct flights and is unexpected; (6) overheated brakes due to a safety incident resulting in the use of emergency procedures; (7) unscheduled maintenance, including in response to an airworthiness directive, manifesting outside a scheduled maintenance program that cannot be deferred or must be addressed before flight; (8) an emergency that required medical attention through no fault of the carrier; (9) the removal of an unruly passenger; and (10) an airport closure due to the presence of volcanic ash, wind, or wind shear. The Department issued the rule addressing the reportable causes of

delay and cancellation in 14 CFR 234.4 under different statutory authorities than those it relies upon in this rulemaking, and the 2024 FAA Act does not require the Department to incorporate those statutory exclusions from the "air carrier" reporting category described in section 511 in this rulemaking.⁶³ Nevertheless, the Department welcomes comments on whether it should or shouldn't consider the aforementioned causes of delay as airline-caused for purposes of this rulemaking.

The Department notes that the EU and Canada have requirements for services and compensation in similar circumstances to those addressed in this ANPRM. The EU currently requires compensation for cancellations and delays of three hours or more, unless the airline proves that the cancellation or delay is "caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken."⁶⁴ The term "extraordinary circumstances" has been interpreted and narrowly construed in a series of decisions by the Court of Justice of the European Union.⁶⁵ In 2013, the European Commission proposed to revise its regulation, EC 261, to provide a list of causes that would be included and excluded from the definition of "extraordinary circumstances," but that proposal was not finalized.⁶⁶

⁶³ The Department issued 14 CFR part 234 under 49 U.S.C. 329, 41708, and 41709.

⁶⁴ EC No 261/2004, Article 5.3; *see also* Joined Cases C-402/07 and C-432/07, *Sturgeon v. Air France*, 2009 E.C.R. I-10923, ¶ 69 (applying EU compensation requirements to delays of three hours or more).

⁶⁵ *See* EU Interpretive Guidelines at C 214/15–17 (summarizing cases).

⁶⁶ The 2013 EU proposal would have included the following non-exhaustive list of extraordinary circumstances: natural disasters rendering impossible the safe operation of the flight; technical problems which are not inherent in the normal operation of the aircraft, including hidden manufacturing defects revealed by the manufacturer or a competent authority and which impinges on flight safety; security risks, acts of sabotage or terrorism rendering impossible the safe operation of the flight; life threatening health risks or medical emergencies necessitating the interruption or deviation of the flight concerned; air traffic management restrictions or closure of airspace or an airport; meteorological conditions incompatible with flight safety; and labor disputes at the operating carrier or at essential service providers. *See* Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (EC) No 261/2004 Establishing Common Rules on Compensation and Assistance to Passengers in the Event of Denied Boarding and of Cancellation or Long Delay of Flights and Regulation (EC) No 2027/97 on Air Carrier Liability in Respect of the Carriage of Passengers and Their Baggage by Air, COM(2013), *available at* eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013PC0130.

The Canadian APPRs currently require airlines to provide compensation for cancellations and delays of three hours or more that are within the airline's control and not required for safety purposes.⁶⁷ In 2023, the Canadian Transportation Agency (CTA) began a consultation to revise the APPRs. In its consultation paper, the CTA proposed to eliminate the categories in the existing APPRs and to move to a mode more similar to EC 261, requiring "compensation for inconvenience for all flight disruptions unless there are exceptional circumstances."⁶⁸ To fall within the proposed definition of exceptional circumstances, the CTA consultation paper would require that the event causing the disruption "must have been outside the airline's control, and not inherent to the normal exercise of the activities of the airline," and that the "event could not be avoided even if the airline took all reasonable measures to do so."⁶⁹ The CTA consultation paper provided a proposed list of events that would and would not constitute exceptional circumstances.⁷⁰

The Department seeks comment on whether this approach under consideration, which is to rely largely on the list of "air carrier" causes from the 2018 BTS directive, is the most appropriate approach for the Department to use to determine whether a delay or cancellation is controllable and asks for feedback on potential alternatives. Are there benefits to using the currently applicable EU or Canadian

⁶⁷ APPRs, ¶ 19.

⁶⁸ Canadian Transportation Agency, Consultation Paper: Proposed Changes to Clarify, Simplify and Strengthen the Air Passenger Protection Regulations at 6, *available at* https://otc-cta.gc.ca/sites/default/files/consultation_paper_-_july_2023.pdf.

⁶⁹ *Id.*

⁷⁰ Those circumstances considered exceptional would include: security risks such as war, political instability, illegal acts, sabotage, and terrorism; weather or other atmospheric conditions, or natural disasters, that make it impossible to safely operate the flight; airport operational issues for which the airline is not responsible; hidden manufacturing defects that come to light and affect flight safety; health risks or medical emergencies on route that require a flight diversion or discovered shortly before flight departure that make it impossible to safely operate the flight; air traffic management restrictions, airspace closures, and airport closures; an official NOTAM; orders or instructions from state, law enforcement agency, or airport security officials; and labor disruptions at the airline or by essential air service providers like airport managers, air navigation personnel, or ground handlers. Those circumstances not considered exceptional would include flight crew or cabin crew unavailability; staff shortages at the airline; technical problems that are an inherent part of normal airline operations; any situation the airline knew about, or should have known about, when it sold the ticket to the passenger; and any action, or failure to act, by the airline or others with which the airline has a contractual relationship. *Id.* at 7–8.

⁶² BTS Technical Reporting Directive #31—On-Time Performance (Dec. 12, 2018) at 27–28.

categories or any categories for assessing delays and cancellations that those jurisdictions have proposed but not enacted? In addition to the Department's requests for comment on specific EU and Canadian requirements throughout this ANPRM, the Department also requests comment on whether there are any additional elements of any current or proposed EU or Canadian regulations covering controllable cancellations and delays (including services and compensation available to passengers during such delays) that the Department should adopt in any rule.

Should the Department consider any alternatives for defining controllable? Should the Department consider applying requirements for services when a delay or cancellation is not within the control of the airline? For example, the Department is considering requiring airlines to provide certain services, such as rebooking, meals, and hotels on domestic flights, regardless of the reason for the flight disruption, as failing to provide those services may not be "adequate" service under 49 U.S.C. 41702. If so, what provisions should apply and why?

(3) Rebooking

(a) General Rebooking Provisions

Should the Department require airlines to offer rebooking, at no additional cost, to a passenger whose trip is disrupted because of a lengthy, controllable flight delay or cancellation and, if so, under what circumstances should rebooking be required? One option the Department is considering is requiring airlines to promptly offer rebooking without charge on the next available flight to any passenger: (1) whose flight is cancelled due to circumstances, in whole or in part, attributable to the carrier; (2) whose flight is delayed due to circumstances, in whole or in part, attributable to the carrier resulting in the passenger missing a connection on a single ticket; and (3) whose departure on a flight is significantly delayed (*i.e.*, delayed three hours or more for domestic flight or delayed six hours or more for an international flight), in whole or in part, attributable to the carrier.

This method is generally consistent with the commitments the largest U.S. airlines have already made in their customer service plans to provide rebooking at no additional cost in the event of a controllable cancellation or a significant controllable delay as reflected on the Department's Airline Customer Service Dashboard.⁷¹

However, unlike some customer service commitments that do not define when a delay is significant, the Department is considering requiring airlines to offer rebooking when the passenger's departure is delayed three hours or more for domestic flights and six hours or more for international flights due to a lengthy, controllable flight delay or cancellation. Additionally, regardless of the length of delay if a controllable delay results in a missed connection, the Department is considering requiring airlines to offer rebooking on the next available flight.

Under this approach, the rebooking offered to a passenger whose departure on a flight is significantly delayed would be prompt and without charge on the next available flight. The Department is considering defining significant delay to be a delay of three hours or more for domestic flight or a delay of six hours or more for an international flight, in whole or in part, attributable to the carrier. This is consistent with section 512 of the 2024 FAA Act, which requires the Department to direct certain air carriers to establish policies regarding reimbursements for the costs of meals, lodging, and transportation to and from that lodging incurred by passengers whose flights are cancelled or "significantly delayed." Section 512 defines "significantly delayed" to mean delayed three hours or more for a domestic flight and six hours or more for an international flight. These thresholds are also consistent with the definition of a significantly delayed flight in section 503 of the 2024 FAA Act and Department's recent Refund Rules.⁷² The Department is considering whether to apply the delay standards in section 512 of the 2024 FAA Act not only to rebooking requirements but also to compensation requirements and invites comment on whether it should do so. Would a consistent definition of significant delay that would entitle consumers to services or compensation promote awareness of passenger rights and reduce logistical burdens for airlines?

The Department requests comment on the appropriateness of this approach under consideration. Should the Department adopt this approach or should it adopt a different approach? For example, EU and Canadian rules provide for rebooking when a scheduled flight is cancelled, regardless of the reason for the cancellation.⁷³ Should the Department, like the EU and Canada,

require airlines to provide rebooking regardless of the reason for the cancellation based on its authority to require safe and adequate interstate transportation in 49 U.S.C. 41702? The Canadian rules require airlines to rebook passengers on another flight if their original flight is delayed for three hours or more whether that flight is domestic or international or if the original flight is cancelled.⁷⁴ Should requirements to provide rebooking for controllable delays of international flights be based on three-hour delays instead of six-hour delays?

Are there any circumstances in which rebooking requirements for controllable flight disruptions should not apply? What rebooking requirements, if any, should apply when a passenger does not accept the initial rebooking offered by the airline after a controllable delay or cancellation? Under what circumstances do airlines typically offer free rebooking? Under what circumstances do airlines typically charge for rebooking?

(b) Rebooking on Other Airlines

The Department is considering requiring an airline to offer an affected passenger the next available flight among flights operated by the airline and its branded codeshare partners. As discussed earlier in this ANPRM, a "branded codeshare partner" typically operates flights for the mainline carrier using the mainline carrier's name. The mainline carrier in this arrangement is generally responsible for selling the tickets for the flight, and consumers likely would consider the two carriers to be one entity when purchasing airline tickets.

If no flight operated by that airline or its branded codeshare partner would depart within 24 hours of the passenger's original scheduled departure time, the Department is also considering requiring an airline to offer rebooking on the next available departing flight among those operated by that airline, its branded codeshare partner, and any carrier with which the airline has a commercial agreement, interline or codeshare, to transport the airline's passengers. An "interline agreement" is a commercial agreement that enables the airlines to work together in providing services to passengers when the passengers travel on multiple airlines on a single itinerary. The agreement typically covers baggage handling, so passengers can check bags seamlessly to their final destination, and a ticketing agreement, to allow a passenger to obtain boarding

⁷¹ See <https://www.transportation.gov/airconsumer/airline-customer-service-dashboard>.

⁷² 89 FR 32833; 89 FR 65536–37.

⁷³ EC No 261/2004, Articles 5.1(a), 8; APPRs ¶¶ 10(3), 17, 18.

⁷⁴ APPRs ¶¶ 17, 18.

passes to their destination. Typically, interline agreements enable the airlines to rebook passengers on one another's flights at a pre-negotiated below-market cost when there is an irregular operation.

Several of the largest U.S. airlines have committed in their customer service plans to rebook passengers on a partner airline or another airline with which it has an agreement at no additional cost when there is a controllable cancellation or significant controllable delay.⁷⁵ Some airlines condition their commitment to use partner carriers on their own flights not being available until the next day. This is consistent with the option under consideration of requiring an airline to offer rebooking on any carrier by which the airline has a commercial agreement to transport the airline's passengers only if the airline cannot provide rebooking within 24 hours using its own branded network.⁷⁶ Some airlines do not have interline or rebooking agreements with other carriers and have not made these commitments. Usually, ultra low-cost carriers (ULCCs) do not have these agreements.

The Department requests comment on whether it should adopt the options described for rebooking or if it should adopt an alternate option and why. What effect, if any, would a requirement to provide rebooking on a carrier with which an airline has an interline or rebooking agreement have on competition among airlines, including those who do not have interline agreements? If the Department should require an airline to offer rebooking on a carrier with which it has an interline or rebooking agreement, should the Department require airlines to publish a list of their interline partners?

At what point, if at all, should the Department require an airline to offer rebooking on another carrier that is not its partner airline? The Canadian APPRs require large airlines to use any carrier to rebook passengers if they cannot rebook passengers on their own or a partner's next available flight leaving that airport within nine hours for controllable cancellations and controllable delays of three hours or more. For cancellations and delays outside the carrier's control, the Canadian APPR requires large airlines to use a non-partner carrier if the airline cannot rebook passengers on their own

or a partner's next available flight leaving that airport within 48 hours of the departure time on the passenger's ticket for cancellations and delays of three hours or more.⁷⁷ Also, under the Canadian APPRs, if the airline cannot provide rebooking from the airport where the passenger is located that departs within 48 hours, large airlines must use any airline leaving from a nearby airport for rebooking and must get the passenger to the other airport free of charge.⁷⁸ Should DOT impose similar requirements? What effect, if any, would a requirement to provide rebooking on any carrier, including non-partner carriers, have on competition among airlines?

The Canadian APPRs currently do not require small airlines to rebook passengers using a non-partner airline.⁷⁹ In 2023, the CTA initiated a consultation to revise the APPRs. In its consultation paper, the CTA proposed to expand requirements to rebook using any airline to small airlines, if they cannot rebook on their flight or their partner's flight within 24 hours.⁸⁰ In addition, the CTA proposed expanding the requirement to use nearby airports after 48 hours to small carriers.⁸¹

Public comments on the Canadian proposal highlight consumer organizations' general support for eliminating distinctions between large and small airlines to better protect passengers.⁸² Small airlines raised issues that rebooking on another airline and/or rebooking within 24 hours is not realistic if one airline operates from the airport or there is a low volume of flights.⁸³ Some industry members proposed that rebooking obligations only apply when there are viable rebooking options.⁸⁴ One airline suggested that rebooking on an unaffiliated airline should not be a requirement and that the passenger should be able to choose the rebooking options that best suits their needs, including being able to choose to rebook

with the same airline versus a different one.⁸⁵

The Department's options under consideration currently apply the same rebooking requirements to smaller airlines as to larger airlines. However, the Department invites comment on whether it should adopt that approach or a different one. Should the Department not impose any requirements or have reduced requirements to rebook passengers on other airlines after controllable flight disruptions by small airlines given these airlines may not have interline agreements and may need to pay the ticket price to transport their passengers on another airline? Is it fair to passengers flying on small airlines not to be provided rebooking on other airlines for controllable flight disruptions, particularly when the network of a small airline may be more limited? How, if at all, can the Department incentivize large airlines to provide rebooking reciprocity to small airlines during cancellations and lengthy delays, or disincentivize large airline practices that prevent reciprocity, in order to improve the options for consumers and facilitate competition? What additional requirements might be necessary to ensure that small carriers are not disadvantaged by the size and scale of their networks or other competitive factors that impact their ability to rebook passengers at the same general rate and cost as larger carriers? If small airlines are not required to rebook on other airlines, how should the Department determine which airlines are small—based on size of aircraft, number of U.S. enplanements, revenue, number of employees, or other criteria? Also, what is the best way to ensure passengers are aware of a two-tiered approach? For example, what sorts of disclosures, if any, should passengers flying on small airlines be provided regarding rebooking should there be flight disruptions under any two-tiered approach?

In the alternative, should the Department require rebooking on other airlines by small airlines but consider more stringent rebooking requirements for large U.S. and foreign airlines with flights to, within, and from the United States? For example, should the Department require large U.S. and foreign airlines to provide rebooking on any carrier if the airline cannot rebook passengers on their own or a partner's next available flight within nine hours instead of within 24 hours? This would be similar to the current Canadian

⁷⁷ See APPRs ¶¶ 17 (1)(a), 18(1).

⁷⁸ See APPRs ¶¶ 17(1)(a)(iii), 18(1.1)(a).

⁷⁹ See APPRs ¶¶ 17(1)(b), 18(1.1)(b).

⁸⁰ Canadian Transportation Agency, Consultation Paper: Proposed Changes to Clarify, Simplify and Strengthen the Air Passenger Protection Regulations at 10, available at https://otc-cta.gc.ca/sites/default/files/consultation_paper_-_july_2023.pdf.

⁸¹ *Id.* at 11.

⁸² Canadian Transportation Agency, Consultations on Proposed Changes to Strengthen the Air Passenger Protection Regulations: What We Heard at 11–12, available at https://otc-cta.gc.ca/sites/default/files/consultations_on_proposed_changes_to_strengthen_the_air_passenger_protection_regulations_what_we_heard.pdf.

⁸³ *Id.* at 12.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁷⁵ See <https://www.transportation.gov/airconsumer/airline-customer-service-dashboard>.

⁷⁶ See e.g., American Airlines Customer Service Plan updated July 19, 2024, available at <https://www.aa.com/i18n/customer-service/support/customer-service-plan.jsp>.

APPRs, which apply that requirement to large airlines. If the Department were to adopt more stringent requirements for large airlines, how should the Department determine which airlines are large—based on size of aircraft, number of U.S. enplanements, revenue, or other criteria? If based on revenue, should the focus be on any U.S. carrier that accounts for at least 10 percent of the domestic scheduled passenger revenue in the most recently reported 12-month period?⁸⁶ If based on enplanements, is the appropriate threshold for foreign air carriers at least two million total enplanements to or from the United States?⁸⁷

(c) Rebooking on Next Available Flight

The option under consideration is to require airlines to offer to rebook affected passengers on their next available departing flight in the passenger's reserved class of service that would advance the passenger to the final stop of their itinerary. Does this option ensure passengers are reaccommodated as soon as possible on a reasonable and productive route, without adversely affecting passengers with confirmed seats or passengers that might need priority or blocked seats, such as passengers with disabilities? If the Department should require rebooking on the next available flight, how should the Department define available? How, if at all, should the Department address rebooking for multiple passengers traveling on the same reservation? How do airlines currently approach free rebooking during controllable disruptions? How long from the time of a cancellation or significant delay does it typically take for an airline to place a passenger on a replacement flight? How do the airlines decide which passengers to rebook when upcoming flights have limited capacity? Are there current industry rebooking practices that the Department should consider either incorporating into a regulation or prohibiting as part of this rulemaking? Would rebooking a passenger on the next available flight be feasible for airlines in practice? Is this option appropriate to best serve affected passengers? Should any rebooking requirement provide more flexibility for passengers? Even if the airline can

rebook the passenger within 24 hours, should the Department require an airline to offer a passenger the option to select any comparable future rebooking on that airline in case the original itinerary no longer meets the passenger's travel needs? If so, how long should airlines be required to make that option available, and how far in the future should the passenger be permitted to rebook without charge? For example, should the passenger be required to rebook within 24 hours of the flight disruption, a week, or another time period? Should the future flight selected be limited to comparable flights departing within a month, a year, or another time period? How would the Department define comparable future rebooking? If rebooking is not comparable, should airlines explicitly be required in a rule to also provide a refund to account for any difference in cost or value? For example, should airlines explicitly be required in a rule to rebook and refund the difference in fare if the passenger is downgraded in fare class?

(d) Returning Consumers to the Point of Origin When Rebooking Is Declined

The Department is considering requiring that, when a passenger misses a connection because of a controllable flight cancellation or flight delay and the rebooking offered by the airline would cause the passenger to be delayed in arriving at their final stop 24 hours or more, the airline must offer the passenger the option of the next available return flight to the passenger's original departure point of that portion of their itinerary (outbound, intermediate, return) at no additional cost and a refund of the cost of the entire portion of their itinerary with the missed connection (including used segments of that portion) and all subsequent portions of their itinerary. This would be similar to a provision of the Canadian APPRs, which require an airline to provide a refund and return to the point of origin if the passenger's travel no longer serves its purpose because of the cancellation or lengthy delay and the passenger is no longer at the point of origin (e.g., is delayed departing at a connecting point).⁸⁸ Should the Department impose a requirement on airlines to return consumers to the point of origin when the passenger is delayed at a connecting point and no longer wishes to continue their journey? Why or why not? If the Department were to impose such a requirement, should it apply only for extended delays or, similar to the

Canadian APPRs, be based on whether the passenger states that his or her travel no longer serves its purpose? Should delays at a connecting point of 24 hours or more be considered extended delays or is there a more appropriate threshold on what is an extended delay? Are there reasons the Department should not require a refund for portions of the itinerary already traveled?

(e) Rebooking Protections When the Airline Makes a Significant Change to a Passenger's Flight Itinerary, Including for Passengers With Disabilities

What rebooking protections should apply when an airline makes significant changes to a passenger's itinerary, including a significant change that affects accessibility for a passenger with a disability? The Department is considering proposing to require airlines to promptly offer rebooking at no additional cost to a passenger who is an individual with a disability (and any individuals in the same travel party) upon notification that the individual decides not to travel on the flight due to any of the following changes: the individual with a disability (1) is downgraded to a lower class of service that results in one or more accessibility features needed by the individual becoming unavailable; (2) is scheduled to depart from, arrive to, or connect through one or more airports that are different from the original itinerary; or (3) is scheduled to travel on substitute aircraft on which one or more accessibility features available on the original aircraft needed by the individual are unavailable. The Department is considering proposing that the airline must offer rebooking on the next departing flight by that airline or its branded codeshare partner that advances the passenger to the final stop of their itinerary, accommodates the individual with a disability, and has open seats for the individual and for all other in the same travel party. The Department is considering proposing to apply this requirement regardless of whether the reason for the change was within the airline's control. In addition, if no flight operated by that airline or its branded codeshare partner would depart within 24 hours of the passenger's original scheduled departure time, the Department is also considering requiring an airline to offer rebooking on the next available departing flight among those operated by that airline, its branded codeshare partner, and any carrier with which the airline has a commercial agreement, interline or codeshare, to transport the airline's passengers.

⁸⁶ Four U.S. carriers—American Airlines, Delta Air Lines, United Airlines, and Southwest Airlines—exceeded this threshold in 2023, all with over 15 percent of domestic scheduled passenger revenue. No other carrier comprised more than six percent of domestic scheduled passenger revenue. See docket at <https://www.regulations.gov/docket/DOI-OST-2024-0062/>.

⁸⁷ Eighteen foreign carriers exceeded two million total enplanements to and from the United States in 2023. See *id.*

⁸⁸ APPRs ¶¶ 17(2)(a), 18(1.2).

In the rulemaking, Refunds and Other Consumer Protections, two disability rights advocacy groups, Paralyzed Veterans of America and United Spinal Association, commented that, from the perspective of passengers with disabilities, any change to the origination, connection, and destination airport should be considered a “significant change of flight itinerary.”⁸⁹ These commenters stated that when booking flights, passengers with disabilities may rely on the specific accessibility features of an airport to select the flights and itinerary, and this may include selecting a particular connecting airport based on the accessibility features needed to accommodate their disabilities during the layover time. In addition, the Paralyzed Veterans of America noted that a “refund” is purposeless if the passenger is stranded and requested the Department require airlines to “expeditiously locate and offer alternative transportation that meets the specific needs of the passenger with a disability.”⁹⁰

For example, when finding alternative transportation for individuals with disabilities who use wheelchairs, it is imperative that the alternative transportation selected is one where the passenger’s wheelchair can be safely stowed. In February 2022, the Department’s Air Carrier Access Act (ACAA) Advisory Committee issued a report that recognized the importance of logistical planning to ensure that wheelchairs are safely accommodated on aircraft. The Advisory Committee unanimously agreed on the benefit of passengers with disabilities completing airline forms describing their wheelchairs (e.g., device dimensions, battery type) and recommended that a group that includes disability organizations, airlines, airports, aircraft manufacturers, and wheelchair manufacturers work together to improve consistency within existing airline forms for handling wheelchairs. It is the Department’s understanding that this working group, led by the International Air Transport Association (IATA), intends to complete its work by the end of 2024.⁹¹ To ensure that any rebooking

requirements provide equitable access to air transportation to people with disabilities, there may be a need for consistent forms for wheelchairs. Should the Department require a consistent wheelchair handling form across airlines for air transportation to, from and within the United States? If so, what information should be included? Should the Department adopt the form developed by the working group led by IATA?

Should the Department propose the rebooking requirements for passengers with disabilities regardless of whether the reason for the cancellation or significant change was within the airline’s control as stated earlier in this section? Should the Department only require airlines to provide rebooking without charge to passengers who are individuals with disabilities when lengthy delays and cancellations are within the airline’s control or responsibility? Are there circumstances in which airlines should not be required to accommodate passengers by rebooking the passenger on another carrier with which the airline has a codeshare or interline agreement? Are there circumstances in which airlines should be required to accommodate passengers on a carrier with which the airline does not have a codeshare, interline, or any other agreement? If the Department proposes that airlines must provide free rebooking to members in the same travel party as a passenger with a disability, how should the Department define “travel party,” and how can airlines determine which passengers belong to the same “travel party?” Should the travel party be determined based on whether the passengers purchased their tickets in a single transaction, are on the same reservation or on linked Passenger Name Record (“PNR”), or based on other criteria?

Should airlines be required to offer the option of free rebooking for any cancellation or significant delay or change of a domestic flight that qualifies for a refund under section 503 of the 2024 FAA Act or under the Department’s Refund Rules?

(4) Compensation

(a) Compensation Amounts

The Department is considering requiring airlines to pay cash compensation to passengers whose trip is disrupted because of a cancellation or delay due, in whole or in part, to any circumstance within the control of the airline. The Department seeks comment on the effect that requiring compensation for lengthy, controllable

delays and cancellations may have on airline performance and profitability as well as the effect that such requirements would have on consumers. A working paper by the European University Institute supports that European compensation and service requirements (discussed later in this ANPRM) have reduced the likelihood and duration of flight delays under that regime, finding “an economically important and statistically significant effect of EC261 regulation [covering compensation and services] on both departure and arrival delay, as well as on-time performance.”⁹² In reaching that conclusion, the working paper compared flights operating on the same route around the same time that were covered by EC 261 with those that were not.⁹³ A separate study contracted by the European Commission documented an overall increase in the number of cancellations and lengthy delays of flights covered by the EU regulation between 2011 and 2018.⁹⁴ That study also documented reduced delays on flights covered by the EU regulation compared with those that were not, concluding that it was “possible” that the EU regulation “has a marginal impact on the proportion of flights delayed” but stating that the impact “does not appear to be significant compared to other factors.”⁹⁵ In addition, the Department requests comment on how requiring cash compensation may impact consumer behavior. For example, would requiring cash compensation make consumers impacted by cancellations and lengthy flight delays more likely to continue to travel by air in the future?

The Department is contemplating proposing that cash compensation would be due to a passenger whose arrival at the final stop of the itinerary is delayed by three hours or more for a domestic flight and six hours or more for an international flight because of a

⁹² See Hinnerk Gnitzmann and Piotr Śpiewanowski, *Can Regulation Improve Service Quality? Evidence from European Air Passenger Rights*, European University Institute Working Paper, RSCAS 2018/44 (2018) at 8, available at https://cadmus.eui.eu/bitstream/handle/1814/58304/RSCAS_2018_44.docx.pdf?sequence=1&isAllowed=y.

⁹³ Flights arriving to the EU from locations outside the EU are covered by EC 261 only if the carrier is an EU carrier. See *id.* at 1 (explaining that differences in EC 261 coverage based on the nationality of the carrier “makes it possible to identify the impact of the regulation while allowing for carrier fixed effects and controlling for route-time effects (e.g., caused by airspace congestion)”).

⁹⁴ See Study on the Current Level of Protection of Air Passenger Rights in the EU, No. MOVE/B5/2018–541 (2020), available at <https://op.europa.eu/en/publication-detail/-/publication/f03df002-335c-11ea-ba6e-01aa75ed71a1>.

⁹⁵ *Id.* at 20.

⁸⁹ See Comment from Paralyzed Veterans of America at 2, available at <https://www.regulations.gov/comment/DOT-OST-2022-0089-5262>, comment from United Spinal Association, available at <https://www.regulations.gov/comment/DOT-OST-2022-0089-5304>.

⁹⁰ See Comment from Paralyzed Veterans of America at 3.

⁹¹ See Final Report, ACAA Advisory Committee Recommendations at 9–10 (Feb. 4, 2022), available at <https://www.regulations.gov/document/DOT-OST-2018-0204-0040>.

controllable flight cancellation or delay. This structure is similar to that used in the Canadian APPRs.⁹⁶ In addition, using a three-hour delay threshold for domestic flights and six-hour thresholds for international flights to determine whether compensation is owed is consistent both with the definition of significantly delayed in section 512 of the 2024 FAA Act and with the definition of significantly delayed flight in the Department's recent Refund Rules.⁹⁷ The Department invites comment on these time thresholds for

compensation, including whether any compensation should be required for delays of less than three hours. To determine the compensation amounts that should be paid to consumers, the Department is considering two options. The first option is using amounts comparable to Canadian amounts of compensation applicable to large airlines. The second option is to base the cash compensation amounts on the value of passenger time and the weighted average flight delay. The Department seeks public comment

on these options and will also consider additional options recommended by commenters. For the first option, the Department is considering using the same compensation amounts required for large airlines under the Canadian APPRs, converted from Canadian to U.S. dollars. Canada currently applies the following tiers of cash compensation requirements to cancellations and flight delays that are within the airline's control and not required for safety:⁹⁸

CANADIAN COMPENSATION REQUIREMENTS⁹⁹

	Large carriers	Small carriers
Delayed Arrival of 3–5:59 hours	\$400 Canadian Dollars (CAD), Approximately \$295 U.S. Dollars (USD).	\$125 (CAD), Approximately \$92 USD.
Delayed Arrival of 6–8:59 hours	\$700 (CAD), Approximately \$517 USD	\$250 (CAD), Approximately \$185 USD.
Delayed Arrival of 9+ hours	\$1,000 (CAD), Approximately \$738 USD	\$500 (CAD), Approximately \$369 USD.

The Department is considering whether to use amounts similar to Canada to ensure U.S. passenger compensation requirements are in line with other similar international requirements. Under this first option, the Department is considering requiring an airline to pay compensation of \$300 USD to a passenger whose arrival at the final stop of a domestic flight is delayed at least three hours but less than six hours; \$525 USD to a passenger whose arrival at the final stop of a domestic flight is delayed at least six hours but less than nine hours; and \$750 USD to a passenger whose arrival at the final stop of a domestic flight is delayed at least nine hours.¹⁰⁰ The Department is considering requiring an airline to pay \$525 USD to a passenger whose arrival at the final stop of an international flight is delayed at least six hours but less than nine hours; and \$750 USD to a passenger whose arrival at the final stop of an international flight is delayed at least nine hours. If the Department proposes this option, should it also include reduced compensation amounts for small airlines like the Canadian APPRs? Why or why not?

The second option the Department is considering is to require airlines to pay compensation based on the Department's hourly value of travel time savings for air travel from DOT's Benefit-Cost Analysis Guidance for Discretionary Grant Programs¹⁰¹ and the weighted average flight segment delay of flights delayed at least three but less than six hours, at least six hours but less than nine hours, and nine hours or more on flight segments within the United States using 2022 and 2023 full-year domestic flight performance data collected by BTS.¹⁰² Under this second option the Department would require an airline to pay compensation of \$200 to a passenger whose arrival at the final stop of a domestic flight is delayed at least three hours but less than six hours; \$375 to a passenger whose arrival at the final stop of a domestic flight is delayed at least six hours but less than nine hours; and \$775 to a passenger whose arrival at the final stop of a domestic flight is delayed at least nine hours. The Department is considering requiring an airline to pay \$375 to a passenger whose arrival at the final stop of an international flight is delayed at least six hours but less than nine hours; and

\$775 to a passenger whose arrival at the final stop of an international flight is delayed at least nine hours. In calculating the compensation amounts for the second option, the Department relies on the BTS data because that data is reported and certified correct by U.S. airlines to the Department. The Department recognizes that BTS data have some limitations as applied to this rulemaking. Notably, BTS only collects flight performance data from U.S. airlines for domestic flight segments, and the data does not reflect passenger trip delay. Accordingly, the data used to establish any compensation amounts from BTS data would necessarily be limited to domestic segment-based delays, not overall delays for passengers arriving at their destinations. The Department invites comment on whether it should use BTS data to establish any compensation amounts or whether an alternate data source would provide information more appropriate to establishing compensation amounts. To arrive at the dollar value for compensation for purposes of soliciting comment on option two in this ANPRM, the Department multiplied its estimated

⁹⁶ See APPRs, ¶ 19(1).
⁹⁷ 89 FR 32833.
⁹⁸ APPRs ¶ 19(1).
⁹⁹ Conversions from CAD to USD estimated based on the average conversion rate on the Bank of Canada website for the week of September 3–September 10, 2024.
¹⁰⁰ The Department rounded the converted values of Canadian compensation to the nearest \$25 for purposes of providing compensation amounts for comment in this ANPRM. Conversion rates from Canadian to U.S. Dollars are provided in the docket at <https://www.regulations.gov/docket/DOT-OST-2024-0062/>.

¹⁰¹ The value was weighted by the proportion of travel that is business and personal. See U.S. Department of Transportation, Benefit-Cost Analysis Guidance for Discretionary Grant Programs, 2024 Update (Dec. 5, 2023), Table A–2, p. 40, n. 2 and 3, available at <https://www.transportation.gov/sites/dot.gov/files/2023-12/Benefit%20Cost%20Analysis%20Guidance%202024%20Update.pdf>. The value of travel time in air transportation is \$47.70 per hour for personal travel and \$80.20 for business travel, with a ratio of 88.2 percent personal travel and 11.8 percent business travel.

¹⁰² The largest U.S. airlines report certified flight performance data for their domestic scheduled operations to BTS on a monthly basis. Based on 2023 BTS T–100 domestic market-based traffic data, these airlines account for more than 95 percent of domestic passenger air traffic. Bureau of Transportation Statistics, T–100 Market Data, available at <https://www.regulations.gov/docket/DOT-OST-2024-0062/>. Additional information on the Department's calculations is available in the docket at <https://www.regulations.gov/docket/DOT-OST-2024-0062/>.

weighted average arrival delay for each compensation tier (3–5:59 hours; 6–8:59 hours; 9+ hours) ¹⁰³ by the Department's hourly value of travel time savings for air travel from DOT's Benefit-Cost Analysis Guidance for Discretionary Grant Programs. This hourly value of travel time savings for air transportation is \$51.54. ¹⁰⁴ The Department developed its value of travel time savings "to be used in all DOT benefit-cost or cost-effectiveness analyses." ¹⁰⁵ Although the value of travel time savings was not specifically developed for the purpose of assessing the value of time lost due to air travel delays, the Department views the factors used to establish the

value of travel time savings—trip purpose, passenger characteristics, passenger income, mode and distance of transportation, and passenger comfort—are also potentially relevant to time lost due to air travel delays. ¹⁰⁶

The Department also closely reviewed the EU compensation regime when developing this ANPRM. The EU, like Canada, uses a three-tiered compensation system, but those compensation regimes have different criteria. Canadian compensation requirements are based on the length of a passenger's delayed arrival and whether the carrier is a large or small carrier. ¹⁰⁷ The EU compensation amounts are based on the distance and

location of the flight (*i.e.*, whether the flight is entirely within the EU), with a reduction of 50 percent if passengers arrive with delays of less than two, three, or four hours depending upon the distance and location of the flight. ¹⁰⁸ The EU applies the following requirements for compensation in the form of cash, electronic bank transfer, bank order or bank check for cancellations and delays of three hours or more unless the airline proves that the cancellation or delay is "caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken." ¹⁰⁹

EU COMPENSATION REQUIREMENTS ¹¹⁰

	Compensation	Reduced compensation if rerouting is provided
All flights 1500km or less	250 Euros, Approximately \$278 USD.	Reduced to 125 Euros (approximately \$139 USD) if passenger arrives less than 2 hours later than scheduled.
All flights entirely within the EU and all flights between the EU and a location outside the EU between 1500 and 3500 km.	400 Euros, Approximately \$445 USD.	Reduced to 200 Euros (approximately \$223 USD) if passenger arrives less than 3 hours later than scheduled.
All other flights	600 Euros, Approximately \$668 USD.	Reduced to 300 Euros (approximately \$334 USD) if passenger arrives less than 4 hours later than scheduled.

Should the Department use a tiered model if it imposes compensation requirements or should the Department require a single level of compensation for all lengthy, controllable delays and controllable cancellations? A tiered approach based on the length of delay as under options one and two would be similar to Canadian regulatory requirements. It would also reflect that passengers lose more time and are likely to experience greater inconvenience and discomfort during longer delays and may provide added incentive for airlines to rebook delayed and cancelled passengers on replacement flights arriving close to the passengers' originally scheduled arrival times. Instead of a tiered approach based on length of delay, should the Department adopt a different compensation model, such as a model more similar to the EU, with different compensation amounts

applicable to domestic and international flights?

If the Department requires airlines to pay compensation, what methodology should the Department use to establish compensation amounts? Should the Department establish compensation amounts using a methodology that provides compensation based on the value of a passenger's lost time, such as the methodology in option two discussed above that would calculate compensation amounts using the Department's hourly value of travel time savings for air travel from DOT's Benefit-Cost Analysis Guidance for Discretionary Grant Programs and BTS data on flight segment delays? ¹¹¹ Or, instead of determining any compensation amounts based on the value of a passenger's time, should the Department establish any compensation amounts with reference to the rates used

in other jurisdictions as under option one? Are there additional or alternate data sources that the Department should examine in order to establish any compensation amounts? Should the Department consider a compensation requirement that includes periodic updates to compensation amounts, such as for inflation using the consumer price index or based on another method?

Should any compensation methodology impose lower compensation requirements on some airlines, similar to the current Canadian regulatory requirements which apply lower compensation requirements to small airlines, or exclude some airlines entirely? ¹¹² For example, should the Department impose lower compensation requirements on airlines that meet the definition of a small entity for purposes of the Regulatory Flexibility Act or

¹⁰³ Additional information about these calculations is provided in the docket for this rulemaking, available at <https://www.regulations.gov/docket/DOT-OST-2024-0062/>.

¹⁰⁴ See U.S. Department of Transportation, Benefit-Cost Analysis Guidance for Discretionary Grant Programs, 2024 Update (Dec. 5, 2023), Table A–2, p. 40, n. 2 and 3, available at <https://www.transportation.gov/sites/dot.gov/files/2023-12/Benefit%20Cost%20Analysis%20Guidance%202024%20Update.pdf>.

¹⁰⁵ U.S. Department of Transportation, Revised Departmental Guidance on Valuation of Travel Time in Economic Analysis (Sept. 27, 2016) at 1, <https://www.transportation.gov/sites/dot.gov/files/docs/2016%20Revised%20Value%20of%20Travel%20Time%20Guidance.pdf>.

¹⁰⁶ *Id.* at 4–7.

¹⁰⁷ Canadian regulations define a large carrier as one that has transported a worldwide total of two million passengers or more during each of the two preceding calendar years. APPRs ¶ 1.

¹⁰⁸ EC No 261/2004, Articles 5, 7.

¹⁰⁹ *Id.* By court decision, the EU's compensation requirements also apply to delays of three hours or more. Joined Cases C–402/07 and C–432/07, *Sturgeon v. Air France*, 2009 E.C.R. I–10923, ¶ 69.

¹¹⁰ Conversions from Euros to USD estimated based on the conversion rate on the Forbes Advisory website on September 16, 2024.

¹¹¹ The value was weighted by the proportion of travel that is business and personal. See U.S. Department of Transportation, Benefit-Cost Analysis Guidance for Discretionary Grant Programs, 2024 Update (Dec. 5, 2023), Table A–2, p. 40, n. 2 and 3, available at <https://www.transportation.gov/sites/dot.gov/files/2023-12/Benefit%20Cost%20Analysis%20Guidance%202024%20Update.pdf>. The value of travel time in air transportation is \$47.70 per hour for personal travel and \$80.20 for business travel, with a ratio of 88.2 percent personal travel and 11.8 percent business travel.

¹¹² See APPRs ¶ 19(1).

airlines that are small based on other criteria?¹¹³

Should the Department apply higher compensation requirements to those carriers that comprise a large percentage of domestic scheduled-service passenger revenues (e.g., 10 percent or greater)¹¹⁴ or comprise a large number of total enplanements to and from the United States (e.g., have two million or more total enplanements to and from the United States)?¹¹⁵ Would higher compensation requirements further incentivize the largest carriers to make operational changes to reduce the prevalence of controllable cancellations and delays?

Are there circumstances in which compensation requirements should not apply? For example, should compensation requirements not apply if the airline provides sufficient advance notice of the cancellation or delay? Among other options, the Department is considering not requiring compensation if the airline notifies the passenger of the flight cancellation or arrival delay at least eight days before the first scheduled departure for that part of the trip (e.g., before the scheduled departure for the first flight segment of an inbound or outbound portion of the itinerary). An eight-day time period is consistent with the BTS reporting rule which defines a cancelled flight as a flight not operated, but that was listed in the carrier's computer reservation system within seven calendar days of the scheduled departure.¹¹⁶ Under those rules, a flight removed for the carrier's reservation system more than seven days out are not reportable to the Department. Should the Department instead adopt a longer or shorter period during which any exclusion would apply, such as 14 days before the first scheduled departure? If commenters recommend a period longer than eight days, please provide a rationale for the recommended approach along any available data source that the Department can consult to estimate the number of flights that are cancelled

more than eight days in advance of the flight. Should higher compensation requirements apply to cancellations and delays that occur closer in time to the scheduled flight to reflect the likelihood of greater inconvenience and costs to passengers from last-minute cancellations and delays? If so, at what point in time should higher compensation requirements apply?

What compensation, if any, should be required if a passenger does not accept any flight offered by the airline and instead elects to receive a refund? In that circumstance, should the Department require compensation in the full amount that would otherwise be required based on the earliest arriving rebooking offered by the airline? Is there any reason for compensation not to be required when a passenger decides not to continue travel because of a controllable delay or cancellation and receives a refund? Canadian regulations require the airline to pay the lowest level of its tiered compensation structure if the passenger elects to accept a refund rather than rebooking.¹¹⁷ Should the Department similarly require reduced compensation in those circumstances? If the passenger elects to receive a refund, should the Department require different compensation if the airline is unable to offer prompt rebooking (for example, because alternate flights are unavailable) than if the airline offers prompt rebooking?

What compensation, if any, should be required if a passenger accepts rebooking, but does not accept the earliest flight offered by the airline? Should the compensation amount be calculated based on the earliest scheduled arrival of the itinerary offered by the carrier? The Department requests comment on whether there are other options that the Department should consider.

Do certain groups of passengers, such as passengers with disabilities, encounter unique costs associated with significant cancellations and delays? If so, should a compensation requirement address the potential for increased costs for certain groups of passengers, and how should it address these costs?

(b) Form of Compensation

The Department is contemplating requiring airlines to pay compensation in the form of cash or a cash equivalent for controllable flight disruptions rather than in alternative formats such as travel credits or vouchers or airline miles. In the Department's recent Refund Rules, the Department defined

"cash equivalent" as a form of payment that can be used like cash, including but not limited to a check, a prepaid card, funds transferred to the passenger's bank account, funds provided through digital payment methods (e.g., PayPal, Venmo), or a gift card that is widely accepted in commerce.¹¹⁸ The Department does not consider a form of payment to be "cash equivalent" if consumers bear the burden for transaction, maintenance, or usage fees related to the payment. The Department notes that cash or a cash equivalent would provide the highest degree of flexibility to a consumer inconvenienced by a controllable cancellation or delay in how and when to spend the required compensation.

Should the Department propose to allow airlines to provide compensation in a form other than cash or cash equivalent, and if so, under what circumstances would a non-cash option provide more benefit to consumers? Given that cash or a cash equivalent has no restriction on how and where it can be spent, under what conditions, if any, might non-cash compensation with limited use represent a better option? If non-cash or non-cash equivalent compensation is an acceptable compensation option, are additional consumer protections needed to ensure consumers are treated fairly and to ensure fair competition? How would the Department determine whether consumers have received the required compensation value with non-cash alternative compensation options? For example, if airlines were to offer miles or rewards points, how would the Department determine whether the miles or points represent a dollar value equivalent to or greater than the compensation amount required, particularly for miles or points that expire, cannot be converted into cash or a cash equivalent, and/or have a dynamic dollar value that changes at the discretion of the airline? How would the Department ensure that any vouchers or airline miles provided as an alternative to cash or cash equivalent compensation provide a benefit and maintain a value equal to or greater than cash or a cash equivalent? What misleading or unfair practices, if any, may occur when airline miles, travel credits or vouchers, or other similar types of compensation are offered in lieu of cash or cash equivalent compensation?

(c) Automatic Compensation Payments

Should the Department require airlines to make automatic cash or cash equivalent compensation payments to

¹¹³ Under the Regulatory Flexibility Act carriers that exclusively provide air transportation with aircraft originally designed to have a maximum passenger capacity of 60 seats or less or a maximum payload capacity of 18,000 pounds or less are small businesses. See 14 CFR 399.73.

¹¹⁴ Four U.S. carriers, American Airlines, Delta Air Lines, United Airlines, and Southwest Airlines, comprised 10 percent or more of domestic scheduled passenger revenue in 2023, all with over 15 percent. No other carrier comprised more than six percent of domestic scheduled passenger revenue. See docket at <https://www.regulations.gov/docket/DOT-OST-2024-0062/>.

¹¹⁵ Eighteen foreign carriers exceeded two million total enplanements to or from the United States in 2023. See *id.*

¹¹⁶ 14 CFR 234.2.

¹¹⁷ APPRs ¶ 19(2).

¹¹⁸ See 89 FR 32833.

consumers who are entitled to receive compensation? Under what circumstances, if any, should the Department require airlines to pay cash or cash equivalent compensation automatically, without requiring the submission of information by the consumer? What should a regulatory framework establishing automatic cash or cash equivalent compensation payment process look like to ensure automatic payments are provided effectively and efficiently to affected passengers? What information would airlines need to process automatic cash and cash equivalent compensation payments? Would cash-equivalent compensation (e.g., a Visa gift card) enable airlines to provide compensation without having to obtain passenger information, such as bank account information? If automatic compensation is required, how should the regulatory framework address disagreements between an airline and passenger about the compensation amounts or whether a given cancellation or delay was outside of the airline's control? Further, in cases where compensation is owed under the laws of multiple jurisdictions, how could a regulatory framework for automatic compensation enable passenger choice to receive compensation under the passenger's preferred regime?

Instead of requiring automatic compensation, should the Department allow airlines to require passengers to submit requests for compensation? What would be the necessary elements of such claims process, if needed? Should airlines be required to accept compensation requests through airline websites, by email, or by phone? If the Department were to allow airlines to require passengers to request compensation, are there ways to ensure that all passengers get the compensation they are entitled to receive? For example, if one passenger submits a compensation request, should that be sufficient to trigger a requirement that all passengers on the flight receive compensation if owed? Should airlines be required to proactively provide a way to request compensation as part of a notification process? What other requirements might be necessary to ensure that a request process results in all passengers getting the compensation they are entitled to, ensure that the request process is easy to navigate, and ensure that compensation disbursement is prompt?

In circumstances in which a third party, such as a private- or public-sector employer, has paid for a passenger's ticket, should any compensation be paid to the passenger or should it be paid to

the third-party payor? Are there challenges to either approach?

(5) Meals, Lodging, and Transportation to and From Lodging

As reflected on the Department's Airline Customer Service Dashboard, the largest U.S. airlines all currently guarantee in their customer service plans that they will cover a meal for passengers affected by a cancellation or delay within the airline's control that results in a passenger waiting three hours or more, and all but one of the largest U.S. carriers currently commit to providing hotel accommodations and travel to and from the hotel when there are controllable overnight delays and cancellations.¹¹⁹ Some of those airline policies contain limitations, for example, limiting their hotel guarantees to non-local passengers and limiting any reimbursements for hotels to reasonable costs.¹²⁰

Section 512 of the 2024 FAA Act requires the Department to "direct all air carriers providing scheduled passenger interstate or intrastate air transportation to establish policies regarding reimbursement for lodging, transportation between such lodging and the airport, and meal costs incurred due to a flight cancellation or significant delay directly attributable to the air carrier." For the purposes of section 512, "significantly delayed" means, "the departure or arrival at the originally ticketed destination associated with such transportation has changed—(1) in the case of a domestic flight, three or more hours after the original scheduled arrival time; and (2) in the case of an international flight, six or more hours after the original scheduled arrival time." As explained earlier in this ANPRM, the Administration views the 2024 FAA Act to "set a floor that the Department of Transportation could build on as deemed appropriate by the Secretary of Transportation."¹²¹

¹¹⁹ See <https://www.transportation.gov/airconsumer/airline-customer-service-dashboard>.

¹²⁰ See, e.g., Alaska Airlines Customer Service Plan, available at <https://www.alaskaair.com/content/about-us/customer-commitment/customer-commitment-delay-care> (guaranteeing a hotel only if the passenger is delayed overnight at "an airport located 100 or more miles away from [the passenger's] home"); American Airlines Customer Service Plan (updated July 19, 2024), available at <https://www.aa.com/i18n/customer-service/support/customer-service-plan.jsp> (guaranteeing a hotel if the passenger is delayed overnight "away from [their] city of residence").

¹²¹ See Statement of Administration Policy, Senate Substitute Amendment to H.R. 3935—FAA Reauthorization Act of 2024 (May 8, 2024), available at <https://www.whitehouse.gov/wp-content/uploads/2024/05/SAP-SSA-HR3935.pdf>.

(a) Service Standards

Consistent with the Administration's position that the 2024 FAA Act is a floor, the Department is considering requiring airlines to guarantee in their customer service plans that they will cover the cost of meals when a controllable cancellation results in passengers waiting for three hours or more for a new flight or when a flight delay results in passengers waiting for three hours or more. This is consistent with the commitments that the large U.S. airlines have made at the urging of DOT. Should the Department use the three-hour delay threshold from the Dashboard for any meal requirements for both domestic and international delays? Or should it apply different thresholds, such as requiring airlines to cover the cost of meals for domestic delays of three hours or more and international delays of six hours or more?

Canadian, EU, and United Kingdom regulatory meal requirements consider waiting time.¹²² Should the Department similarly require airlines to cover more than one meal for longer delays based on actual or expected length of delay, based on a daily per diem allotment per passenger, or based on another metric? Should the Department consider requirements ensuring airlines cover a meal with certain qualities, for example that the meal includes a non-alcoholic beverage and an entrée or that the meal meets the dietary restrictions of the affected passenger?

The Department is also considering requiring airlines to guarantee in their customer service plans that they will cover lodging for passengers affected by an overnight delay or cancellation or reimburse passengers for expenses incurred for lodging. If the Department proposes this approach, how should

¹²² The Canadian regulation currently requires airlines to provide "food and drink in reasonable quantities, taking into account the length of the wait, the time of day and the location of the passenger." See APPRs section 14(1)(a). Similarly, EC 261 requires "meals and refreshments in a reasonable relation to the waiting time." Article 9(1)(a). The EU has further explained that this means that "operating air carriers should provide passengers with appropriate care corresponding to the expected length of the delay and the time of day (or night) at which it occurs, including at the transfer airport in the case of connecting flights, in order to reduce the inconvenience suffered by the passengers as much as possible, while bearing in mind the principle of proportionality." EU Interpretative Guidelines. The United Kingdom's Civil Aviation Authority explains on its website that, in the case of a covered delay or cancellation, the airline must provide passengers with meals and hotel "until it is able to fly you to your destination, no matter how long the delay lasts or what has caused it." See <https://www.caa.co.uk/passengers/resolving-travel-problems/delays-and-cancellations/cancellations/>.

“overnight delay or cancellation” be defined? The Department notes that neither the EU nor Canadian regulations define when a delay is overnight for purposes of their requirements for overnight accommodations. How do those requirements apply in practice in those jurisdictions? Should the Department consider passengers delayed past 10 p.m. or 11 p.m. to be affected by an overnight delay or cancellation and thus entitled to receive lodging, or is there another measure that the Department should consider? Should the original scheduled time of the flight and length of delay be considered in making this determination (e.g., a flight was originally scheduled for 9 p.m. and is delayed for two hours to 11 p.m.)? Should the Department use the three hours for domestic delays and six hours for international delays from the 2024 FAA Act to establish a minimum waiting time that must occur before a passenger would be entitled to receive overnight accommodation? How should the length of the delay impact lodging requirements when a consumer experiences excessive delay (e.g., 12 hours) but the delay is not overnight? Should any requirement to cover lodging be based on the duration of the delay because the passenger may need to obtain lodging for multiple nights during an extended cancellation or delay?

How should the Department define lodging? Should the Department define lodging to include types of accommodation beyond traditional hotels and motels, and if so, what types of accommodation should be included? Are there circumstances when an airline should be required to cover lodging with more than one bedroom for a traveling party, and if so, in what circumstances? How should a traveling party be defined?

In addition, the Department is considering requiring any lodging provided by the airline must be reasonable in quality (*i.e.*, a safe and healthy environment that is accessible to a passenger who self identifies as a person with a disability) and be nearby to the airport, when available. The Department seeks comment on any options that would ensure lodging requirements appropriately address passenger needs, including any standards to determine what is reasonable and nearby for the purposes of lodging, as well as any additional or different requirements that the Department should apply. The Department also requests comment on whether airlines should be required to cover ancillary lodging costs such as

extra bedding, a baby crib, or parking at the lodging, and if so, which ancillary costs should be required to be covered.

The Department is considering allowing airlines to limit lodging to non-local travelers as provided in some current airline policies. If the Department allows airlines to limit lodging to non-local travelers, how should the Department define which travelers are “local”? If the Department does not require airlines to cover the cost of lodging for local travelers, should the Department require airlines to cover travel to and from the passenger’s residence or airport parking costs associated with a controllable cancellation or lengthy, controllable delay for those travelers?

The Department is also considering requiring airlines to guarantee in their customer service plans that they cover transportation to and from lodging to affected passengers, including transportation that is accessible to a passenger who self identifies as a person with a disability. What costs to and from lodging should airlines be required to cover? For example, should airlines be required to cover the cost of shuttle service, driver service such as taxi or ride share, rental car, or gas mileage for the passenger’s vehicle or for friend’s vehicle if picking up the passenger? Should the Department require airlines to cover the cost of a driver service such as a taxi or ride share to and from the lodging in all circumstances, or some circumstances, and if so, which circumstances should not be covered and why? The Department is considering allowing airlines to provide in their policies that they will not cover services if the passenger is provided sufficient advance notice of a cancellation or delay. If the Department proposes this approach, what time period should constitute sufficient advance notice? For example, should the Department allow airlines not to cover meals if the passenger is notified of the delay or cancellation at least 12 hours in advance of the scheduled departure because the passenger is less likely to need to purchase a meal at the airport in that circumstance? Should any differing time periods apply to any requirements for meals and lodging and transportation to and from lodging? If so, why?

What requirements for meals, lodging, and transportation to and from lodging, if any, should apply if a passenger accepts a refund, rather than rebooking, in the event of a controllable cancellation or a lengthy, controllable flight delay?

Should the Department, under its authority to ensure “adequate”

transportation in 49 U.S.C. 41702, extend any requirement that airlines cover the costs of meals, and lodging for overnight delays, and transportation to and from lodging to all cancellations and lengthy flight delays when the passengers are flying domestically, regardless of whether the cancellation or delay is controllable? Why or why not? Are there additional circumstances in which the Department should consider requiring these services?

(b) Upfront Services

The Department is seeking comment on the best way to ensure that passengers receive the services they are entitled to, with minimal expense and hassle. The Department is considering proposing a multi-tiered approach for airlines to provide meals, lodging, and transportation to and from lodging to passengers. Under this approach, an airline would be required to dispense all upfront vouchers or credits for these services as soon as the airline becomes aware of the flight disruption that triggers a passenger’s entitlement to services, and, if the airline does not offer and provide those services upfront, then the airline would be required to reimburse passengers for the cost of those services.

The Department is of the tentative view that passengers are best served when airlines cover the upfront costs of meals, lodging, and travel to and from lodging during flight disruptions so that passengers do not have to pay out of pocket for those services. Passengers may not have the means to pay for these unexpected costs, and some passengers may not be able to navigate the process of procuring some or all these services on their own. Under this option, the required services would be provided by airlines directly through physical or electronic vouchers, e-credits, or other mechanisms that ensure passengers receive the services upfront. The Department is concerned that airlines’ current policies and procedures for distributing services upfront may be inadequate for meeting passengers’ needs and may not be consistently or evenly provided, particularly during widespread flight disruptions. Airlines have disparate policies and processes for distribution and may not plan appropriately to have enough vouchers or credits to provide them to all affected passengers who are entitled to them. Moreover, frontline staff may lack training or instruction regarding when passengers are entitled to each of these services, what services are available upfront, who to prioritize when vouchers or credits are limited, and what costs will be reimbursed when

vouchers or credits run out or are not provided. Additionally, long waits to receive vouchers or credits for services may result in passengers giving up and paying for these services directly themselves.

How should the Department define “upfront” in terms of process and timing? What, if any, requirements might be necessary to ensure that the manner and timeliness of distribution is adequately meeting passengers’ needs? Does this option best address the Department’s concerns, or would an alternate approach better ensure that passengers receive needed services with minimal expense and hassle?

(c) Reimbursements for Services

The Department is contemplating proposing to require airlines to reimburse passengers for costs incurred for meals, lodging, and transportation to and from lodging when the airline fails to offer those services or those services are not offered and provided in a timely manner. In lieu of providing vouchers or credits, some airlines currently reimburse passengers for the costs of the services during wide-spread controllable disruptions. However, airlines do not consistently disclose when passengers are eligible for reimbursements for services and what costs the airlines will reimburse for and how much they will cover. Moreover, because the process for requesting reimbursement is different for each airline, it can be difficult for passengers to navigate, and the timing of the reimbursement payment is discretionary and often lengthy.

The Department believes frustrated and inconvenienced passengers may purchase a service that the airline should be providing if the passenger is unaware of when and where a service or voucher is available. How should any proposed requirements ensure that passengers are aware of the airlines’ obligations to provide a service, so that the consumer would not purchase the service out-of-pocket expecting reimbursement? How should any requirements for airlines to provide reimbursements apply, if at all, if the passenger purchased the service themselves before the airline notifies the passenger that the airline will provide the service? Should the Department require airlines to offer passengers the option of choosing reimbursements even if the airline also offers to provide a service or a voucher for the service? Should airlines be required to provide documentation that the passenger received the service upfront in lieu of reimbursement, if so, what kind of documentation should be required?

(i) Automatic Reimbursements for Services

The Department is considering how reimbursements for services should be provided, including whether reimbursements should be automatic or requested by the passenger. Due to concerns that the process for requesting reimbursements can be cumbersome for passengers, one option would be to require automatic reimbursements in some circumstances without submission of information by the passenger. The Department is considering requiring automatic reimbursement for a minimum amount after an established time period if an affected passenger does not submit receipts of their costs for meals, lodging, or transportation to and from lodging, and the airline has no documentation of the passenger receiving the service upfront. On the other hand, if the passenger submits receipts during that time period, the Department is considering proposing that the airline must reimburse the passenger for those expenses up to a pre-established maximum threshold for each service. The Department invites comment on what time period should apply to the submission of receipts and the minimum and maximum amounts for reimbursement if the Department proposes this approach. In addition, in both scenarios, the Department would consider requiring the airline to provide the reimbursement within a defined period and solicits comment on what that time period should be.

The Department is seeking comment on this approach and what requirements would be necessary to ensure that it produces the expected outcomes for passengers. Under what circumstances, if any, should the Department require airlines to pay reimbursements automatically, without requiring the submission of information by the consumer? How would the automatic payment process work? Would an airline need to obtain a passenger’s bank account information to process a reimbursement? Would cash-equivalent compensation (e.g., a Visa gift card) enable airlines to provide reimbursements without having to obtain passenger information, such as bank account information?

Would establishing minimums and maximums make obtaining meals, lodging, and transportation to and from lodging more predictable for consumers during a cancellation or lengthy delay compared with current airline practices? If it proposes this approach, how should the Department determine the minimum and maximum amounts that airlines must reimburse consumers for these

services? Should these values be nationwide or regional? Should the Department adjust these minimum and maximum values periodically to account for market pricing? Should the values for lodging be adjusted seasonally? Should any minimum payments for meals, lodging, and transportation to and from lodging, apply regardless of whether the consumer submits receipts? If the Department establishes minimum reimbursement amounts, should the Department require that if the airline offers a meal, lodging, or transportation to and from the lodging instead of providing reimbursement for that service, the airline must provide a service with equal value to the minimum reimbursement amount? How should that value be determined? Should the airline be required to provide reimbursement unless they present the passenger with documentation that the passenger received the service upfront?

Instead of requiring reimbursements based on minimum and maximum cost thresholds, should the Department require airlines to provide reimbursements for “reasonable” costs? If so, how should the Department establish the amount of reasonable reimbursements in any proposal? For example, should the Department establish reasonable reimbursement amounts for lodging or meals based on what airlines provide their own crews, based on per diem rates established by the U.S. General Services Administration, or using another methodology?¹²³

(ii) Claims for Reimbursement

For passenger claims for reimbursements supported by receipts, the Department is considering whether it is appropriate to require airlines to approve and pay a complete claim or deny a complete claim, with a written explanation of the airline’s reason for denying the claim if it does so, no later than a set timeframe after the complete claim is received. The Department invites comment on what timeframe should apply if the Department proposes this approach. If the Department does not propose automatic reimbursements for services during a set time period, should it establish a set time period during which passengers must submit claims for reimbursement, and, if so, what should that time period be?

Should the Department place any limits on information that airlines may

¹²³ See <https://www.gsa.gov/travel/plan-book/per-diem-rates>.

request from passengers to process their claims or establish a minimum basis for what qualifies as a “claim” the airline must accept? What other requirements, if any, should the Department establish for any process for consumer-provided information? For example, should the Department require airlines to establish their own policies and procedures for which reimbursements will be approved and not approved, provide opportunity for passengers to resubmit claims if corrections are needed and establish an internal appeals process? Should the Department require that airlines make any claims process streamlined, easy to access, available at any time, and with clear and conspicuous instructions and disclosures of airline policies for compensation or reimbursements? Are there circumstances in which the Department should permit airlines to reject, rather than respond to, submissions that do not provide sufficient information to process the claim? If an airline rejects a claim for reimbursement because they provided the service upfront, should the airline be required to present documentation of the passenger having received the service?

(6) Cancellations and Delays Covered by Foreign Legal Requirements

As previously discussed, EU and Canadian regulations require services and compensation similar to those on which the Department solicits comment in this ANPRM. How can the Department best avoid duplicative burdens on airlines? Are there provisions that are needed to ensure passengers receive favorable outcomes when more than one law applies to a controllable cancellation or lengthy controllable delay?

Both the EU and Canadian regulations limit entitlement to compensation if the passenger has already received compensation for the same delay or cancellation in another jurisdiction.¹²⁴ The EU regulation also limits entitlement to other services if the passenger has already received that service for the same delay or cancellation under another regime.¹²⁵

¹²⁴ See CTA, Air Passenger Protection Regulations—Regulatory Impact Analysis Statement, available at <https://otc-cta.gc.ca/eng/air-passenger-protection-regulations-regulatory-impact-analysis-statement> (noting that “passengers would only be able to receive compensation . . . if they have not already received compensation for the same event under a different regime”), see also EC No 261/2004, Article 3.1(b). Canadian regulations clarify that mere eligibility for compensation under another jurisdiction’s law is not a permissible basis for refusing compensation. See APPRs, ¶ 3(3).

¹²⁵ EC No 261/2004, Article 3.1(b); see also EU Interpretive Guidelines at C 214/7.

The European Commission has further clarified that if a passenger accepts only compensation or a service (but not both) under a different regime, the passenger’s entitlement to receive the compensation or service not accepted is unaffected under EU law.¹²⁶ Should the Department adopt similar limits to those under EU and Canadian regulations? How do these limits operate in practice? Can airlines efficiently provide a consumer their choice of benefits when more than one jurisdiction’s regulation applies to an event?

The Department is considering whether to require the airline to notify passengers of any differences in value of reimbursements, services, and compensation owed under any DOT requirements and the law of a foreign jurisdiction, if applicable, so that passengers would have the ability to accept a reimbursement, service, or compensation on an informed basis when the laws of multiple jurisdictions apply. The Department seeks comment on whether these options are appropriate, feasible for airlines, and benefit consumers, particularly if the Department were to decide to require automatic compensation and reimbursements. Would the value of services, such as lodging or a meal, likely be the same under any DOT-imposed requirement and the law of a foreign jurisdiction?

(7) Information Provided to Passengers

The Department is concerned that airlines do not sufficiently inform passengers about their rights when there are controllable cancellations and lengthy delays that entitle passengers to services such as meals, lodging, and rebooking. To address harm to consumers, the Department solicits comment on whether to require airlines to: (1) notify passengers of the required or promised services, (2) disclose proactively whether the cancellation or delay is controllable and would entitle passengers to services, (3) respond to passengers’ questions about reasons for disruptions and whether they qualify for services, (4) make information about services and reimbursements clear, easy to find, and accurate, and (5) explain the differences, if there are any, in the policies between codeshare partners for services and reimbursements.

If the Department requires airlines to provide compensation or rebooking without charge or to cover the costs of meals, lodging, and transportation to and from lodging, should the Department require notifications of available compensation, rebooking, or

costs of meals, lodging, and transportation to and from lodging? As discussed earlier in this ANPRM, at the December 2022 ACPAC meeting, the ACPAC recommended that the Department issue a regulation requiring airlines to notify affected consumers of the availability of services and amenities for controllable delays and cancellations, with three of the four members voting in favor of the recommendation.¹²⁷ The Department is considering requiring airlines to promptly notify consumers when a required service, reimbursement, or compensation is owed. The Department is considering requiring airlines to provide such notification when the airline expects that an entire flight segment will be subject to a controllable cancellation or delay that would entitle the passengers to services, reimbursements, and compensation. As an alternative, the Department is also considering instead requiring individualized notifications when only some passengers on a flight would be owed compensation, rebooking, or a service (e.g., when some passengers on a flight miss a connecting flight due to a controllable cancellation or delay) and seeks comment on whether it is feasible for airlines to do so. Are there challenges to providing individualized notifications or to providing these notifications to passengers who purchase air transportation from ticket agents, and if so, how should the Department address such challenges? What would be the costs for airlines to provide individualized notifications?

Where and by what means should any required notifications be provided? The Department is considering requiring that airlines provide notifications on the carrier’s primary website, to passengers who contact the airline’s customer service representative, at the boarding gate area, and/or through a method that the passenger has elected to receive flight status notifications. Should these or different notification methods apply? Should the Department require airlines to establish reasonable policies, procedures, and/or training for airline customer service staff to ensure that staff provide passengers proper notification of available reimbursements, compensation, and services and provide services promptly where applicable? If airlines are permitted to require passengers to affirmatively request compensation or services, should airlines be required to

¹²⁷ See ACPAC December 8 and 9, 2022 Meeting Minutes at 26, available at <https://www.regulations.gov/document/DOT-OST-2018-0190-0110>.

¹²⁶ EU Interpretive Guidelines at C 214/7.

proactively provide information on how to make that request or provide a link or other avenue for submitting the request in any notification regarding the cancellation or delay? The Department also requests comment on what requirements are needed to ensure passengers who identify to airlines as persons with disabilities receive effective notification.

What timing requirements, if any, should apply to any notifications? The Department is considering a proposal that notifications for reimbursements, services, and compensations must be promptly provided to consumers. If the Department should require prompt notifications, is additional clarification needed regarding when a notification is “prompt?” Should the Department establish a set timeframe following the occurrence of a cancellation or delay during which an airline must provide any required notifications? The Department would expect airlines to begin to provide notifications soon after the delay or cancellation rather than hours after it. Should different timeframes apply to any notifications about compensation and to any notifications about rebooking or services that are likely needed during or soon after the delay or cancellation?

Should the Department require airlines to notify passengers in real time of the specific cause of a lengthy delay or cancellation? If so, how can the Department ensure that information provided by the airline is accurate?

(8) Timely Customer Service

Section 505 of the 2024 FAA Act requires that air carriers selling tickets for scheduled passenger air transportation on an aircraft that, as originally designed, has a passenger capacity of 30 or more seats must maintain, without charge and available at all times: (1) a customer service telephone line staffed by live agents, (2) a customer chat option that allows for customers to speak to a live agent within a reasonable time, to the greatest extent practicable, or (3) a monitored text messaging number that enables customers to communicate and speak with a live agent directly. Section 505 authorizes DOT to issue such rules as may be necessary to carry out the requirement and provides that airlines must comply with section 505’s requirements “without regard to whether the Secretary has promulgated any rules to carry out” section 505.

In enforcement matters, the Department has taken the position that the practice of not providing adequate customer service assistance when a carrier cancels or significantly changes

a passenger’s flight is an unfair practice and also that the practice is deceptive when a carrier advertises a particular service to consumers as an available means of obtaining customer service assistance and fails to provide that service or fails to provide the service within a reasonable time period.¹²⁸ However, the Department’s regulations do not currently set forth specific requirements for timely customer service assistance or contain provisions addressing section 505 of the 2024 FAA Act. The Department is considering whether to propose minimum timely customer service requirements, particularly for passengers affected by cancellations and delays. Should the Department establish specific minimum wait times for customer service during or after a cancellation or lengthy delay, and what should the minimum wait times be or what should minimum wait times be based on? Should any minimum customer service wait time be based on the type of customer service the passenger seeks, for example, customer service about rebooking, refunds, compensation, etc.? Should the Department consider requiring airlines to make call center service available at all times during a disruption, regardless of whether the other means of assistance are available as well? Should the Department consider as an option letting airlines determine a minimum standard of customer service and requiring the airline to put it in their customer service plan? The Department invites comments on these options for improving the timeliness of customer service.

(9) Reporting and Recordkeeping

What recordkeeping and reporting requirements should apply to the areas covered by this ANPRM, if any? The Department is considering proposing that airlines must submit periodic reports regarding compliance with any requirements adopted. The intent of this option would be to enable the Department to monitor airline implementation of and compliance with any requirements effectively and efficiently and to facilitate enforcement of noncompliance, when appropriate. Such reports may include, for example, information about cancellations and lengthy flight delays that the airline determined were controllable and not controllable and the specific bases for the carrier’s determinations; information about notifications, services, reimbursements, and compensation provided; and information about

requests for services and claims for reimbursements and/or compensation, including the airline’s responses. Should the Department require reports and, if so, should the Department require airlines to report on a fixed interval? Should different reporting requirements, if any, apply to foreign carriers, and, if so, why?

Regulatory Notices

A. Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The Office of Management and Budget (OMB) has determined that this ANPRM is a significant regulatory action under Executive Order 12866. Executive Order 12866 requires agencies to provide a meaningful opportunity for public participation. Accordingly, we have asked commenters to answer a variety of questions to elicit practical information about alternative approaches and relevant data. These comments will help the Department evaluate whether a NPRM is needed and if so, the content of the NPRM. If the Department issues a NPRM after the completion of the comment period on this ANPRM, it will prepare a regulatory impact analysis for the proposed rule, assessing the potential benefits, costs, and transfers. The Department seeks any information, data, and analysis that would help the Department understand the economic impacts of the potential regulatory options discussed within this ANPRM.

B. Executive Order 13132 (Federalism)

This ANPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (“Federalism”). This ANPRM does not propose any requirement that (1) has substantial direct effects on the States, the relationship between the National Government and the States, or the distribution of power and responsibilities among the various levels of government, (2) imposes substantial direct compliance costs on State and local governments, or (3) preempts State law. States are already preempted from regulating in this area by the Airline Deregulation Act, 49 U.S.C. 41713. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

C. Executive Order 13175

This ANPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 (“Consultation and Coordination with Indian Tribal Governments”). Because none of the options on which we are seeking comment would

¹²⁸ See *Southwest Airlines Co.*, DOT Order No. 2023–12–11, Consent Order (Dec. 15, 2023).

significantly or uniquely affect the communities of the Indian Tribal governments or impose substantial direct compliance costs on them, the funding and consultation requirements of Executive Order 13175 do not apply.

D. Regulatory Flexibility Act

When a Federal agency is required to publish a notice of proposed rulemaking (5 U.S.C. 553), the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires the agency to conduct an initial regulatory flexibility analysis (IRFA). An IRFA describes the impact of the rule on small entities (5 U.S.C. 603). An IRFA is not required if the agency head certifies that a rule will not have a significant economic impact on a substantial number of small entities (5 U.S.C. 605). Under the Regulatory Flexibility Act, carriers that exclusively provide air transportation with aircraft originally designed to have a maximum passenger capacity of 60 seats or less or a maximum payload capacity of 18,000 pounds or less are small businesses.¹²⁹ If the Department proposes to adopt the consumer protections discussed in this ANPRM, it is possible that it may have some impact on small entities. We invite comment to facilitate DOT's assessment of the potential impact of adopting the possible regulatory requirements discussed in this ANPRM on small entities.

E. Paperwork Reduction Act

Under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), no person is required to respond to a collection of information unless it displays a valid OMB control number. This ANPRM is not covered by the Paperwork Reduction Act because it does not propose any new information collection burdens. If the Department proposes to adopt information collections in a NPRM, the burdens associated with such a collection will be analyzed at that time.

F. Unfunded Mandates Reform Act

The Department has determined that the requirements of Title II of the Unfunded Reform Act of 1995 do not apply to this document.

G. National Environmental Policy Act

The Department has analyzed the environmental impacts of this ANPRM pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and has determined that it is categorically excluded pursuant to DOT Order 5610.1C, Procedures for Considering Environmental Impacts (44

FR 56420, Oct. 1, 1979). Categorical exclusions are actions identified in an agency's NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS).¹³⁰ In analyzing the applicability of a categorical exclusion, the agency must also consider whether extraordinary circumstances are present that would warrant the preparation of an EA or EIS.¹³¹ Paragraph 4(c)(6)(i) of DOT Order 5610.1C provides that "actions relating to consumer protection, including regulations" are categorically excluded. The Department does not anticipate any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking.

Signed this 3rd day of December, 2024, in Washington, DC.

Peter Paul Montgomery Buttigieg,

Secretary of Transportation.

[FR Doc. 2024-28930 Filed 12-10-24; 8:45 am]

BILLING CODE 4910-9X-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-117213-24]

RIN 1545-BR37

Accounting for Disregarded Transactions Between a Qualified Business Unit and Its Owner

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to the determination of taxable income or loss and foreign currency gain or loss with respect to a qualified business unit. The proposed regulations include an election that is intended to reduce the compliance burden of accounting for certain disregarded transactions between a qualified business unit and its owner. This document also includes a request for comments relating to the treatment of partnerships and controlled foreign corporations.

DATES: Written or electronic comments and requests for a public hearing must be received by March 11, 2025.

ADDRESSES: Commenters are strongly encouraged to submit public comments

electronically via the Federal eRulemaking Portal at <https://www.regulations.gov> (indicate IRS and REG-117213-24) 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 comments submitted to the IRS's public docket. Send paper submissions to: CC:PA:01:PR (REG-117213-24), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT:

Concerning the proposed regulations, Adam G. Province at (865) 329-4546; concerning submissions of comments, requests for a public hearing, and access to a public hearing, Publications and Regulations Section at (202) 317-6901 (not toll-free numbers) or by email to publichearings@irs.gov (preferred).

SUPPLEMENTARY INFORMATION:

Authority

This document contains proposed additions and amendments to 26 CFR part 1 (Income Tax Regulations) addressing the application of section 987 of the Internal Revenue Code (Code) and related provisions (the "proposed regulations"). The additions and amendments are issued under sections 987 and 989, pursuant to the express delegations of authority provided under those sections. The express delegations relied upon are referenced in the Background section of this preamble. The proposed regulations are also issued under the express delegation of authority under section 7805 of the Code.

Background

This document contains proposed regulations under section 987 of the Code. Section 987 applies to any taxpayer that has a qualified business unit (QBU) with a functional currency other than the dollar. Section 987(1) and (2) provide rules for determining and translating taxable income or loss ("section 987 taxable income or loss") with respect to the QBU. In addition, foreign currency gain or loss must be determined under section 987(3) ("section 987 gain or loss"), which requires proper adjustments (as prescribed by the Secretary) for transfers of property between QBUs of the

¹²⁹ See 14 CFR 399.73.

¹³⁰ See 40 CFR 1508.4.

¹³¹ *Id.*

taxpayer having different functional currencies.

Sections 987 and 989 provide several explicit grants of regulatory authority. The statute does not specify how the proper adjustments should be made under section 987(3), but instead directs the Secretary to prescribe the proper adjustments needed to determine the taxable income of the owner of a section 987 QBU. Section 989(c) directs the Secretary to “prescribe such regulations as may be necessary or appropriate to carry out the purposes of this subpart.”¹ The grants of authority in section 989(c) include regulations providing for the appropriate treatment of related party transactions (including transactions between QBUs of the same taxpayer). Section 989(c)(5).

Concurrently with the publication of these proposed regulations, the Treasury Department and the IRS are publishing in the rules and regulations section of this edition of the **Federal Register** (RIN 1545–BO07) final regulations under sections 861, 985, 987 through 989, and 1502 of the Code (the “final regulations”). On November 14, 2023, the Treasury Department and the IRS published proposed regulations (REG–132422–17) under those same sections of the Code (the “2023 proposed regulations”) in the **Federal Register** (88 FR 78134). The comments received in response to the 2023 proposed regulations, and the revisions made in response to those comments, are summarized in the Summary of Comments and Explanation of Revisions in the preamble to the final regulations. In response to certain comments, the Treasury Department and the IRS are publishing this notice of proposed rulemaking to provide additional proposed rules under section 987 and to request comments relating to the application of section 987 to partnerships and controlled foreign corporations (“CFCs”).

Explanation of Provisions

The proposed regulations provide an election under which, in certain cases, taxpayers can translate a group of frequently recurring transfers between a section 987 QBU and its owner using the yearly average exchange rate (rather than the spot rate applicable on the date of each transfer). The proposed regulations also would simplify the computation of unrecognized section 987 gain or loss under § 1.987–4 for taxpayers that make this election.

I. Rules of the Final Regulations Relating to Disregarded Transactions

A. Accounting for Disregarded Transactions Between a Section 987 QBU and Its Owner

Under the final regulations, an asset is treated as transferred to a section 987 QBU from its owner if, because of a disregarded transaction, the asset is reflected on the books and records of the section 987 QBU. *See* § 1.987–2(c)(2)(i). Similarly, an asset is treated as transferred from a section 987 QBU to its owner if, because of a disregarded transaction, the asset ceases to be reflected on the books and records of the section 987 QBU. Thus, for example, if a section 987 QBU purchases inventory from its owner (or another eligible QBU of its owner) in a disregarded transaction, the section 987 QBU is treated as distributing cash to its owner, and the owner is treated as contributing the inventory to the section 987 QBU. Disregarded transactions, however, do not give rise to items of income, gain, deduction, or loss that are taken into account in determining section 987 taxable income or loss under § 1.987–3. *See* § 1.987–2(c)(2)(iii).

The final regulations provide rules for determining the basis of an asset or the amount of a liability that has been transferred by an owner to a section 987 QBU. In general, marked items are translated into the section 987 QBU’s functional currency at the spot rate applicable on the date of the transfer, while historic items are translated at the applicable historic rate. *See* § 1.987–2(d). Similarly, when an asset or liability is transferred from a section 987 QBU to its owner, marked items are translated into the owner’s functional currency at the spot rate applicable on the date of transfer, while historic items are translated at the applicable historic rate. *See* § 1.987–5(f). These rules apply to all transfers of assets and liabilities between a section 987 QBU and its owner, including transfers made in connection with ordinary course disregarded transactions (for example, sales of inventory).

The definition of a marked item under the final regulations includes an asset or liability denominated in, or determined by reference to, the functional currency of the section 987 QBU that would be a section 988 transaction if it were held or entered into directly by the owner of the section 987 QBU; it also includes several other categories of assets and liabilities. *See* § 1.987–1(d)(1). However, the final regulations provide an election to treat all items of a section 987 QBU as marked items (the “current rate election”). *See* § 1.987–1(d)(2).

B. Determination of Unrecognized Section 987 Gain or Loss With Respect to a Section 987 QBU

Section 1.987–4 provides rules for computing net unrecognized section 987 gain or loss with respect to a section 987 QBU. Under § 1.987–4(b), net unrecognized section 987 gain or loss is equal to the sum of (i) the unrecognized section 987 gain or loss for the current taxable year and (ii) net accumulated unrecognized section 987 gain or loss for all prior taxable years.

Section § 1.987–4(d) provides a ten-step formula for computing unrecognized section 987 gain or loss for the current taxable year. The first step of this formula is to determine the change in owner functional currency net value (“OFCNV”) of the section 987 QBU for the taxable year, computed using end-of-year exchange rates for marked items and historic rates for historic items. *See* § 1.987–4(d)(1) and (e). The other steps adjust for amounts comprising the separate components of the annual change in OFCNV (other than changes in the exchange rate). Steps 2 through 5 relate to transfers of assets and liabilities between a section 987 QBU and its owner, and steps 6 through 9 relate to items of income or loss of the section 987 QBU. *See* § 1.987–4(d)(2) through (9). Step 10 is a residual adjustment for any remaining increase or decrease to the section 987 QBU’s functional currency balance sheet. This residual adjustment is translated into the owner’s functional currency using the yearly average exchange rate for the taxable year. *See* § 1.987–4(d)(10).

In applying steps 2 through 5, an owner must account for all transfers of assets and liabilities between a section 987 QBU and its owner, including transfers made in connection with ordinary course disregarded transactions. *See* § 1.987–4(d)(2) through (5). For this purpose, marked items are translated into the owner’s functional currency at the spot rate applicable on the date of the transfer, while historic items are translated at the applicable historic rate.

II. Proposed Rules Relating to Disregarded Transactions

A. Comment Concerning the Compliance Burden of Accounting for Disregarded Transactions

A comment to the 2023 proposed regulations asserted that it is burdensome for taxpayers to track and translate disregarded transactions between a section 987 QBU and its owner (or between different section 987 QBUs of the same owner) that arise in

¹ The reference to “this subpart” refers to subpart J of part III of subchapter N of chapter 1 of the Code, which includes section 987.

the ordinary course of a section 987 QBU's trade or business. The comment recommended that, for taxpayers that make a current rate election, unrecognized section 987 gain or loss for the taxable year should be computed by applying only two of the steps provided in § 1.987-4(d): step 1 (determining the change in OFCNV) and step 10 (reducing or increasing the amount determined in step 1 by the change in QBU net value, translated into the owner's functional currency at the yearly average exchange rate). The comment asserted that, under this approach, it would not be necessary to track ordinary course disregarded transactions between a section 987 QBU and its owner (or different section 987 QBUs of the same owner), because those transactions would be eliminated from the computation of unrecognized section 987 gain or loss.

As explained in the preamble to the final regulations, the effect of the comment's recommended rule would be to translate the net amount of all transfers between a section 987 QBU and its owner at the yearly average exchange rate under step 10. *See* part V.A.3 of the Summary of Comments and Explanation of Revisions in the preamble to the final regulations. By contrast, § 1.987-4(d) requires each transfer to be translated at the appropriate exchange rate in applying steps 2 through 5. Under the final regulations, if a current rate election is in effect, the basis of each asset and the amount of each liability transferred is translated at the spot rate applicable on the date of transfer (because all assets and liabilities are treated as marked items). The final regulations do not adopt the rule recommended by the comment because the applicable spot rate could be significantly higher or lower than the yearly average exchange rate, in which case the comment's recommended rule could substantially distort the computation of unrecognized section 987 gain or loss.

B. Recurring Transfer Group Election

Notwithstanding the concern described in part II.A of this Explanation of Provisions, the Treasury Department and the IRS are of the view that, in certain cases, a group of frequently recurring transfers between a section 987 QBU and its owner could be translated using the yearly average exchange rate without creating significant distortions. Further, permitting taxpayers to use the yearly average exchange rate in lieu of the applicable spot rate would reduce the compliance burden of the section 987 regulations.

Therefore, the proposed regulations would provide that a taxpayer that has made a current rate election may elect to use the yearly average exchange rate to translate assets that are transferred between a section 987 QBU and its owner as part of a recurring transfer group (a "recurring transfer group election"). Proposed § 1.987-2(f)(1). The recurring transfer group election would be subject to the general timing and consistency requirements provided in § 1.987-1(g) of the final regulations.

If a recurring transfer group election is in effect, assets transferred between a section 987 QBU and its owner as part of a recurring transfer group ("grouped assets") are translated under §§ 1.987-2(d), 1.987-4(d)(2), and 1.987-5(f) using the yearly average exchange rate in lieu of the applicable spot rate. Proposed § 1.987-2(f)(4). In addition, proposed § 1.987-2(f)(5)(i) would provide that transfers made as part of a recurring transfer group are disregarded for purposes of § 1.987-4(d)(2) and (3) (steps 2 and 3). Proposed § 1.987-2(f)(5). That is, because all transfers that are part of a recurring transfer group are translated at the yearly average exchange rate, these transfers do not need to be separately tracked and translated for purposes of determining unrecognized section 987 gain or loss.

Transfers that are part of a recurring transfer group are also disregarded when applying steps 2 and 3 in the functional currency of the section 987 QBU for purposes of determining the residual increase or decrease to net assets under § 1.987-4(d)(10). Proposed § 1.987-4(d)(10)(ii)(D). To the extent that these transfers increase or reduce the year-end net assets of the section 987 QBU (determined in the section 987 QBU's functional currency), the residual increase or decrease to net assets will be translated at the yearly average exchange rate under § 1.987-4(d)(10) (step 10).

Under the proposed regulations, if a recurring transfer group election is in effect, and the only transfers between a section 987 QBU and its owner are part of a recurring transfer group, the owner would determine unrecognized section 987 gain or loss for the taxable year by applying only steps 1 and 10 (as recommended by the comment). Transfers that are not part of a recurring transfer group must be taken into account at the applicable spot rate under steps 2 through 5. However, the final regulations permit taxpayers to use a spot rate convention based on the average of spot rates for a reasonable period (which can be as long as three months), which should reduce the

compliance burden of accounting for these transfers. *See* § 1.987-1(c)(1)(ii).

The special rule for computing unrecognized section 987 gain or loss in proposed § 1.987-2(f)(5)(i) would not apply if the owner of a section 987 QBU determines QBU net value using the formula provided in § 1.987-4(e)(2)(iii). Proposed § 1.987-2(f)(5)(ii). Taxpayers using this formula must separately track each transfer for purposes of computing QBU net value, and therefore disregarding the transfers for purposes of § 1.987-4(d)(2) and (3) would not reduce the compliance burden for these taxpayers.

The proposed regulations also would modify the recordkeeping requirements in § 1.987-9 to provide that taxpayers are not required to maintain records concerning amounts transferred between an owner and a section 987 QBU unless the transferred amounts are taken into account in applying § 1.987-4 or § 1.987-5. Proposed § 1.987-9(b)(5) and (6). Therefore, if a taxpayer makes a recurring transfer group election and uses the alternative calculation provided in § 1.987-5(c)(2) (under which the remittance for a taxable year is determined by reference to the change in QBU net value, adjusted for income or loss of the section 987 QBU), the taxpayer generally would not be required to maintain records with respect to transfers of grouped assets.

C. Definition of a Recurring Transfer Group

Under the proposed regulations, a recurring transfer group would be defined as a group of frequently recurring transfers between a section 987 QBU and its owner (or another eligible QBU of the owner) that are made in the ordinary course of a trade or business. Proposed § 1.987-2(f)(2)(i). Only transfers made in connection with sales of inventory, payments for services, or rent or royalty transactions in which arm's length compensation (determined by applying the principles of the arm's length standard of § 1.482-1(b)(1)) has been paid would be included in a recurring transfer group. Proposed § 1.987-2(f)(2)(ii). For this purpose, the principles of the arm's length standard apply as if the section 987 QBU were a corporation that is separate from its owner and, thus, as if the disregarded transaction were a controlled transfer within the meaning of § 1.482-1(i)(8). A recurring transfer group would not include a transfer between the section 987 QBU and its owner if the transfer (or a portion of the transfer) would be treated as a distribution with respect to stock, or an exchange for stock (or a contribution to

capital), for U.S. tax purposes if the QBU were treated as a separate corporation. Proposed § 1.987–2(f)(2)(iii). Those transfers are unlikely to be made in the ordinary course of a trade or business and could be used to manipulate the computation of unrecognized section 987 gain or loss.

The definition of a recurring transfer group in § 1.987–2(f)(2) is tailored to identify ordinary business transactions for which the use of the yearly average exchange rate would not cause significant distortions and which could be burdensome to account for under the rules of the final regulations. The Treasury Department and the IRS request comments as to whether other transfers should be included in a recurring transfer group. For example, comments are requested as to whether intercompany lending transactions (or other transactions) of a bank or other financial entity should be included in a recurring transfer group and, if so, how the scope of the covered transactions should be defined. Although lending transactions are made in the ordinary course of a bank's trade or business, it may be difficult to distinguish between ordinary course loans and extraordinary transactions that could be used to manipulate a taxpayer's unrecognized section 987 gain or loss.

D. Exception for Disproportionate Transfers

The rules of proposed § 1.987–2(f)(4) and (5) would not apply in a taxable year in which a disproportionate amount of the assets transferred as part of a recurring transfer group are transferred during one or more quarters of the taxable year. Proposed § 1.987–2(f)(6). In particular, proposed § 1.987–2(f)(4) and (5) would not apply if either (i) more than 50 percent of the total amount transferred during the taxable year is transferred during one quarter of the taxable year or (ii) more than 80 percent of the total amount transferred during the taxable year is transferred during two quarters of the taxable year.

The exception in proposed § 1.987–2(f)(6) is intended to prevent significant distortions that could arise from using the yearly average exchange rate to translate transfers that primarily occur in only part of the taxable year, while being flexible enough to accommodate ordinary course disregarded transactions between a section 987 QBU and its owner. The Treasury Department and the IRS request comments as to whether other standards could be used to identify transfers that can appropriately be translated at the yearly average exchange rate. For example, comments are requested as to whether

more flexibility should be provided in taxable years in which exchange rates do not significantly fluctuate.

Applicability Dates

Once finalized, the regulations would apply to taxable years beginning after the date the Treasury Decision adopting these rules as final regulations is published in the **Federal Register**. A taxpayer may rely on these proposed regulations for a taxable year in which the final regulations (that is, the final regulations that are being published concurrently with the proposed regulations) apply, provided the taxpayer and each member of its consolidated group and section 987 electing group, as applicable, consistently follow the proposed regulations in their entirety and in a consistent manner.

In addition, for a taxable year in which the final regulations apply, a taxpayer may continue to rely on the parts of the proposed regulations published in the **Federal Register** (REG–128276–12, 81 FR 88882) on December 8, 2016 (the “2016 proposed regulations”) that have not been finalized or withdrawn, provided that the taxpayer and each member of its consolidated group and section 987 electing group, as applicable, consistently follow these parts in their entirety and in a consistent manner. The following parts of the 2016 proposed regulations have not been finalized or withdrawn: (1) rules regarding QBUs with the U.S. dollar as their functional currency (*see* §§ 1.987–1 and 1.987–6 of the 2016 proposed regulations); and (2) rules requiring the deferral of certain section 988 loss that arises with respect to related-party loans (*see* § 1.988–2 of the 2016 proposed regulations).

Comments and Request for Public Hearing

I. In General

Before these proposed regulations are adopted as final regulations, consideration will be given to comments that are submitted timely to the IRS as prescribed in this preamble under the **ADDRESSES** heading. In addition to the specific requests for comments in parts II.C and II.D of the Explanation of Provisions, the Treasury Department and the IRS request comments on all other aspects of the proposed regulations as well as on the specific issues identified in part II of this Comments and Request for Public Hearing section. Any comments submitted will be made available at <https://www.regulations.gov> or upon request.

A public hearing concerning the proposed regulations will be scheduled if requested in writing by any person who timely submits electronic or written comments. Requests for a public hearing are also 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**.

II. Additional Requests for Comments

A. Treatment of Partnerships for Purposes of Sections 987 and 989(a)

The final regulations do not provide detailed rules concerning the application of section 987 to partnerships, and they reserve on the treatment of a partnership as a QBU under section 989(a). *See* part VIII.B.1 of the Summary of Comments and Explanation of Revisions in the preamble to the final regulations. *See* also part VIII of the Explanation of Provisions in the preamble to the 2023 proposed regulations. The Treasury Department and the IRS continue to study those issues and therefore request comments on the following topics:

1. Should section 987 be applied to partnerships using an entity approach, an aggregate approach, or a hybrid approach? Comments recommending an entity approach should address the concerns raised in the preamble to the 2023 proposed regulations regarding the potential for unrecognized section 987 gain or loss to be shifted between partners upon a sale of a partnership interest. *See* part VIII.C of the Explanation of Provisions in the preamble to the 2023 proposed regulations.

2. Should a partnership be treated as a per se QBU under section 989(a) and § 1.989(a)–1(b)(2)(i)?

3. Should different rules be provided for purposes of sections 987 and 989(a) depending on whether the partners in the partnership are related parties? Comments recommending an entity approach for partnerships owned by related parties should address the concerns raised in the preamble to the 2023 proposed regulations regarding the potential for a group of related parties to hold an eligible QBU through a partnership (rather than directly) in order to alter the section 987 treatment of the eligible QBU without meaningfully altering the group's economic position. *See* part VIII.E of the Explanation of Provisions in the preamble to the 2023 proposed regulations.

4. Under an entity approach, if a partnership's functional currency differs from that of its partners, how should the

partners account for currency gain or loss with respect to their partnership interests?

Comments submitted in response to the 2023 proposed regulations do not need to be resubmitted in response to these proposed regulations.

B. Application of Section 987 to CFCs

As discussed in part II.A.3 of the Summary of Comments and Explanation of Revisions in the preamble to the final regulations, a comment on the 2023 proposed regulations recommended that the application of section 987 be simplified by applying rules similar to section 986(c) to section 987 QBUs owned by CFCs in lieu of applying section 987. In response to this comment, the preamble to the final regulations explained that the Treasury Department and the IRS are of the view that it would not be feasible to adopt this comment, but nonetheless are studying whether there are instances in which it would be possible to simplify the application of section 987 by modifying the application of section 987(3) (and the related regulations, including §§ 1.987–4 through 1.987–6, 1.987–8, and 1.987–11 through 1.987–13) to certain entities.

In considering the appropriateness of such a rule, it is helpful to consider United States persons (“U.S. persons”) and foreign persons separately. In the case of a U.S. person, except to the extent that the Code specifically provides otherwise, the taxable income of the U.S. person should reflect that person’s accession to wealth, as measured in the U.S. dollar. Accordingly, when the amount of the U.S. person’s basis in its assets or the amount of its liabilities fluctuates as a result of fluctuations in the functional currency of a section 987 QBU, section 987(3) is necessary to ensure that currency gain or loss is taken into account to prevent these fluctuations from artificially increasing or decreasing the taxpayer’s income, gain, deduction, and loss, as measured in the U.S. dollar. In contrast, in the case of a foreign person, such as a CFC or a partnership with only foreign partners, the Treasury Department and the IRS are studying whether the U.S. tax system appropriately tracks and taxes the foreign person’s accession to wealth given that its functional currency may not be the U.S. dollar.

The Treasury Department and the IRS agree with the comment that the compliance and administrative burdens of the section 987 regulations would be substantially reduced if section 987(3) and the related regulations did not apply to CFCs or to partnerships with

only foreign partners. Under such an approach, a CFC or a partnership with only foreign partners would not calculate net unrecognized section 987 gain or loss with respect to a section 987 QBU and would not recognize section 987 gain or loss on a remittance or termination. Instead, if a section 987 QBU owned by the CFC or partnership transferred assets or liabilities to its owner, the CFC or partnership would merely take a basis in the assets or measure the amount of the liabilities by translating from the section 987 QBU’s functional currency into the CFC or partnership’s functional currency at the spot rate on the date of the transfer.

Relatedly, the Treasury Department and the IRS are concerned about the ability of foreign entities to manipulate the recognition of section 987 gain and loss under section 987(3) and the related regulations. This concern is not entirely alleviated by the loss-to-the-extent-of-gain-rule in § 1.987–11, which suspends the recognition of section 987 loss for taxpayers that make a current rate election.

Accordingly, the Treasury Department and the IRS are studying whether, in certain cases, it would be appropriate to not apply section 987(3) and the related regulations to CFCs and partnerships with only foreign partners. However, the Treasury Department and the IRS have a number of concerns, including that, under this approach, the amount of currency gain (or loss) that would have been taken into account under section 987(3) would give rise to an increase (or decrease) in a CFC’s aggregate inside asset basis without a corresponding change in the CFC’s earnings and profits, and the resulting mismatch between inside asset basis and earnings and profits could produce inappropriate results.

For example, over time, it would be common for a CFC’s aggregate inside asset basis to be greater or less than the sum of its (i) earnings and profits determined under the principles of § 1.367(b)–2(d) but without regard to whether the exchanging shareholder is a U.S. person or foreign person, (ii) total basis in the stock of the CFC; and (iii) the amount of the CFC’s liabilities. Although it is possible for a CFC to have aggregate inside asset basis in excess of these amounts (“excess asset basis”)² under current law, the Treasury Department and the IRS are concerned that, if CFCs were not required to recognize currency gain or loss under

section 987(3), excess asset basis would become more prevalent. If the United States shareholder (“U.S. shareholder”) ultimately sells its stock in the CFC, the U.S. shareholder would generally recognize the appropriate amount of gain or loss on the sale of stock (notwithstanding the potential excess asset basis of the CFC). However, if, in lieu of a sale of stock, the CFC merges or liquidates into a domestic corporation pursuant to an inbound asset reorganization or liquidation described in § 1.367(b)–3, the excess asset basis could be imported into the United States without a corresponding inclusion of income or gain under § 1.367(b)–3, and thus permanently escape U.S. taxation.

Accordingly, the Treasury Department and the IRS request comments concerning the following topics:

1. Should the final regulations be modified to provide that section 987(3) and the related regulations do not apply to CFCs or to partnerships with only foreign partners? If so, how should currency gain or loss be recognized with respect to the section 987 QBU (if at all)?

2. If section 987(3) did not apply to CFCs and partnerships with only foreign partners, what other rules would be needed to prevent value equal to the amount of excess asset basis from permanently escaping U.S. taxation upon an inbound transaction such as an asset reorganization or liquidation described in § 1.367(b)–3? For example, should the importation of excess asset basis trigger the recognition of gain in the same manner that § 1.367(b)–3 triggers a deemed dividend to a shareholder? If so, are there circumstances in which excess asset basis should not trigger gain (such as excess asset basis arising by reason of section 362(e) or by reason of minority interests)? How should excess asset basis be computed? What additional rules would be needed to similarly prevent taxpayers from planning into the permanent avoidance or indefinite deferral of gain or acceleration of losses?

3. If section 987(3) and the related regulations continue to apply to CFCs and partnerships with only foreign partners generally, are any modifications needed to the calculation of section 987 gain and loss for these entities?

Special Analyses

I. Regulatory Planning and Review—Economic Analysis

Pursuant to the Memorandum of Agreement, Review of Treasury Regulations under Executive Order

² For a discussion of “excess asset basis,” see the preambles accompanying issuance of § 1.367(b)–3(g) (TD 10004, 89 FR 58275) and proposed § 1.367(b)–3(g) (88 FR 69559), respectively.

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) (PRA) requires that a Federal agency obtain the approval of the Office of Management and Budget (OMB) before collecting information from the public, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the OMB.

The collections of information in the proposed regulations with respect to section 987 are in proposed § 1.987–2(f)(1) (and the related election rules in § 1.987–1(g) of the final regulations). The likely respondents are individuals who file a Form 1040 and businesses that file a Form 1065 or Form 1120.

The collection of information in proposed § 1.987–2(f)(1) is required only when a taxpayer makes or revokes a recurring transfer group election under proposed § 1.987–2(f)(1). In the first year in which the section 987 regulations apply to a taxpayer, or the first year in which the taxpayer or a member of its consolidated group or section 987 electing group is the owner of a section 987 QBU, the taxpayer is permitted to make a recurring transfer group election without the Commissioner's consent. Thereafter, the taxpayer may make or revoke a recurring transfer group election only with the consent of the Commissioner, which may be granted with a private letter ruling. When a taxpayer makes or revokes an election, the collection of information is mandatory. The collection of information required by proposed § 1.987–2(f)(1) will be used by the IRS for tax compliance purposes.

The Treasury Department and the IRS intend that the information required by § 1.987–1(g) with respect to a recurring transfer group election under proposed § 1.987–2(f)(1) will be collected by attaching a statement to a taxpayer's return (such as the appropriate Form 1040, Form 1120, Form 1065, or other appropriate forms). For purposes of the PRA, the reporting burden associated with those collections of information will be reflected in the PRA submissions associated with those forms. The OMB Control Numbers for the forms will be approved under 1545–0074 for

individuals and under 1545–0123 for business entities.

To the extent that a taxpayer makes or revokes an election by obtaining a private letter ruling, the reporting burden associated with those collections of information will be reflected in the PRA submissions associated with revenue procedures governing private letter rulings. The OMB Control Number for those revenue procedures is control number 1545–1522. The proposed regulations would only require taxpayers to follow the procedures under Revenue Procedure 2024–1, IRB 2024–1 (or future revenue procedures governing private letter rulings) and would not change the collection requirements of the Revenue Procedure.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

III. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that this rulemaking will not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the Regulatory Flexibility Act. The proposed regulations affect individuals and corporations (other than S corporations) with foreign branch operations.

The number of small entities potentially affected by the proposed regulations is unknown; however, it is unlikely to be a substantial number because taxpayers with wholly owned foreign operations are typically larger businesses. The Treasury Department and the IRS estimate that the total number of corporations (other than S corporations) with a foreign branch subject to section 987 is approximately 2,000. This estimate is based on the number of corporations (other than S corporations) that filed a Form 8858 in 2022 that showed that the filer: (1) owned at least one disregarded entity or branch with a functional currency different from the functional currency of the owner, and (2) indicated that the disregarded entity or branch was a section 989 QBU. As shown in the following table, only a small percentage of those filers are small entities.

Total receipts/positive income (2022)	Percentage of filers
Under \$5 Million	7
\$5 Million to \$10 Million	2

Total receipts/positive income (2022)	Percentage of filers
\$10 Million to \$25 Million	4
Over \$25 Million	87

The number of affected corporations (other than S corporations) with total receipts of less than \$25 million represents 0.02% of all corporations (other than S corporations) with total receipts of less than \$25 million.

These proposed regulations generally modify the rules that would otherwise apply under the final regulations by providing taxpayers with an election that reduces the compliance burden of applying section 987. Small entities generally would not be affected by these rules unless they choose to make an election to reduce their compliance burden.

A portion of the economic impact of the proposed regulations may derive from the collection of information requirements imposed under proposed § 1.987–2(f)(1) (and the related election rules in § 1.987–1(g) of the final regulations). The Treasury Department and the IRS have determined that the average burden is 1.95 hours per response. The IRS's Research, Applied Analytics, and Statistics division estimates that the appropriate wage rate for this set of taxpayers is \$99.87 per hour. Thus, the annual burden per taxpayer from each collection of information requirement is \$194.75. The requirements of proposed § 1.987–2(f)(1) apply only if a taxpayer chooses to make or revoke an election (and only in the year of the election or revocation).

IV. Section 7805(f)

Pursuant to section 7805(f) of the Code, this proposed regulation will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

V. 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.

VI. Executive Order 13132: Federalism

Executive Order 13132 (entitled “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 and do not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive order.

Drafting Information

The principal authors of these proposed regulations are Adam G. Province and Raphael J. Cohen of the Office of Associate Chief Counsel (International). 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.

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 continues to read in part as follows:

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

Section 1.987–2 also issued under 26 U.S.C. 987, 989, and 1502.

* * * * *

Section 1.987–4 also issued under 26 U.S.C. 987 and 989.

* * * * *

Section 1.987–9 also issued under 26 U.S.C. 987, 989, and 6001.

* * * * *

Section 1.987–15 also issued under 26 U.S.C. 987 and 989.

* * * * *

■ **Par. 2.** Section 1.987–2 is amended by adding paragraph (f) to read as follows:

§ 1.987–2 Attribution of items to eligible QBUs; definition of a transfer and related rules.

* * * * *

(f) Recurring transfer group election—
(1) In general. For a taxable year in which a current rate election is in effect, the owner of a section 987 QBU may

elect to use the yearly average exchange rate to translate all assets that are transferred to or from the section 987 QBU in a taxable year as part of a recurring transfer group (a recurring transfer group election). The rules of this paragraph (f) apply to all transfers that are part of a recurring transfer group in any taxable year to which the recurring transfer group election applies (regardless of whether transfers of the same kind occurred in the first year to which the election applied).

(2) Recurring transfer group. A recurring transfer group is a group of frequently recurring transfers made between a section 987 QBU and its owner (or another eligible QBU of the owner) in a taxable year that meet the requirements of paragraphs (f)(2)(i) through (iii) of this section.

(i) Ordinary course transfers. The transfers must be made in the ordinary course of a trade or business.

(ii) Specified transactions. The transfers must be made as part of one or more disregarded transactions described in paragraphs (f)(2)(ii)(A) through (C) of this section between the section 987 QBU and its owner (or another eligible QBU of the owner), the compensation for which would satisfy the principles of the arm’s length standard (within the meaning of § 1.482–1(b)) if the section 987 QBU were treated as a separate corporation. Transfers made in connection with different disregarded transactions described in paragraphs (f)(2)(ii)(A) through (C) of this section in the same taxable year are treated as part of a single recurring transfer group.

(A) Sales of inventory;
(B) Payments for services;
(C) Rents or royalties.

(iii) *Distributions and contributions excluded.* A transfer is not included in a recurring transfer group if the transfer (or any portion of the transfer) would be treated as a distribution with respect to stock, or an exchange for stock (or a contribution to capital), if the section 987 QBU were treated as a separate corporation.

(3) *Consistency requirement.* The determination as to which transfers are included in a recurring transfer group must be made consistently from year to year. However, this determination may change from one year to the next based on changes in the nature and timing of the relevant transfers.

(4) *Effect of recurring transfer group election.* Except as provided in paragraph (f)(6) of this section, in a taxable year in which a recurring transfer group election is in effect, assets that are transferred to or from a section 987 QBU in a taxable year as part of a recurring transfer group (*grouped assets*)

are translated under paragraph (d) of this section and §§ 1.987–4(d)(2) and 1.987–5(f) by deeming the spot rate applicable on the date of each transfer to be equal to the yearly average exchange rate for the taxable year. However, if the Commissioner determines that the use of the yearly average exchange rate to translate grouped assets in a taxable year does not clearly reflect income, the Commissioner may require some or all transfers of the grouped assets to be excluded from the recurring transfer group or may prescribe the use of a different exchange rate to translate the grouped assets.

(5) *Accounting for a disregarded transfer group in determining unrecognized section 987 gain or loss for the taxable year—(i) In general.* Except as provided in paragraph (f)(5)(ii) or (f)(6) of this section, in a taxable year in which a recurring transfer group election is in effect, transfers of grouped assets are disregarded for purposes of § 1.987–4(d)(2) and (3) (steps 2 and 3).

(ii) *Exception.* Paragraph (f)(5)(i) of this section does not apply to a section 987 QBU in a taxable year in which the owner determines QBU net value with respect to the section 987 QBU under the steps provided in § 1.987–4(e)(2)(iii) (alternative formula for determining QBU net value without preparing an adjusted balance sheet).

(6) *Exception for taxable years in which a disproportionate amount of grouped assets is transferred in one or more quarters of the taxable year—(i) In general.* Paragraphs (f)(4) and (5) of this section do not apply to a section 987 QBU in a taxable year in which—

(A) More than 50 percent of the total amount of grouped assets transferred to or from the section 987 QBU during the taxable year is transferred during one quarter of the taxable year; or

(B) More than 80 percent of the total amount of grouped assets transferred to or from the section 987 QBU during the taxable year is transferred during two quarters of the taxable year.

(ii) *Amount of grouped assets transferred.* For the purpose of applying paragraph (f)(6)(i) of this section, the amount of grouped assets transferred to or from a section 987 QBU in a taxable year and in each quarter of the taxable year is determined in the functional currency of the section 987 QBU by reference to the aggregate of the amount of functional currency transferred and the basis of the other assets transferred (taking into account the total gross amount of both the transfers from the section 987 QBU to the owner or another eligible QBU of the owner and

the transfers from the owner or another eligible QBU of the owner to the section 987 QBU). For this purpose, amounts transferred from the owner (or another eligible QBU of the owner) to the section 987 QBU are translated into the section 987 QBU's functional currency at the yearly average exchange rate.

(iii) *Short taxable year.* For purposes of applying this paragraph (f)(6) in a short taxable year, each quarter comprises a number of days equal to one fourth of the total number of days in the taxable year. If a section 987 QBU did not exist for the full taxable year of the owner, this paragraph (f)(6) is applied with respect to the section 987 QBU by treating the taxable year as comprising the portion of the taxable year in which the section 987 QBU existed.

(7) *Examples.* The following examples illustrate the application of this paragraph (f). For purposes of the examples, DC1 is a domestic corporation that owns Business A, a section 987 QBU that has the euro as its functional currency. In year 1, DC1's home office provides services to Business A in exchange for arm's length cash payments (within the meaning of § 1.482-1(b)). The payments are made in the ordinary course of the Business A trade or business. A current rate election and a recurring transfer group election are in effect for year 1. DC1 does not determine QBU net value with respect to Business A under the steps provided in § 1.987-4(e)(2)(iii).

(i) *Example 1: Transfers treated as part of a recurring transfer group—(A) Facts.* In year 1, Business A made 50 payments for services to DC1's home office, totaling €30,000x. Of this amount, Business A paid €5,000x in the first quarter of year 1, €7,500x in the second quarter of year 1, €10,000x in the third quarter of year 1, and €7,500x in the fourth quarter of year 1. No other transfers were made between Business A and DC1 for year 1.

(B) *Analysis—(1) Recurring transfer group.* Under paragraph (c)(2) of this section, each payment for services is treated as a transfer of assets from Business A to DC1. These transfers qualify as a recurring transfer group under paragraph (f)(2) of this section because they are frequently recurring payments for services made in the ordinary course of the Business A trade or business that would satisfy the principles of the arm's length standard (within the meaning of § 1.482-1(b)) if Business A were treated as a separate corporation. In addition, the exception in paragraph (f)(6) of this section does not apply because Business A did not transfer more than 50 percent of the

total amount of grouped assets transferred in year 1 in any one quarter, and Business A did not transfer more than 80 percent of the total amount of grouped assets transferred in year 1 in any two quarters.

(2) *Effect of recurring transfer group election.* Under paragraph (f)(4) of this section, because Business A's transfers to DC1 comprise a recurring transfer group, DC1 applies § 1.987-5(f) by deeming the spot rate applicable on the date of each transfer to be equal to the yearly average exchange rate for year 1. As a result, DC1 determines its basis in the euros received from Business A by translating the total amount of euros transferred in year 1 at the yearly average exchange rate for year 1. In addition, under paragraph (f)(5) of this section, the transfers are disregarded for purposes of determining unrecognized section 987 gain or loss for year 1 under § 1.987-4(d)(2).

(ii) *Example 2: Disproportionate transfers—(A) Facts.* The facts are the same as in paragraph (f)(7)(i) of this section (*Example 1*), except that most of the payments are made in the fourth quarter of year 1 to compensate DC1's home office for additional services provided at the end of year 1. Specifically, of the €30,000 paid by Business A for services in year 1, €18,000x is transferred in the fourth quarter of year 1, and €4,000x is transferred in each of the first three quarters of year 1.

(B) *Analysis.* The amount of grouped assets transferred in the fourth quarter (€18,000x) exceeds 50 percent of the total amount of grouped assets transferred in year 1 (€30,000x). Therefore, under paragraph (f)(6) of this section, paragraphs (f)(4) and (5) of this section do not apply. As a result, DC1 determines its basis in the euros received from Business A by translating each transfer at the applicable spot rate under § 1.987-5(f), and DC1 must take each transfer into account for purposes of determining unrecognized section 987 gain or loss for year 1 under § 1.987-4(d)(2).

(iii) *Example 3: Determination of the transfers including in a recurring transfer group over multiple taxable years—(A) Facts.* The facts in year 1 are the same as in paragraph (f)(7)(i) of this section (*Example 1*). The recurring transfer group election remains in effect in years 2 and 3. In year 2, DC1's home office continues to provide services to Business A in exchange for arm's length cash payments made in the ordinary course of the Business A trade or business. Additionally, in year 2, Business A begins to sell Product X inventory to Business B, an eligible

QBU of DC1 that is not a section 987 QBU, in exchange for arm's length cash payments. In year 3, DC1's home office no longer provides services to Business A, but Business A continues to sell Product X inventory to Business B in exchange for arm's length cash payments. Additionally, in year 3, Business A begins to sell Product Y inventory to Business B in exchange for arm's length cash payments. In each of years 1, 2, and 3, the transfers to and from Business A are made on a frequent basis in the ordinary course of the Business A trade or business.

(B) *Analysis.* In year 1, the cash payments for services made by Business A to DC1's home office are part of a recurring transfer group. In year 2, the recurring transfer group includes the cash payments for services made by Business A to DC1's home office, the transfers of Product X inventory from Business A to Business B, and the cash payments made by Business B to Business A in connection with the inventory sales. In year 3, the recurring transfer group includes the transfers of Product X inventory and Product Y inventory from Business A to Business B and the cash payments made by Business B to Business A in connection with the inventory sales. Therefore, in each of years 1, 2, and 3, unless the exception in paragraph (f)(6) of this section applies, the grouped assets are translated at the yearly average exchange under paragraph (f)(4) of this section, and the transfers of the grouped assets are disregarded for purposes of determining unrecognized section 987 gain or loss under § 1.987-4(d)(2) and (3).

* * * * *

■ **Par 3.** Section 1.987-4 is amended by adding paragraph (d)(10)(ii)(D) to read as follows:

§ 1.987-4 Determination of net unrecognized section 987 gain or loss of a section 987 QBU.

* * * * *

(d) * * *

(10) * * *

(ii) * * *

(D) *Recurring transfer group.* In order to determine the residual increase or decrease to net assets under this paragraph (d)(10) in a taxable year in which transfers of grouped assets are disregarded under § 1.987-2(f)(5), the transfers of grouped assets are disregarded for purposes of applying steps 2 and 3 (paragraphs (d)(2) and (3) of this section) in the functional currency of the section 987 QBU.

* * * * *

■ **Par 4.** Section 1.987–9 is amended by revising paragraphs (b)(5) and (6) to read as follows:

§ 1.987–9 Recordkeeping requirements.

* * * * *

(b) * * *

(5) The amount of assets and liabilities transferred by the owner to the section 987 QBU determined in the functional currency of the owner and the section 987 QBU (to the extent those amounts are taken into account in applying § 1.987–4 or § 1.987–5).

(6) The amount of assets and liabilities transferred by the section 987 QBU to the owner determined in the functional currency of the owner and the section 987 QBU (to the extent those amounts are taken into account in applying § 1.987–4 or § 1.987–5).

* * * * *

■ **Par 5.** Section 1.987–15 is amended by adding paragraph (e) to read as follows:

§ 1.987–15 Applicability date.

* * * * *

(e) *Recurring transfer group election.* Sections 1.987–2(f), 1.987–4(d)(10)(ii)(D), and 1.987–9(b)(5) and (6) apply to taxable years beginning after [DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**].

Douglas W. O'Donnell,
Deputy Commissioner.

[FR Doc. 2024–28371 Filed 12–10–24; 8:45 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2024–0417; FRL–12279–01–R9]

Air Plan Conditional Approval; California; Bay Area Air Quality Management District

Correction

In Proposed Rule document 2024–27518 beginning on page 94633 in the issue of Friday, November 29th, 2024, make the following correction:

On page 94633, in the first column, in the **DATES** section, in the second line, “December 30, 2025” should read “December 30, 2024”.

[FR Doc. C1–2024–27518 Filed 12–10–24; 8:45 am]

BILLING CODE 0099–10–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R03–OAR–2024–0316; FRL–11777–01–R3]

Air Plan Approval; Pennsylvania; Redesignation of the Allegheny County Nonattainment Area to Attainment and Approval of the Area's Maintenance Plan for the 2010 1-Hour Primary Sulfur Dioxide National Ambient Air Quality Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a state implementation plan (SIP) revision and redesignation request submitted on November 14, 2023, by the Pennsylvania Department of Environmental Protection (PADEP) on behalf of the Allegheny County Health Department (ACHD). The SIP revision asks the EPA to redesignate the Allegheny County, Pennsylvania area from nonattainment to attainment for the 2010 1-hour primary sulfur dioxide (SO₂) national ambient air quality standard (NAAQS). The revision also asks the EPA to approve into the SIP Allegheny County's maintenance plan for the 2010 1-hour primary SO₂ standard for the Allegheny County area. This action is being taken under the Clean Air Act (CAA).

DATES: Written comments must be received on or before January 10, 2025.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R03–OAR–2024–0316 at www.regulations.gov, or via email to talley.david@epa.gov. For comments submitted at Regulations.gov, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For

additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit www.epa.gov/dockets/commenting-epa-dockets.

FOR FURTHER INFORMATION CONTACT:

Philip McGuire, Planning & Implementation Branch (3AD30), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, 1600 John F Kennedy Boulevard, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814–2251. Mr. McGuire can also be reached via electronic mail at m McGuire.philip@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

A. Nonattainment Designation

On June 22, 2010, the EPA revised the primary SO₂ NAAQS, establishing a new 1-hour primary standard of 75 parts per billion (ppb).¹ Under the EPA's regulations at title 40 of the Code of Federal Regulations (CFR) part 50, the 2010 1-hour SO₂ NAAQS is met at a monitoring site when the 3-year average of the annual 99th percentile of daily maximum 1-hour average concentrations is less than or equal to 75 ppb (based on the rounding convention in 40 CFR part 50, appendix T).² Ambient air quality monitoring data for the 3-year period must meet a data completeness requirement. A year meets data completeness requirements when all four quarters are complete, and a quarter is complete when at least 75 percent of the sampling days for each quarter have complete data. A sampling day has complete data if 75 percent of the hourly concentration values, including State-flagged data affected by exceptional events which have been approved for exclusion by the Administrator, are reported.³

Upon promulgation of a new or revised NAAQS, the CAA requires the EPA to designate as nonattainment any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the NAAQS.⁴ On August 5, 2013, the EPA designated a portion of Allegheny County, Pennsylvania (hereafter the “Allegheny County NAA”), as nonattainment for the 2010 1-hour primary SO₂ NAAQS, effective October

¹ 75 FR 35520, June 22, 2010.

² 40 CFR 50.17.

³ 40 CFR part 50, appendix T, section 3(b).

⁴ CAA section 107(d)(1)(A)(i).

4, 2013.⁵ The designation was based on violating air quality monitoring data for calendar years 2009–2011. The Allegheny County NAA consists of 22 municipalities including: the Borough of Braddock, Borough of Dravosburg, Borough of East McKeesport, Borough of East Pittsburgh, Borough of Elizabeth, Borough of Glassport, Borough of Jefferson Hills, Borough of Liberty, Borough of Lincoln, Borough of North Braddock, Borough of Pleasant Hills, Borough of Port Vue, Borough of Versailles, Borough of Wall, Borough of West Elizabeth, Borough of West Mifflin, City of Clairton, City of Duquesne, City of McKeesport, Elizabeth Township, Forward Township, and North Versailles Township.⁶ This action established an attainment date five years after the effective date for the areas designated as nonattainment for the 2010 SO₂ NAAQS (*i.e.*, by October 4, 2018). The Commonwealth was also required to submit an attainment SIP revision for the Allegheny County NAA to the EPA that meets the requirements of CAA sections 110, 172(c) and 191–192 within 18 months following the October 4, 2013, effective date of designation (*i.e.*, by April 6, 2015).

B. Relevant Historical SIP Actions

The EPA did not receive an attainment SIP revision for the Allegheny County NAA by the April 6, 2015 deadline and subsequently on March 18, 2016, the EPA published a finding of failure to submit indicating that Pennsylvania did not submit the required SO₂ attainment plan.⁷ This finding initiated a clock under CAA section 179(a) for the potential imposition of new source review sanctions 18 months after the effective date of the finding and the potential imposition of highway funding sanctions 6 months following that, in accordance with CAA section 179(b) and 40 CFR 52.31. Additionally, under CAA section 110(c), the finding triggered a requirement for the EPA to promulgate a Federal implementation plan (FIP) within two years of the effective date of the finding unless, by that time, Pennsylvania made the necessary complete submittal, and the EPA approved the submittal.

Pursuant to Pennsylvania's October 3, 2017 attainment plan submittal, and the EPA's October 6, 2017 letter to Pennsylvania finding the submittal complete and noting the stopping of the

sanctions' deadline, these CAA section 179(b) sanctions were not imposed as Pennsylvania did not miss the original deadline.⁸ The EPA proposed approving the SIP revision submittal on November 19, 2018,⁹ and issued a final approval on April 23, 2020.¹⁰ This approval ended the requirement for the EPA to promulgate a FIP under CAA section 110(c). On November 14, 2023, PADEP, on behalf of ACHD, submitted a revision to its SIP for the inclusion of a maintenance plan for the 2010 1-hour primary SO₂ NAAQS and requested a concurrent redesignation of the Allegheny County NAA to attainment for the 2010 1-hour primary SO₂ NAAQS.

C. Redesignation to Attainment Criteria

After a State has submitted a redesignation request for a nonattainment area, the EPA must assess if the statutory criteria identified in CAA section 107(d)(3)(E) have been met to redesignate the area to attainment. These conditions include: (1) the EPA has determined that the applicable NAAQS has been attained; (2) the applicable SIP has been fully approved by the EPA under CAA section 110(k); (3) the EPA has determined that the improvement in the area's air quality is due to permanent and enforceable reductions in emissions; (4) the area has a fully approved maintenance plan, including a contingency plan, under CAA section 175A; and (5) the State has met all applicable requirements for the area under CAA section 110 and part D. The EPA has provided direction for how it would consider if these conditions have been met in the April 23, 2014 memorandum "Guidance for 1-Hour SO₂ Nonattainment Area SIP Submissions" (2014 SO₂ Guidance).¹¹

D. Maintenance Plan Approval Criteria

CAA section 175A and additional EPA guidance, including the September 4, 1992 memorandum "Procedures for Processing Requests to Redesignate Areas to Attainment" (Calcagni Memo),¹² identify the required elements

for an approvable maintenance plan for areas seeking redesignation from nonattainment to attainment. Under CAA section 175A, the plan must demonstrate continued attainment of the applicable NAAQS for at least 10 years after the EPA approves a redesignation request to attainment. Eight years after the redesignation, the State must submit a revised maintenance plan demonstrating that attainment will continue to be maintained for an additional 10 years following the initial 10-year period. To address the possibility of future NAAQS violations, the maintenance plan must contain contingency measures, as the EPA deems necessary, to assure prompt correction of any future 2010 1-hour SO₂ violations. The Calcagni Memo provides further guidance on the content of a maintenance plan, explaining that a maintenance plan should address five requirements: (1) an attainment emissions inventory that identifies the level of emissions in the area which is sufficient to attain the NAAQS; (2) a maintenance demonstration that shows future emissions of a pollutant will not exceed the level of the attainment inventory; (3) the continued operation of a monitoring network that conforms to 40 CFR part 58; (4) a means for verifying the continued attainment of the NAAQS; and (5) a contingency plan to correct any violation of the NAAQS in the area following redesignation of the area.

II. Summary of SIP Revision and EPA Analysis

The EPA's evaluation of Pennsylvania's redesignation request and maintenance plan is based on consideration of the five redesignation criteria provided under CAA section 107(d)(3)(E) and relevant guidance, including the aforementioned 2014 SO₂ Guidance and Calcagni Memo.

A. Criterion (1)—The Allegheny County SO₂ Nonattainment Area Has Attained the 2010 1-Hour SO₂ NAAQS

CAA section 107(d)(3)(E)(i) requires that the EPA determine if a nonattainment area has attained the applicable NAAQS in order to redesignate the area to attainment. In assessing if the area has attained the NAAQS, the 2014 SO₂ Guidance stipulates that the EPA can interdependently consider two components to support an attainment

procedures for processing requests to redesignate areas to attainment_090492.pdf.

⁵ 78 FR 47191, August 5, 2013.

⁶ A list of Pennsylvania's attainment status designations is available at 40 CFR 81.339.

⁷ 81 FR 14736, March 18, 2016.

⁸ Both the 2017 attainment plan submittal and EPA completeness letter are available in the docket for this action and are titled *Allegheny County September 2017 Attainment Demonstration and EPA Letter of Completeness dated October 6, 2017*, respectively.

⁹ 83 FR 58206, November 19, 2018.

¹⁰ 85 FR 22593, April 23, 2020.

¹¹ Available in the docket for this action as *2014 SO₂ Guidance* and at www.epa.gov/sites/default/files/2016-06/documents/20140423guidance_nonattainment_sip.pdf.

¹² Available in the docket for this action as *Calcagni Memo* and at www.epa.gov/sites/default/files/2016-03/documents/calcagni_memo_

determination: air quality monitoring data and air quality modeling data.¹³

The Allegheny County NAA contains two operational SO₂ monitor sites: the Liberty site (Air Quality System (AQS) Site ID 42-003-0064) and the North Braddock site (AQS Site ID 42-003-1301). The Liberty monitor is located centrally within the Allegheny County NAA and has been in operation since 1969, while the North Braddock monitor

is located in the northern segment of the Allegheny County NAA and has been in operation since 2014. Both monitors have been in attainment of the 2010 1-hour primary SO₂ NAAQS since the 2019–2021 period, with Liberty recording a design value of 63 ppb for the 2021–2023 period and North Braddock recording a design value of 54 ppb for the 2021–2023 period.¹⁴ Design values for the past 10 years are reported

in Table 1 in this document. Although both monitors are currently in attainment of the NAAQS, prior analysis has determined that neither of these monitoring sites are located in the area of maximum concentration,¹⁵ and as such, additional air quality modeling is generally needed to estimate SO₂ concentrations within the area.

TABLE 1—2014–2023 SO₂ DESIGN VALUES FOR ALLEGHENY COUNTY NONATTAINMENT AREA MONITOR SITES
[Parts per billion]

Monitor site	2012–2014	2013–2015	2014–2016	2015–2017	2016–2018	2017–2019	2018–2020	2019–2021	2020–2022	2021–2023
Liberty	101	99	94	97	103	109	85	59	56	63
North Braddock *	89	71	64	55	61	63	64	58	56	54

* North Braddock design values from the 2012–2014 and 2013–2015 periods are comprised of less than three years of data as the monitor began operating in 2014.

Pennsylvania's 2017 attainment plan contained an attainment demonstration which utilized allowable SO₂ emission limits from stationary sources within the Allegheny County NAA to inform several modeling analyses for SO₂ emissions.¹⁶ These modeling analyses were based on emissions limits for large, stationary sources of SO₂, which, if enacted, would ensure that the Allegheny County NAA would attain the 2010 1-hour primary SO₂ NAAQS. The 2014 SO₂ Guidance states that the EPA may make a determination of attainment based on this attainment plan modeling, eliminating the need for separate actual emissions-based modeling to support a redesignation request—provided that the source characteristics are still reasonably represented.¹⁷ The source characteristics are still reasonably represented¹⁸ and from 2020–2021, large, stationary SO₂ sources¹⁹ within the Allegheny County NAA were meeting their allowable emission limits for attainment.²⁰ As such, the 2017 attainment demonstration modeling submitted by Pennsylvania will allow for the EPA's determination of attainment. The 2014 SO₂ Guidance further states that a demonstration that the control strategy in the SIP has been fully implemented will also be pertinent for making the determination of

attainment.²¹ Pennsylvania has submitted information detailed in its redesignation request and maintenance plan to confirm that the control strategy outlined in the SIP has been fully implemented. The specific measures identified in the control strategy include upgrades to the Vacuum Carbonate Unit equipment at the U.S. Steel (USS) Clairton Plant, the implementation of a tail gas recycling project at the USS Clairton Plant, and a new stack and combined flue system for select boilers at the USS Edgar Thomson Plant.²² Additionally, lower permitted SO₂ emission rates were implemented for nearly all processes at the primary stationary SO₂ sources in the Allegheny County NAA, including the USS Clairton Plant, the USS Edgar Thomson Plant, the USS Irvin Plant, and Harsco Metals. These implemented, permanent and federally enforceable control measures have aided in reducing the actual total emissions from large, stationary USS SO₂ sources to 2,373 tons per year (as of 2021),²³ which is below the revised total emissions limits proposed for USS facilities in the 2017 attainment demonstration modeling (2,669 tons per year),²⁴ thus contributing to bringing the Allegheny County NAA into attainment.

In this action, the EPA proposes to find that the air quality monitoring data

and air quality modeling data demonstrate that the Allegheny County NAA has attained the 2010 1-hour primary SO₂ NAAQS.

B. Criterion (2)—Pennsylvania Has a Fully Approved SIP Under Section 110(k)

CAA section 107(d)(3)(E)(ii) requires that the EPA fully approve the applicable implementation plan for the area under CAA section 110(k) in order to redesignate that area to attainment. The EPA has fully approved the applicable Pennsylvania SIP for the Allegheny County NAA under section 110(k) of the CAA for all requirements applicable for purposes of redesignation. An area cannot be redesignated to attainment if a required element of the SIP is the subject of a disapproval; a finding of failure to submit, or failure to implement the SIP; or a partial, conditional, or limited approval.²⁵ The 2017 attainment plan SIP was initially proposed for EPA approval on November 19, 2018²⁶ and received final EPA approval on April 23, 2020.²⁷ The approved elements from the 2017 attainment plan include a 2011 base year emissions inventory, a control strategy and air quality modeling demonstration, a reasonable available control measures/reasonably available control technology (RACM/RACT)

¹³ See 2014 SO₂ Guidance, at 62.

¹⁴ Design values are calculated by computing the three-year average of the annual 99th percentile daily maximum 1-hour average concentrations. An SO₂ 1-hour primary standard design value is valid if it encompasses three consecutive calendar years of complete data. The data completeness requirements were previously described in the *Nonattainment Designation* section I.A. of this document above.

¹⁵ See *Allegheny County EPA Modeling TSD* at pp. 16–17, available in the docket for this action.

¹⁶ See *Allegheny County September 2017 Attainment Demonstration*.

¹⁷ See 2014 SO₂ Guidance, at 50.

¹⁸ See *ACHD Email Source Characteristics*, available in the docket for this action.

¹⁹ Large, stationary sources specifically include US Steel Clairton, US Steel Edgar Thomson, and US Steel Irvin, which collectively account for over 99% of all point source SO₂ emissions within the Allegheny County NAA.

²⁰ See *Allegheny County September 2017 Attainment Demonstration*, at 15, and *ACHD SO₂*

RR and MP App B Emissions Inv, at 2, available in the docket for this action.

²¹ See *supra* Note 17.

²² See *ACHD SO₂ RR and MP*, at 15.

²³ See *ACHD SO₂ RR and MP App B Emissions Inv*, at 2.

²⁴ See *Allegheny County September 2017 Attainment Demo App D*, at 2, available in the docket for this action.

²⁵ See 2014 SO₂ Guidance, at 64.

²⁶ 83 FR 58206, November 19, 2018.

²⁷ 85 FR 22593, April 23, 2020.

analysis, a reasonable further progress (RFP) analysis, contingency measures, and nonattainment new source review (NNSR) regulations.

C. Criterion (3)—The Air Quality Improvement in the Allegheny County SO₂ Nonattainment Area Is Due to Permanent and Enforceable Reductions in Emissions

For redesignating a nonattainment area to attainment, CAA section 107(d)(3)(E)(iii) requires the EPA to determine that the air quality improvement in the area is due to permanent and enforceable reductions in emissions resulting from implementation of the SIP, applicable Federal air pollution control regulations, and other permanent and enforceable reductions. The EPA proposes to find that Pennsylvania has demonstrated that the requirements of CAA section 107(d)(3)(E)(iii) have been met.

Specifically, the implementation of multiple permanent and federally enforceable control measures at stationary point sources of SO₂ identified in the EPA-approved 2017 attainment demonstration aided in a substantial decrease in SO₂ emissions, and consequently lower SO₂ concentrations in the Allegheny County NAA. These measures include upgrades to the Vacuum Carbonate Unit equipment at the USS Clairton Plant, the implementation of a tail gas recycling project at the USS Clairton Plant, and a new stack and combined flue system for select boilers at the USS Edgar Thomson Plant. Furthermore, the Guardian Glass Plant ceased operations in August 2015 and its operating permit was terminated in November 2015.²⁸ The Calcagni Memo states that “[e]mission reductions from source shutdowns can be considered permanent and enforceable to the extent that those shutdowns have been reflected in the SIP and all applicable permits have been modified accordingly,” and therefore the Guardian shutdown is considered permanent and enforceable.²⁹ Any future operations at this location would require a new permit and a new source evaluation, as described in ACHD Article XXI, sections 2102.04 and 2103.13.³⁰ Additionally, Emissions

Reductions Credits for SO₂ were not requested for the Guardian Glass Plant, preventing the transfer or sale of associated emission credits to another entity in Pennsylvania or some surrounding states.

Allegheny County also established lower SO₂ emissions limits for nearly all processes at the USS facilities in the Allegheny County NAA, including USS Clairton, USS Edgar Thomson, and USS Irvin, as well as the Harsco (Braddock Recovery) facility, located on the property of USS Edgar Thomson. These emissions limits are embedded in the installation permits issued by ACHD for these facilities and are federally enforceable as they have been approved into Pennsylvania’s SIP, and they are permanent because they cannot be altered without an additional SIP submittal.³¹ Details on the imposed emissions limits were included as copies of the installation permits in Appendix K of the 2017 attainment plan submittal and are available in the docket for this action.³²

Collectively, the implemented controls and lower permitted SO₂ emissions rates resulted in an actual decrease of 835 tons of SO₂ emitted per year from 2011 to 2017. This is approximately a 25% reduction from 2011 levels of 3,418 tons of SO₂ emitted per year.³³ As this reduction comes from EPA-approved SIP controls and permit-controlled emission limits, the EPA finds the air quality improvement in the Allegheny County NAA to be due to permanent and enforceable reductions in emissions.

D. Criterion (4)—The Allegheny County SO₂ Nonattainment Area Has a Fully Approved Maintenance Plan Pursuant to Section 175A of the CAA

To redesignate a NAA to attainment, CAA section 107(d)(3)(E)(iv) requires the EPA to determine that the area has a fully approved maintenance plan pursuant to section 175A of the CAA. In conjunction with its request to redesignate the Allegheny County NAA to attainment for the 2010 1-hour primary SO₂ NAAQS, the State submitted a SIP revision to provide for the maintenance of the 2010 1-hour primary SO₂ NAAQS for at least 10 years after the effective date of redesignation to attainment. The EPA is proposing to find that this maintenance plan meets the requirements for

approval under section 175A of the CAA.

1. What is required in a maintenance plan?

CAA section 175A sets forth the elements of a maintenance plan. Under section 175A, the plan must demonstrate continued attainment of the applicable NAAQS for at least 10 years after the Administrator approves a redesignation request to attainment. Eight years after the redesignation, the State must submit a revised maintenance plan demonstrating that attainment will continue to be maintained for an additional 10 years following the initial 10-year period. To address the possibility of future NAAQS violations, the maintenance plan must contain contingency measures as the EPA deems necessary to assure prompt correction of any future 2010 1-hour primary SO₂ NAAQS violations. The Calcagni Memo provides further guidance on the content of a maintenance plan, explaining that a maintenance plan should address five requirements: the attainment emissions inventory, maintenance demonstration, monitoring, verification of continued attainment, and a contingency plan.³⁴ As is discussed more fully later in this section, the EPA is proposing to determine that Pennsylvania’s maintenance plan meets the requirements in CAA section 175A and is thus proposing to approve it as a revision to the Allegheny County portion of the Pennsylvania SIP.

2. Attainment Emissions Inventory

In a maintenance plan, states are required to submit an emissions inventory to identify the level of emissions in the area which is sufficient to attain and maintain the SO₂ NAAQS, which is called the attainment inventory. This inventory is used as the basis for future, projected emission inventories that are used to show the area will remain in attainment. Pennsylvania submitted a 2017 SO₂ emissions inventory as the attainment inventory with its maintenance plan. The year 2017 was selected because it was the first year in which emissions were at levels required to demonstrate attainment of the 2010 SO₂ NAAQS, with the exception of emissions associated with malfunctions of the desulfurization facility at the USS Clairton Plant. Additionally, 2017 was a year in which a fully reviewed National Emission Inventory (NEI) was released. The NEI is a comprehensive, triennial estimate of emissions. Generally, the

²⁸ Documentation of this closure is in *Guardian closure-App J*, available in the docket for this action.

²⁹ See *Calcagni Memo*, at 10.

³⁰ See *Allegheny County Article XXI*, available in the docket for this action and at www.alleghenycounty.us/files/assets/county/v/1/government/health/documents/air-quality/article-21-air-pollution-control.pdf.

³¹ 85 FR 22593, April 23, 2020 and 40 CFR 52.2020(d)(3).

³² See *Installation Permits with emission limits-App K*, available in the docket for this action.

³³ See *ACHD SO₂ RR and MP*, at 16.

³⁴ See *Calcagni Memo*, at pp. 8–12.

attainment year is selected as a year within the attaining design value period (i.e., 2019–2021). However, alternate years from 2018–2022 were less ideal than 2017 for the attainment year for a variety of factors, including excess emissions from sources due to equipment breakdowns, atypical emissions during the COVID pandemic, and incomplete emissions compilations for recent years. Additional details for choosing 2017 as the attainment year are available in the submitted redesignation request.³⁵

For the 2017 attainment year inventory, Pennsylvania directly used point and area source emissions reported in the 2017 NEI, except for corrections identified in Appendix B of the submitted redesignation request.³⁶ The point source emissions for the Allegheny County NAA were verified against the EPA’s emissions inventory system (EIS) and the EPA found them to be acceptable.³⁷ Area source emissions were estimated based on the relative percentage of the Allegheny County population residing in the Allegheny County NAA and the resulting factor allocated the appropriate fraction of the County’s total emissions to the Allegheny County NAA.

Nonroad and onroad mobile source emissions for 2017 were obtained from the EPA’s Motor Vehicle Emissions Simulator (MOVES) model, specifically the MOVES3 version. PADEP executed the MOVES3 modeling runs for nonroad mobile sources and utilized a contractor

to run the model for onroad mobile source emissions. Natural SO₂ emission sources, such as fires and biogenics, were also compiled. Fire emissions data was pulled from the EPA’s Fires³⁸ inventory, while biogenic emissions from soils and vegetation were predicted by the Biogenic Emission Inventory System³⁹ (BEIS) model. Projection inventories predicted from the attainment inventory demonstrate that the area will continue to remain in attainment during the maintenance period. Pennsylvania developed 2026 and 2035 emission projections for the interim and maintenance plan end year, respectively. Projected emissions for these years—as well as the base year inventory—are available in Table 2 in this document. Projected emissions for point and area sources were estimated from the 2017 base year emissions and growth factors developed by the Mid-Atlantic Regional Air Management Association, Inc., and other sources. These growth factors are developed based on forecasts from various databases and tools, including the Energy Information Administration’s Annual Energy Outlook 2022, Pennsylvania Industry Employment 2018–2028 Long-Term Projections, National Inventory Collaborative 2016v1 Emissions Modeling Platform, and the Federal Aviation Administration’s Terminal Area Forecast. Projected emissions were subject to the same corrections utilized in the 2017 base year inventory for consistency.

Furthermore, point sources with implemented enforceable controls or shutdowns since the 2017 base year were excluded from the 2026 and 2035 projections. Specifically, the Koppers Clairton tar refining facility ceased operation in 2017 and its permit expired in 2021. Additionally, Coke Batteries 1, 2, and 3 at the USS Clairton Plant ceased operation in March 2023. Conversely, projections for the 2026 and 2035 inventories included the permitted plantwide SO₂ emissions limit of 23.89 tons/year for a new major source facility—the Invenergy Allegheny Energy Center. However, the permit for this facility was terminated on November 9, 2023,⁴⁰ and construction of this facility is not expected to proceed at this time. As such, the actual emissions in 2026 and 2035 should be even lower than the anticipated values reported in the maintenance year projections. Nonroad and onroad mobile source emissions for the projected years 2026 and 2035 were also obtained from the MOVES3 version. MOVES3 modeling runs were once again executed by PADEP for nonroad mobile source emissions and by the contractor for onroad mobile source emissions. Additional details on some of the assumptions and inputs to the model are available in the redesignation request and its associated Appendix B.⁴¹ Fire and biogenic sources are typically not projected for future case scenarios and therefore emissions were held constant from 2017 to 2026 and 2035.

TABLE 2—EMISSIONS INVENTORIES FOR THE ALLEGHENY COUNTY NONATTAINMENT AREA
[Tons per year]

Sector	2017 Actual emissions (base year)	2026 Projected emissions (interim year)	2035 Projected emissions (maintenance year)
Point Sources	2,556	2,511	2,472
Area Sources	22	26	27
Nonroad Mobile Sources	0	0	0
Onroad Mobile Sources	5	2	2
Fires	0	0	0
Biogenics	0	0	0
Total	2,583	2,539	2,501

3. Maintenance Demonstration

The Calcagni memo describes two ways for a State to demonstrate maintenance of the NAAQS for a period of at least 10 years following the

redesignation of the area: (1) the State can show that future emissions of a pollutant will not exceed the level of the attainment inventory, or (2) the State can model to show that the future mix

of sources and emission rates will not cause a violation of the standard.⁴² Pennsylvania’s projected actual emissions for the interim year of 2026 and for the maintenance year of 2035

³⁵ See *ACHD_SO2_RR_and_MP*, at 19.
³⁶ See *ACHD_SO2_RR_and_MP_App_B_Emissions_Inv*, at pp. 1–2.
³⁷ See *EI_TSD_ACHD_SO2_RR_and_MP*, available in the docket for this action.

³⁸ EPA Fires: www3.epa.gov/ttn/chief/ap42/ch13/related/firerept.pdf.
³⁹ EPA BEIS: www.epa.gov/air-emissions-modeling/biogenic-emission-inventory-system-beis.

⁴⁰ See *Allegheny County Energy Center Termination Letter*, available in the docket for this action.
⁴¹ See *ACHD_SO2_RR_and_MP*, at 22 and *ACHD_SO2_RR_and_MP_App_B_Emissions_Inv*.
⁴² See *Calcagni Memo*, at 9.

are both below the total attainment inventory, which is acceptable for showing maintenance in the Allegheny County NAA.

4. Monitoring Network

The 2014 SO₂ Guidance indicates that once an area has been redesignated to attainment, the state should continue to operate an appropriate air quality monitoring network as provided under 40 CFR part 58 to verify the attainment status of the area. ACHD has committed to continued operation of its SO₂ monitoring network in the Allegheny County NAA to verify the attainment status. Also, ACHD will continue to submit an annual monitoring network plan to the EPA for approval, in accordance with 40 CFR 58.10. No changes will be made to the existing network unless pre-approved by the EPA.

5. Verification of Continued Attainment

The 2014 SO₂ Guidance states that each air agency should ensure that it has the legal authority to implement and enforce all measures necessary to attain and maintain the 2010 SO₂ NAAQS. The air agency's submittal should indicate how it will track the progress of the maintenance plan for the area either through air quality monitoring or modeling.

Article XXI, section 2101.07(a) grants the ACHD legal authority to implement and enforce all measures necessary to maintain the 2010 1-hour primary SO₂ NAAQS. In addition, ACHD has indicated it will track the progress of the maintenance plan through an integrated approach utilizing monitoring data and emissions inventories.

As previously indicated, ACHD will continue to operate its SO₂ monitoring network to verify the attainment status of the Allegheny County NAA. Monitored concentrations will serve as the primary indicator for verifying continued attainment and will also act as the triggering mechanism for contingency measures.

ACHD will also use emissions inventories—developed annually by ACHD for point sources and triennially by PADEP for area and mobile sources—and compare these inventories to the 2017 attainment inventory for assessing continued attainment. It is anticipated that future inventories will remain below the levels of the attainment inventory. However, if future inventories exceed the attainment inventory levels, ACHD will conduct a study to evaluate if the increased emissions have caused increased monitored concentrations within the Allegheny County NAA and, if so,

ACHD will determine if any additional emission control measures should be enacted. Emissions data will not serve as a triggering mechanism for contingency measures for two reasons. Primarily, increased emissions may not directly affect monitored concentrations, as SO₂ concentrations can be impacted by meteorological conditions. Additionally, emissions inventory reporting is slower than monitoring data reporting, and the use of emissions data as a contingency initiator would not provide for a prompt response to any potential NAAQS violations.

Under ACHD's new source review program, any major new sources or modifications to existing sources that would affect emissions must provide a modeling demonstration that illustrates new emissions will not cause or contribute to a violation of the 2010 1-hour primary SO₂ NAAQS, as described in ACHD Article XXI, section 2102.04(b). ACHD will not approve any modifications that would lead to expected violations of the 2010 1-hour primary SO₂ NAAQS in the Allegheny County NAA.

The EPA proposes to find that these proposed measures will provide for verifying continued attainment within the Allegheny County NAA.

6. Contingency Measures

Section 175A(d) of the CAA requires that a maintenance plan include such contingency measures as the EPA deems necessary to assure that the State will promptly correct a violation of the NAAQS that occurs after redesignation. The maintenance plan should identify the contingency measures to be adopted, a schedule and procedure for adoption and implementation, and a time limit for action by the State. A State should also identify specific indicators to be used to determine when the contingency measures need to be implemented. The maintenance plan must also include a requirement that a State will continue to implement all measures with respect to control of the pollutant that were contained in the SIP before redesignation of the area to attainment.

ACHD has committed to continuing implementation of all measures indicated in the SIP after redesignation of the Allegheny County NAA.⁴³ Furthermore, ACHD has identified triggering indicators for its contingency measures, a schedule for implementing these potential measures, and has

specified multiple potential options to correct any NAAQS violation.⁴⁴

Fully validated and quality assured SO₂ monitoring data will serve as the primary trigger for any responses to prevent or correct a NAAQS violation in the Area. ACHD has established both warning level and action level responses with specific triggering indicators for each.

Warning level responses are subdivided into two tiers. A first-level warning will occur when the 99th percentile daily maximum 1-hour SO₂ concentration exceeds 75 ppb at any monitor site in the Allegheny County NAA in a single calendar year. This first-level warning will prompt an ACHD study to determine if the trigger indicates a trend toward increasing SO₂ concentrations in the Allegheny County NAA. If there seems to be a rising trend in SO₂ concentrations, the study will examine if the trend is likely to continue and if so, the needed measures that could reverse the trend. A second-level warning will occur when the average of two consecutive years of 99th percentile daily maximum 1-hour SO₂ concentrations exceeds 75 ppb at any monitor in the Allegheny County NAA. This second-level warning will result in ACHD evaluating the chance of a violation of the NAAQS and the need for supplemental control measures to be activated. Both first- and second-level warnings will allow for ACHD to consider the early adoption of measures to permit the expeditious implementation of these measures in the event of a NAAQS violation. This early adoption could allow for implementation of the measures within 30 to 90 days following the potential occurrence of a NAAQS violation.

An action level response will occur when the 1-hour design value, based on the average of three consecutive years of 99th percentile daily maximum 1-hour SO₂ concentrations, violates the 2010 1-hour SO₂ NAAQS at any monitor site in the Allegheny County NAA. This response will include the adoption and implementation of additional control measures as needed to promptly correct the violation. If regulatory measures are selected, these measures will conform to all Federal, State, and local rules and regulations. Both non-regulatory and regulatory measures are expected to be implemented within one year following a violation of the NAAQS.⁴⁵

ACHD has specified multiple potential regulatory and non-regulatory

⁴⁴ See *ACHD SO₂ RR and MP*, at 28–31.

⁴⁵ Specific schedules and associated procedures for the adoption and implementation of regulatory and non-regulatory measures are available in the *ACHD SO₂ RR and MP* document at pp. 29–30.

⁴³ See *ACHD SO₂ RR and MP*, at 27.

contingency measures for this maintenance plan—including both area-wide and USS Mon Valley Works measures.⁴⁶ Selection will be based on several factors, including but not limited to, the degree of the violation, the emission reduction potential, and cost. ACHD has identified non-regulatory, area-wide measures such as wood burning-related programs and alternative fuel promotions as potential options for correcting a NAAQS violation. Additionally, ACHD has proposed USS Mon Valley Works regulatory measures, including but not limited to, additional desulfurization controls for coke oven gas at USS Clairton, additional fugitive controls at USS Mon Valley Works plants, and restrictions on fuel usage at USS Mon Valley Works plants. All of these measures can be individually implemented or in conjunction with others to ensure correction of any NAAQS violation.

The EPA proposes to find that ACHD's submitted maintenance plan meets the requirements set forth in CAA section 175A and EPA guidance and is proposing to approve the maintenance plan as a revision to the Pennsylvania SIP.

E. Criterion (5)—Pennsylvania Has Met All Applicable Requirements Under Section 110 and Part D of Title I of the CAA

In accordance with section 107(d)(3)(E)(v) of the CAA, to redesignate the Allegheny County NAA to attainment, Pennsylvania must meet all requirements applicable to the Allegheny County NAA under CAA section 110 (general SIP requirements) and part D of title I of the CAA (SIP requirements for nonattainment areas).

1. Section 110 General Requirements for SIPs

Pursuant to CAA section 110(a)(1), whenever new or revised NAAQS are promulgated, the CAA requires States to submit a plan (*i.e.*, SIP) for the implementation, maintenance, and enforcement of such NAAQS. Section 110(a)(2) of title I of the CAA contains the general requirements for a SIP, also known as “infrastructure” requirements. These requirements include, but are not limited to, the following: submittal of a SIP that has been adopted by the state after reasonable public notice and hearing; provisions for establishment and operation of appropriate procedures needed to monitor ambient air quality;

implementation of a source permit program; provisions for the implementation of part C requirements (Prevention of Significant Deterioration (PSD)) and provisions for the implementation of part D requirements (New Source Review (NSR) permit programs); provisions for air pollution modeling; and provisions for public and local agency participation in planning and emission control rule development.

Section 110(a)(2)(D) requires that SIPs contain certain measures to prevent sources in a state from significantly contributing to air quality problems in another state. To implement this provision, the EPA has required certain states to establish programs to address the interstate transport of air pollutants.⁴⁷ The section 110(a)(2)(D) requirements for a state are not linked with a particular nonattainment area's designation and classification in that state. The EPA has concluded that the requirements linked with a particular nonattainment area's designation and classifications are the relevant measures to evaluate in reviewing a redesignation request. The transport SIP submittal requirements, where applicable, continue to apply to a state regardless of the designation of any one particular area in the state. Thus, the EPA has concluded that the CAA's interstate transport requirements should not be construed to be applicable requirements for purposes of redesignation.

In addition, the EPA has concluded other section 110 elements—those that are neither connected with nonattainment plan submissions nor linked with an area's attainment status—are not applicable requirements for purposes of redesignation. The area will still be subject to these requirements after the area is redesignated. The section 110 and part D requirements which are linked with a particular area's designation and classification are the relevant measures to evaluate in reviewing a redesignation request. This approach is consistent with the EPA's existing policy on applicability (*i.e.*, for redesignations) of conformity and oxygenated fuels requirements, as well as with section 184 ozone transport requirements. See Reading, Pennsylvania, proposed and final rules (61 FR 53174–53176, October 10, 1996), (62 FR 24826, May 7, 2008); Cleveland-Akron-Loraine, Ohio, final rule (61 FR 20458, May 7, 1996); and Tampa, Florida, final rule (60 FR 62748, December 7, 1995). See also the

⁴⁷ See Nitrogen Oxides (NO_x) SIP Call and amendments to the NO_x SIP Call (64 FR 26298, May 14, 1999 and 65 FR 11222, March 2, 2000), and the Cross-State Air Pollution Rule (CSAPR) Update (81 FR 74504, October 26, 2016).

discussion on this issue in the Cincinnati, Ohio, redesignation (65 FR 37890, June 19, 2000), and in the Pittsburgh, Pennsylvania, redesignation (66 FR 50399, October 19, 2001).

The EPA approved elements of Pennsylvania's June 15, 2014 SO₂ infrastructure SIP submittal on August 5, 2015.⁴⁸ As explained previously, certain general requirements of CAA section 110(a)(2) are statewide requirements that are not linked to the nonattainment status of the Allegheny County NAA and are therefore not “applicable requirements” for the purpose of reviewing Pennsylvania's redesignation request. Because Pennsylvania satisfies the general SIP elements and requirements set forth in CAA section 110(a)(2) applicable to and necessary for SO₂ redesignation, the EPA proposes to conclude that Pennsylvania has satisfied the criterion of section 107(d)(3)(E)(v) related to section 110(a)(2) of the CAA.

2. Part D Requirements

In addition to the CAA section 110 requirements, section 107(d)(3)(E)(v) requires that the state meet all the requirements applicable to the nonattainment area “under part D of this subchapter” for the nonattainment area to be redesignated. Both section 107 and part D are within subchapter 1 of the CAA. Part D, entitled “Plan Requirements for Nonattainment Areas,” consists of six subparts, of which only subparts 1 and 5 are applicable to SO₂ nonattainment areas. Subpart 1 (sections 171 through 179B) contains provisions that can apply to all nonattainment areas for all criteria pollutants, while subpart 5 (sections 191 through 192) contains additional provisions for SO₂, NO_x, or lead nonattainment areas. The requirements applicable to this redesignation are discussed below.

a. Subpart 1 Requirements

1. Section 172 Requirements

CAA section 172 requires states with nonattainment areas to submit plans that provide for timely attainment of the NAAQS. More specifically, CAA section 172(c) contains general requirements for nonattainment plans. A thorough discussion of these requirements is found in the General Preamble for Implementation of title I.⁴⁹

As noted in the General Preamble, certain attainment-related planning requirements under section 172(c) no longer have meaning for an area that is already attaining the NAAQS, and

⁴⁸ 80 FR 46494, August 5, 2015.

⁴⁹ 57 FR 13498, April 16, 1992.

⁴⁶ USS Mon Valley Works collectively refers to the USS Clairton, Edgar Thomson, and Irvin Plants located within the Allegheny County NAA.

therefore are not applicable for purposes of redesignation. For example, for an area that is already attaining the NAAQS, there would be nothing for the State to provide to show reasonable further progress to attainment in that area. Similarly, the CAA section 172 requirements for the attainment demonstration, implementation of reasonably available control measures, including reasonably available control technology, and contingency measures that are triggered if an area fails to meet RFP or fails to attain are also not applicable for purposes of redesignation.

With respect to CAA section 172(c)(3), Pennsylvania was required to submit an actual current emissions inventory with its attainment plan. Pennsylvania had submitted a base year inventory with its attainment plan SIP on October 3, 2017 and the EPA approved this element on April 23, 2020.⁵⁰

2. Section 173 Requirements

Section 173 of the CAA includes requirements for permit programs that are required in a nonattainment area for new sources as required by section 172(c)(5), known as nonattainment new source review (NNSR). However, the EPA has a longstanding interpretation that because the NNSR permit program is replaced by the PSD permit program upon an area's redesignation to attainment, nonattainment areas seeking redesignation to attainment do not need a fully approved part D NNSR program to be redesignated. A more detailed rationale for this view is described in a memorandum from Mary Nichols, Assistant Administrator for Air and Radiation, dated October 14, 1994, entitled, "Part D New Source Review Requirements for Areas Requesting Redesignation to Attainment."⁵¹ Nevertheless, the EPA notes that the ACHD's Article XXI Rules and Regulations for Air Pollution Control have SIP-approved NNSR and PSD programs found in section 2102.06 for NNSR and section 2102.07 for PSD. Allegheny County has incorporated by reference Pennsylvania's NNSR provisions at 25 Pa. Code 127.201–127.218 and also Pennsylvania's PSD regulations found at 25 Pa. Code 127.81–127.83. Pennsylvania's PSD regulations merely incorporate by reference the Federal PSD regulations found at 40 CFR part 52. Allegheny County has therefore addressed all required provisions for the permitting of

sources in NAAs, including NNSR. See 40 CFR 52.2020(c). Pennsylvania's PSD program will become applicable for SO₂ in the Allegheny County NAA upon redesignation to attainment.

3. Section 175A Requirements

CAA section 175A requires that states seeking redesignation of an area to attainment submit a "maintenance plan" containing certain elements. Pennsylvania included a maintenance plan for the Allegheny County NAA with its November 14, 2023 redesignation request, which the EPA is proposing to approve in conjunction with the redesignation, and it is discussed in detail in section II, Criterion (4) of this document.

4. Section 176 Requirements

Section 176(c) of the CAA requires that Federal actions conform to the air quality planning goals in the applicable SIP. The requirement to determine conformity applies to transportation plans, programs, and projects that are developed, funded, or approved under title 23 of the United States Code and the Federal Transit Act (transportation conformity) as well as to all other Federally-supported or funded projects (general conformity). Section 176(c) of the CAA also requires that states establish criteria and procedures to ensure that Federally-supported or funded transportation plans, transportation improvement programs (TIPs) and projects conform to the goals of the applicable SIP. This is referred to as a transportation conformity SIP. In the preamble to the January 1993 proposed transportation conformity rule, the EPA stated that, "Based on available emissions information, EPA believes highway and transit motor vehicles are not significant sources of lead or sulfur dioxide. Therefore, transportation plans, TIPs, and projects are presumed to conform to the applicable implementation plans for these pollutants."⁵² In November 1993, the EPA finalized its transportation conformity regulations. One section of those regulations addressed the geographic applicability of the transportation conformity regulations. The regulation stated at that time that, "The provisions of this subpart apply with respect to emissions of the following criteria pollutants: Ozone, carbon monoxide, nitrogen dioxide, and particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM₁₀)."⁵³ Based on this

provision, transportation conformity does not apply in nonattainment or maintenance areas for SO₂. Therefore, a transportation conformity SIP is not required for SO₂ nonattainment and maintenance areas and is not necessary for an SO₂ nonattainment area to be redesignated to attainment, and the EPA's transportation conformity rules do not apply to SO₂ for the Allegheny County NAA.

5. Section 179 Requirements

Section 179(a) of the CAA addresses potential sanctions for the failure of a State to submit certain required SIP elements by statutory deadlines. The EPA is not aware of any missing or incomplete Allegheny County planning elements subject to Section 179(a) of the CAA.

b. Subpart 5 Requirements

The subpart 5 requirements, which consist of sections 191 and 192 of the CAA, are specific provisions applicable to SO₂, NO₂ or lead nonattainment areas. Section 191 of the CAA requires states with areas designated nonattainment for SO₂, NO₂ or lead after November 15, 1990, to submit within 18 months of the designation an implementation plan meeting the requirements of part D. The substance of the required plans is established by section 172(c). Section 192 sets forth attainment dates for nonattainment areas under section 191.

For SO₂, section 192(a) requires that attainment plans provide for attainment of the primary standard as expeditiously as possible, but no later than five years from the date of the nonattainment designation. The EPA designated the Allegheny County NAA as nonattainment on August 5, 2013, with an attainment date of October 4, 2018. However, because the EPA is reviewing a redesignation request under section 107(d)(3)(E), rather than a determination of attainment under section 179(c), the determination of whether the Area attained by the attainment date set forth in section 192 is not applicable to this action proposing approval of Pennsylvania's redesignation request.

Based on the above, the EPA is proposing to find that Pennsylvania has satisfied the applicable requirements for the redesignation of the Allegheny County NAA under section 110 and part D of title I of the CAA.

III. Environmental Justice Concerns

Within its redesignation request and maintenance plan, ACHD provided

equal to a nominal 2.5 micrometers (PM_{2.5}). See 40 CFR 93.102(b)(1).

⁵⁰ 85 FR 22593, April 23, 2020.

⁵¹ Available in the docket for this action as *Nichols Memo* and at www.epa.gov/sites/default/files/2015-07/documents/101494m.pdf.

⁵² 58 FR 3776, January 11, 1993.

⁵³ This provision has been revised to include particles with an aerodynamic diameter less than or

supplemental information regarding environmental justice considerations within the Allegheny County NAA. Utilizing the Environmental Justice Index (EJI) tool developed by ACHD's Bureau of Assessment, Statistics, & Epidemiology, ACHD identified areas within the Allegheny County NAA with higher environmental health risks. The EJI tool uses Allegheny County-specific factors to evaluate environmental justice concerns, including the following indicators: race, education, median household income, housing vacancy, lead paint risk, greenness, air quality, and flood risk. Six municipalities within the Allegheny County NAA were designated as "highest need" areas according to EJI, while seven other municipalities were designated as "high need" areas. ACHD has indicated that its SO₂ monitoring network provides enhanced surveillance in vulnerable communities, and the two current SO₂ monitors in the Allegheny County NAA are located within or directly downwind of areas labeled as "highest need." Furthermore, ACHD states that the controls specified in its 2017 attainment demonstration as well as the shutdowns denoted in the maintenance demonstration illustrate the greatest emissions reductions in the "highest need" areas.

As explained in the EJ Legal Tools to Advance Environmental Justice 2022 document, the CAA provides states with the discretion to consider environmental justice in developing rules and measures related to redesignation requests and maintenance plans. In this instance, ACHD exercised this discretion, as is described above in summary. In reviewing ACHD's analysis, the EPA defers to ACHD's reasonable exercise of its discretion in considering EJ in this way. The EPA is taking proposed action to approve the SIP revision because it meets minimum requirements pursuant to the CAA and relevant implementing regulations. The EPA also finds that ACHD's consideration of EJ analyses in this context is reasonable. The EPA encourages air agencies generally to evaluate environmental justice considerations of their actions and carefully consider impacts to communities. The EJ analyses submitted by the air agency were considered but were not the basis for the EPA's decision making and the SIP met the minimum applicable requirements, as explained above.

IV. Proposed Action

The EPA's review of this material indicates that the Allegheny County NAA has met the criteria necessary

under CAA section 107(d)(3)(E) for the EPA to redesignate the Area from nonattainment to attainment for the 2010 1-hour primary SO₂ NAAQS. The EPA is proposing to approve the Pennsylvania redesignation request for the Allegheny County NAA, which was submitted on behalf of ACHD on November 14, 2023. Final approval of Pennsylvania's redesignation request would change the legal designation of the portion of Allegheny County designated nonattainment at 40 CFR 81.339 to attainment for the 2010 1-hour primary SO₂ NAAQS. The EPA is also proposing to approve ACHD's maintenance plan, which is designed to ensure that the potentially redesignated Allegheny County NAA will continue to maintain the SO₂ NAAQS. The EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

V. Statutory and Executive Order Reviews

Under the CAA, the redesignation of an area to attainment and the accompanying approval of the maintenance plan under CAA section 107(d)(3)(E) are actions that affect the status of geographical area and do not impose any additional regulatory requirements on sources beyond those required by state law. A redesignation to attainment does not in and of itself impose any new requirements, but rather results in the application of requirements contained in the CAA for areas that have been redesignated to attainment. Moreover, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities

under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
 - Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
 - Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
 - Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); 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 Clean Air Act; Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994) directs Federal agencies to identify and address "disproportionately high and adverse human health or environmental effects" of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. The EPA defines environmental justice (EJ) as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." The EPA further defines the term fair treatment to mean that "no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies."
- ACHD evaluated environmental justice considerations as part of its SIP submittal even though the CAA and applicable implementing regulations neither prohibit nor require an evaluation. The EPA's evaluation of ACHD's environmental justice considerations is described above in the section titled, "Environmental Justice Considerations." 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. The EPA is taking action under the CAA on bases independent of ACHD's evaluation of environmental justice. Due to the nature of the action

being taken here, this action is expected to have a neutral to positive impact on the air quality of the affected area. In addition, there is no information in the record upon which this decision is based that is inconsistent with the stated goal of Executive Order 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

In addition, this proposed rulemaking, for the redesignation and approval of the maintenance plan for the Allegheny County NAA, does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and the EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements, Sulfur oxides.

40 CFR Part 81

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Adam Ortiz,

Regional Administrator, Region III.

[FR Doc. 2024-28536 Filed 12-10-24; 8:45 am]

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COUNCIL ON ENVIRONMENTAL QUALITY

40 CFR Parts 1515 and 1516

[CEQ-2024-001]

RIN 0331-AA02

Freedom of Information Act and Privacy Act Regulations

AGENCY: Council on Environmental Quality.

ACTION: Proposed rule.

SUMMARY: The Council on Environmental Quality (CEQ) is proposing to amend its Freedom of Information Act (FOIA) regulations to incorporate amendments to the FOIA set forth in the FOIA Improvement Act of 2016; to conform to guidance for Federal agencies from the Department of Justice;

to make them easier for the public to understand and use; and to better reflect CEQ's current policy and practice.

These proposed regulations reaffirm CEQ's commitment to providing the fullest possible disclosure of records to the public. In addition, CEQ is proposing to amend its regulations implementing the Privacy Act of 1974 (the Privacy Act) to make them easier for the public to understand and use and to better reflect CEQ's current policy and practice. The proposed regulations would also make administrative changes, including reorganizing, renumbering, and renaming the sections of CEQ's current FOIA and Privacy Act regulations.

DATES: Send comments on or before January 10, 2025.

ADDRESSES: You may submit comments, identified by docket number [CEQ-2024-0001], by any of the following methods:

- **Federal eRulemaking Portal:** Visit <https://www.regulations.gov> and follow the instructions for submitting comments.
- **Fax:** 202-456-6546.
- **Mail:** Council on Environmental Quality, 730 Jackson Place NW, Washington, DC 20503.

Instructions: Your submission must include the agency name, "Council on Environmental Quality," and the docket number for this rulemaking, [CEQ-2024-0001]. CEQ will post your comment without change, including any personal information you provide, to <https://www.regulations.gov>. Do not submit any information you consider to be private information, privileged or confidential commercial or financial information, or other information the disclosure of which is restricted by statute.

Docket: For access to the docket, visit <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Samuel Roth, Associate General Counsel, 202-395-5750, Samuel.E.Roth@ceq.eop.gov.

SUPPLEMENTARY INFORMATION:

I. Background

A. The FOIA

The FOIA, 5 U.S.C. 552, provides a right of access to certain records that Federal agencies maintain and control. The FOIA directs each Federal agency to publish regulations that describe how the agency will process FOIA requests it receives from members of the public.

CEQ first adopted its FOIA regulations in 1977.¹ In 2010, CEQ

amended its regulation to reflect legislative amendments to the FOIA, a 2009 Presidential Memorandum regarding FOIA policy, and additional guidance from the Department of Justice (DOJ) and the Office of Management and Budget (OMB).² CEQ's current FOIA regulation is codified at 40 CFR part 1515.

CEQ is proposing to revise and republish its FOIA regulation in its entirety in order to make several improvements to the current rule. First, CEQ is proposing updates to reflect a number of important changes to the FOIA made by the FOIA Improvement Act of 2016 (Pub. L. 114-185). Section 3(a) of the Act directs each agency to review its FOIA regulations and update them to implement the changes set forth in the Act. Second, CEQ is proposing to include a number of provisions to improve the usefulness and readability of its FOIA regulations consistent with DOJ's 2017 revised Template for Agency Regulations (the Template).³ CEQ modeled this proposed rule on the Template, which also incorporates the FOIA Improvement Act of 2016's amendments to the FOIA.

Third, CEQ is proposing updates to better convey the FOIA's and CEQ's requirements to members of the public who are interested in CEQ's operations and activities, so they can easily understand and use CEQ's FOIA process.⁴ Specifically, CEQ referred to the Plain Writing Act of 2010 and the Federal Plain Language Guidelines⁵ in preparing the proposed rule.

Finally, the proposed rule reflects updates to CEQ's FOIA policies and procedures, as well as the practical experience of CEQ's FOIA staff. As it does under its current regulations, CEQ would administer the FOIA under the proposed regulations with a presumption of openness, consistent with the Memorandum of the Attorney General dated March 15, 2022.⁶

B. The Privacy Act

The Privacy Act, 5 U.S.C. 552a, governs each Federal agency's

² CEQ, Revision of Freedom of Information Act Regulations, 75 FR 48585 (Sept. 10, 2010).

³ Template for Agency FOIA Regulations (February 22, 2017), <https://www.justice.gov/oip/template-agency-foia-regulations>.

⁴ See, e.g., E.O. 13563, *Improving Regulation and Regulatory Review*, (Jan. 18, 2011) ("regulations [must be] accessible, consistent, written in plain language, and easy to understand"), 76 FR 3821 (Jan. 21, 2011).

⁵ Federal Plain Language Guidelines (1st rev. May 2011), <https://www.plainlanguage.gov/media/FederalPLGuidelines.pdf>.

⁶ Department of Justice, *Freedom of Information Act Guidelines* (March 15, 2022), <https://www.justice.gov/media/1212566/dl>.

¹ CEQ, Freedom of Information Act Procedures; Final Rule, 42 FR 65158 (Dec. 30, 1977).

collection, maintenance, use, and dissemination of any information about individuals that it maintains in a system of records. The Privacy Act directs each Federal agency to publish regulations that describe the agency's procedures for carrying out the provisions of the Privacy Act. CEQ first adopted a Privacy Act regulation in 1977,⁷ codified at 40 CFR part 1516.

CEQ is proposing to revise and republish its Privacy Act regulation in its entirety to make it easier for the public to understand and use and to reflect updates to CEQ's Privacy Act procedures over the past five decades.

II. Summary of the Proposed Rules

A. Part 1515—Freedom of Information Act Procedures

1. Subpart A—The Council on Environmental Quality's FOIA Program

Section 1515.1—What is the purpose of the rules in this part? This section describes the purpose of part 1515, which is to set forth CEQ's FOIA procedures, and explains the limitations of the regulations.

Section 1515.2—What kind of records does CEQ maintain? This section explains CEQ's activities and legal authorities.

Section 1515.3—Are there any CEQ records for which I do not have to make a request? This section describes CEQ information the public can access without filing a FOIA request.

Section 1515.4—Who is responsible for processing FOIA requests and appeals to CEQ? This section explains the roles of Chief FOIA Officer and FOIA Appeals Officer at CEQ.

Section 1515.5—Who can help me with my FOIA request to CEQ? This section explains that FOIA requesters can obtain assistance from CEQ's FOIA Public Liaison and dispute resolution services from the National Archives and Records Administration's Office of Government Information Services.

Section 1515.6—What are CEQ's procedures for preserving records? This section explains CEQ's procedures for preserving records in connection with its administration of the FOIA.

2. Subpart B—Making a FOIA Request and Receiving a Response

Section 1515.11—How do I make a FOIA request to CEQ? This section explains how members of the public

may request CEQ records under the FOIA. It also describes CEQ's procedures for clarifying requests that do not reasonably describe the records that the requester is seeking.

Section 1515.12—Will CEQ keep my request confidential? This section notes that FOIA requests and the identities of FOIA requesters are generally matters of public record.

Section 1515.13—When will CEQ respond to my request? This section describes CEQ's timeline for responding to FOIA requests, including circumstances in which CEQ will extend or pause the ordinary time period for processing FOIA requests.

Section 1515.14—What if my request is urgent? This section explains how to ask CEQ to expedite its processing of a FOIA request or appeal.

Section 1515.15—How will CEQ process my request? This section describes CEQ's procedures for processing requests and circumstances in which CEQ will deny requests.

Section 1515.16—How does CEQ determine when to withhold records or portions of a record? This section describes CEQ's procedures for applying the statutory exemptions from disclosure set forth in the FOIA.

Section 1515.17—What if I request records that involve another government office or agency? This section describes CEQ's procedures for consulting with other Federal agencies regarding whether to disclose or withhold particular records in response to a FOIA request, as well as CEQ's procedures for referring records to another agency for processing.

Section 1515.18—What happens if CEQ grants my request in full or in part? This section describes CEQ's procedure for disclosing records in response to a FOIA request.

Section 1515.19—What happens if CEQ denies my request in full or in part? This section describes CEQ's procedure for withholding records in response to a FOIA request.

3. Subpart C—Appealing a FOIA Request

Section 1515.20—Can I appeal CEQ's response to my request? This section describes how a FOIA requester may appeal a determination that CEQ made in processing the requester's request.

Section 1515.21—How will CEQ process my appeal? This section describes CEQ's procedures for upholding, reversing, or modifying a prior determination on appeal.

4. Subpart D—Fees for FOIA Requests and Appeals

Section 1515.31—Can CEQ charge fees for processing FOIA requests and appeals? This section explains that CEQ charges fees for processing FOIA requests, but not appeals, and describes the rules that CEQ will follow in determining whether to charge a fee and the amount of the fee. As in CEQ's current FOIA regulation, the provisions of this section and the subsequent sections reflect OMB's Uniform Freedom of Information Act Fee Schedule and Guidelines.

Section 1515.32—What is the amount of the fee for processing a request? This section describes how CEQ will determine the amount of the fee for processing a FOIA request.

Section 1515.33—Are there any exceptions for non-commercial requests? This section describes the services that CEQ will exclude from the calculation of fees for non-commercial requesters, in general, and for representatives of non-commercial scientific institutions, educational institutions, and the news media, in particular.

Section 1515.34—Can I apply for a fee waiver? This section describes the availability of fee waivers and explains the criteria CEQ will apply in determining whether to grant a fee waiver.

Section 1515.35—When will CEQ contact me about fee-related matters? This section describes CEQ's procedures for contacting FOIA requesters to resolve fee-related matters.

Section 1515.36—Do I have to pay fees if CEQ misses the deadline for responding to my request? This section describes the circumstances in which CEQ will not charge fees for processing a FOIA request because CEQ did not respond to the request within the time period set forth in the FOIA.

Section 1515.37—When are fees due and how do I pay them? This section describes when and how FOIA requesters must pay fees to CEQ, including the circumstances in which CEQ may require a FOIA requester to pay fees in advance.

Section 1515.38—What will CEQ do if I do not promptly pay the fee? This section explains when CEQ will charge interest and use debt collection procedures.

5. Subpart E—Confidential Commercial Information and Preservation of Records

Section 1515.41—How does CEQ handle confidential commercial information? This section implements the requirements of Executive Order

⁷ CEQ, Procedures for Gaining Access to Information Under the Privacy Act of 1974; Final Regulations, 42 FR 32537 (June 27, 1977); see also Procedures for Gaining Access to Information Under the Privacy Act of 1974, Correction to Final Regulations, 42 FR 35960 (July 13, 1977) (technical amendment).

(E.O.) 12600, *Predisclosure Notification Procedures for Confidential Commercial Information*,⁸ which directs Federal agencies to allow submitters of information to designate records that contain confidential commercial information and to notify submitters when a FOIA requester seeks disclosure of confidential commercial information.

B. Part 1516—Privacy Act Implementation

Section 1516.1—What is the purpose of these rules? This section describes the purpose of part 1516, which is to set forth CEQ's Privacy Act procedures.

Section 1516.2—What records do these rules cover? This section explains when part 1516 applies and explains the meaning of "record" and "system of records" for purposes of part 1516.

Section 1516.3—When will CEQ disclose records about me? This section describes the conditions under which CEQ will disclose records, which are (1) in response to an individual's request for the individual's own records; (2) as part of a routine use of records; or (3) pursuant to one of the other bases for disclosure that appear in section 3 of the Privacy Act, 5 U.S.C. 552a(b).

Section 1516.4—How can I obtain access to CEQ's records about me? This section describes the procedures for an individual to request access to the individual's own records.

Section 1516.5—How can I obtain information about how CEQ has used its records about me? This section describes the procedures for an individual to request an accounting of disclosures of the individual's own records.

Section 1516.6—How can I ask CEQ to correct my records? This section describes the procedures for an individual to request an amendment of the individual's own records and explains how CEQ will review such a request.

Section 1516.7—How can I appeal CEQ's decision to deny my request to access or correct records about me? This section describes the procedures for an individual to appeal CEQ's denial of the individual's request to amend the individual's own records.

Section 1516.8—Will CEQ charge me a fee for a copy of my records? This section describes the fees CEQ will charge for copies of records.

III. Regulatory Analysis and Notices

A. Regulatory Flexibility Act and Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking

The Regulatory Flexibility Act (RFA), as amended, 5 U.S.C. 601 *et seq.*, and E.O. 13272, *Proper Consideration of Small Entities in Agency Rulemaking*,⁹ require agencies to assess the impacts of proposed and final rules on small entities. Under the RFA, small entities include small businesses, small organizations, and small governmental jurisdictions. An agency must prepare an Initial Regulatory Flexibility Analysis (IRFA) unless it determines and certifies that a proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). The FOIA authorizes Federal agencies to charge fees only to certain requesters, and only in order to recover the direct costs of searching for, reviewing, and duplicating agency records. Under the proposed rule, CEQ would continue to charge fees in accordance with the FOIA and guidelines from DOJ and OMB. The Privacy Act authorizes Federal agencies to charge fees only to individuals, and accordingly CEQ will not charge fees under the Privacy Act to small entities within the meaning of the RFA.

The fees that CEQ assesses for processing FOIA requests are nominal and will not have a significant impact on a substantial number of small entities within the meaning of the RFA. Accordingly, CEQ hereby certifies that the proposed rule, if finalized, would not have a significant economic impact on a substantial number of small entities.

B. Unfunded Mandates Reform Act

Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 2 U.S.C. 1531), requires Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments, and the private sector to the extent that such regulations incorporate requirements specifically set forth in law. Before promulgating a rule that may result in the expenditure by a State, Tribal, or local government, in the aggregate, or by the private sector of \$100 million, adjusted annually for inflation, in any 1 year, an agency must prepare a written statement that assesses the effects on State, Tribal, and local governments and the private sector. 2 U.S.C. 1532. This proposed rule would apply only to requesters under the FOIA

or the Privacy Act and would not result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any 1 year. This proposed action also would not impose any enforceable duty, contain any unfunded mandate, or otherwise have any effect on small governments subject to the requirements of 2 U.S.C. 1531–1538.

C. Executive Order 12866, Regulatory Planning and Review

E.O. 12866, as supplemented and affirmed by E.O. 13563 and amended by E.O. 14094, provides that the Office of Information and Regulatory Affairs will review any regulatory action that qualifies as a "significant regulatory action" within the meaning of the E.O.¹⁰ The proposed rule does not qualify as a significant regulatory action.

D. Executive Order 12988, Civil Justice Reform

Under section 3(a) of E.O. 12988,¹¹ agencies must review their proposed regulations to eliminate drafting errors and ambiguities, draft them to minimize litigation, and provide a clear legal standard for affected conduct. Section 3(b) provides a list of specific matters that agencies must consider when conducting the review required by section 3(a). CEQ has conducted this review and determined that this proposed rule complies with the requirements of E.O. 12988.

E. Paperwork Reduction Act

This proposed rule would not impose any new information collection burden that would require additional review or approval by OMB under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*

F. National Environmental Policy Act (NEPA)

The National Environmental Policy Act of 1969 (NEPA) (Pub. L. 118-5, 42 U.S.C. 4321 *et seq.*), as amended, and the CEQ regulations that implement NEPA, 40 CFR parts 1500 through 1508, require consideration of the environmental effects of proposed actions in agency decision making. NEPA provides for three levels of review. First, agencies may establish in their agency-specific NEPA procedures categorical exclusions (CEs) for categories of actions that normally do

¹⁰ See E.O. 12866, *Regulatory Planning and Review*, 58 FR 51735, 51737 (Oct. 4, 1993); E.O. 14094, *Modernizing Regulatory Review*, 88 FR 21879, 21879–80 (Apr. 11, 2023); E.O. 13563, *Improving Regulation and Regulatory Review*, 76 FR 3821, 3822 (Jan. 21, 2011).

¹¹ 61 FR 4729 (Feb. 7, 1996).

⁸ 52 FR 23781 (June 25, 1987).

⁹ 67 FR 53461 (Aug. 16, 2002).

not have a significant effect on the human environment, individually or in the aggregate, and apply CEs to individual actions, as appropriate.¹² If an agency proposes to take an action that does not fall within a CE but is not likely to have significant environmental effects (or the significance of whose effects is unknown), CEQ's NEPA regulations direct the agency to prepare an environmental assessment (EA).¹³ If, as a result of this assessment, the agency determines that the proposed action will not have significant effects, the agency may make a finding of no significant impact (FONSI), in which case the agency may proceed with the action.¹⁴ Otherwise, the agency must prepare an environmental impact statement (EIS).¹⁵

CEQ has not established a CE for the dissemination of information under the FOIA; the disclosure of records under the Privacy Act; or the preparation, revision, and adoption of regulations generally. Accordingly, CEQ has prepared an EA to determine whether the proposed revisions to CEQ's FOIA and Privacy Act regulations would have a significant effect on the human environment. Because, as set forth below, the proposed regulation will likely result in a small reduction in the use of resources in CEQ's administration of the FOIA and the Privacy Act, CEQ proposes finding that the proposed regulation will have no significant impact on the human environment and that it is therefore unnecessary to prepare an EIS.

1. Environmental Assessment

Purpose and Need: As set forth above in the Summary of the Proposed Rule, CEQ adopted its FOIA regulations in 1977 and has not updated them to reflect developments in FOIA law, policy, and practice since 2010. As such, the current regulations fail to reflect current FOIA requirements, including those set forth in the FOIA Improvement Act of 2016. Furthermore, CEQ's current FOIA regulations do not conform in all points to the Template and the directions in the Plain Writing Act of 2010, and do not fully reflect CEQ's current policy and practice with respect to the FOIA. Likewise, CEQ adopted its Privacy Act regulations in 1977, and has not updated them since that time to reflect updates to CEQ's Privacy Act procedures.

Proposed Action and Alternatives: A summary of the proposed action is set forth above in the Summary of the

Proposed Rule. Under a "no action" alternative, CEQ would continue to operate under its current regulations, addressing inconsistencies between the regulations and current law and agency procedure on a case-by-case basis. CEQ has decided that this approach is undesirable because it is confusing to the public and requires CEQ staff to address inconsistencies between the regulation, the law, and agency procedure that CEQ can obviate by updating the regulation.

CEQ considered an alternative of making only narrowly tailored amendments to its current FOIA regulations in order to implement the FOIA Improvement Act of 2016. While this alternative would eliminate direct inconsistencies between CEQ's regulations and the FOIA, it would not address inconsistencies between CEQ's FOIA regulations, the Template and CEQ's FOIA policies and procedures, or inconsistencies between CEQ's Privacy Act regulations and CEQ's practice in implementing the Privacy Act.

CEQ's preferred alternative is to amend its regulations as proposed in this notice of proposed rulemaking, for the reasons set forth in parts I and II of this preamble.

Environmental Effects of Alternatives: CEQ's FOIA and Privacy Act programs affect the environment primarily through requesters' use of paper and energy in submitting requests and CEQ's use of paper and energy in searching for, reviewing, and duplicating responsive records. CEQ's use of paper and energy for these purposes has remained within the range typical of the operations of a small office. Currently, CEQ accepts FOIA and Privacy Act requests by mail and fax, which require the use of paper and energy to print and transmit requests to CEQ. The proposed regulations would direct FOIA and Privacy Act requesters to submit their requests electronically if they are able to do so, thereby reducing the use of paper and energy associated with mailed and faxed requests. CEQ receives requests by fax or mail infrequently, however, so any reduction in the use of resources is likely to be modest. In addition, by improving the public's timely access to information contained in CEQ records, the proposed regulations support the meaningful involvement of all communities, including communities with environmental justice concerns, in Federal decision-making processes.

List of Agencies and Persons Consulted: CEQ's NEPA staff reviewed and commented on this EA and this notice of proposed rulemaking.

2. Finding of No Significant Impact

Based on the foregoing EA, which this FONSI incorporates by reference, CEQ proposes to find that implementation of the proposed regulations in this document would reduce the use of paper and energy resources in CEQ's FOIA and Privacy Act programs, streamline CEQ's FOIA and Privacy Act procedures, make CEQ more accessible and responsive to the public, and improve the opportunity for all communities to access information and be meaningfully involved in Federal decision-making processes. Thus, there would be no significant effects associated with implementation of the proposed action, and it is not necessary for CEQ to prepare an EIS.

CEQ further finds that the proposed action is not one that normally requires the preparation of an EIS, closely similar to such an action, or an action without precedent. CEQ invites public comment on this environmental assessment.

List of Subjects

40 CFR Part 1515

Administrative practice and procedures, Courts, Freedom of information, Government employees, Records.

40 CFR Part 1516

Administrative practice and procedures, Courts, Government employees, Privacy, Records.

Amy B. Coyle,
Principal Deputy General Counsel.

For the reasons discussed in the preamble, the Council on Environmental Quality proposes to revise and republish 40 CFR parts 1515 and 1516 to read as follows:

PART 1515—FREEDOM OF INFORMATION ACT PROCEDURES

Subpart A—The Council on Environmental Quality's FOIA Program

Sec.

1515.1 What is the purpose of the rules in this part?

1515.2 What kind of records does CEQ maintain?

1515.3 Are there any CEQ records for which I do not have to make a request?

1515.4 Who is responsible for processing FOIA requests and appeals to CEQ?

1515.5 Who can help me with my FOIA request to CEQ?

1515.6 What are CEQ's procedures for preserving records?

Subpart B—Making a FOIA Request and Receiving a Response

1515.11 How do I make a FOIA request to CEQ?

¹² 40 CFR 1501.4(a).

¹³ *Id.* § 1501.5(a).

¹⁴ *Id.* § 1501.6.

¹⁵ 40 CFR part 1502.

- 1515.12 Will CEQ keep my request confidential?
- 1515.13 When will CEQ respond to my request?
- 1515.14 What if my request is urgent?
- 1515.15 How will CEQ process my request?
- 1515.16 How does CEQ determine when to withhold records or portions of a record?
- 1515.17 What if I request records that involve another government office or agency?
- 1515.18 What happens if CEQ grants my request in full or in part?
- 1515.19 What happens if CEQ denies my request in full or in part?

Subpart C—Appealing a FOIA Request

- 1515.20 Can I appeal CEQ's response to my request?
- 1515.21 How will CEQ process my appeal?

Subpart D—Fees for FOIA Requests and Appeals

- 1515.31 Can CEQ charge fees for processing FOIA requests and appeals?
- 1515.32 What is the amount of the fee for processing a request?
- 1515.33 Are there any exceptions for non-commercial requests?
- 1515.34 Can I apply for a fee waiver?
- 1515.35 When will CEQ contact me about fee-related matters?
- 1515.36 Do I have to pay fees if CEQ misses the deadline for responding to my request?
- 1515.37 When are fees due and how do I pay them?
- 1515.38 What will CEQ do if I do not promptly pay the fee?

Subpart E—Confidential Commercial Information and Preservation of Records

- 1515.41 How does CEQ handle confidential commercial information?

Authority: 5 U.S.C. 552; E.O. 13392; Pres. Mem. 74 FR 4685.

Section 1515.41 also issued under E.O. 12600.

Subpart A—The Council on Environmental Quality's FOIA Program

§ 1515.1 What is the purpose of the rules in this part?

(a) This part explains how you, a member of the public, may request copies of records from the Council on Environmental Quality (CEQ) under the Freedom of Information Act (the FOIA). You can find the text of the FOIA at 5 U.S.C. 552.

(b) Nothing in this part entitles you to any service or to the disclosure of any record to which you are not entitled under the FOIA.

§ 1515.2 What kind of records does CEQ maintain?

CEQ carries out responsibilities under the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321–4347); the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371–4375); Reorganization

Plan No. 1 of 1977 (July 15, 1977); and various Executive orders, among other authorities. CEQ maintains certain records on these subjects, among others.

§ 1515.3 Are there any CEQ records for which I do not have to make a request?

Yes. The FOIA requires CEQ to make certain records available for public inspection online, such as records that have been or are likely to become the subject of repeated requests. You can find those records, together with an index, at <https://www.whitehouse.gov/ceq/foia/>.

§ 1515.4 Who is responsible for processing FOIA requests and appeals to CEQ?

(a) CEQ's Chief FOIA Officer oversees the administration of requests made to CEQ under the FOIA. The Chief FOIA Officer, or the Chief FOIA Officer's designee, is responsible for processing and granting or denying FOIA requests. The Chair of CEQ appoints the Chief FOIA Officer.

(b) The Chief FOIA Officer may appoint a FOIA Appeals Officer. If the Chief FOIA Officer does so, the FOIA Appeals Officer or the FOIA Appeals Officer's designee is responsible for processing and granting or denying FOIA appeals. Otherwise, the Chief FOIA Officer or the Chief FOIA Officer's designee is responsible for processing FOIA appeals.

§ 1515.5 Who can help me with my FOIA request to CEQ?

(a) You may contact CEQ's FOIA Public Liaison for assistance with your FOIA request, including help in formulating your request and information about the status of your request, or to submit concerns about CEQ's handling of your request. You can contact CEQ's FOIA Public Liaison by email at efoia@ceq.eop.gov or by phone at 202–395–5750. For additional contact information, visit <https://www.foia.gov> and choose “Council on Environmental Quality” in the index of government agencies.

(b) If you have a dispute with CEQ over its handling of your FOIA request, you may contact the National Archives and Records Administration's Office of Government Information Services for assistance or dispute resolution services by calling (202) 741–5770 or visiting <https://archives.gov/ogis>.

(c) If you are an individual with a disability, CEQ will provide you with access to and use of information and data through its FOIA program that is comparable to the access to and use of the information and data by members of the public who are not individuals with

disabilities, unless doing so would impose an undue burden on CEQ.

(d) If your proficiency in English is limited, CEQ will take steps as appropriate to provide you with meaningful access to CEQ's FOIA program.

§ 1515.6 What are CEQ's procedures for preserving records?

(a) CEQ preserves records pursuant to title 44 of the United States Code and the Records Schedules issued by the Archivist of the United States.

(b) CEQ will not dispose of or destroy agency records that are the subject of a pending request, appeal, or lawsuit under the FOIA.

Subpart B—Making a FOIA Request and Receiving a Response

§ 1515.11 How do I make a FOIA request to CEQ?

(a) You must make your request by email to efoia@ceq.eop.gov or by completing the request form at <https://www.foia.gov>. If you are not able to make your request by either of these methods, please contact CEQ's FOIA Public Liaison for assistance.

(b) When making a request to CEQ, you must:

(1) Include “Freedom of Information Act Request” in the subject line if you are submitting your request by email. If your email includes attachments, you must enter your request in the body of the email in addition to the attachment.

(2) Identify or reasonably describe the records you are requesting in sufficient detail to enable CEQ personnel to locate them with a reasonable amount of effort. Make your request as specific as you can. If possible, include the date (or a range of dates), title or name, author, recipient, subject matter, case number, file designation, or reference number for the records you seek.

(3) Explain if you need CEQ to provide the records in a particular form or format. CEQ ordinarily provides records in Portable Document Format (PDF), but CEQ will provide its response in the format you request if it is reasonably practicable to do so.

(4) Provide your contact information, such as your phone number, your email address, or both, so that CEQ is able to contact you, as necessary, regarding the status of your request and to clarify matters related to your request.

(5) Indicate the maximum amount you are willing to pay in fees, as described in subpart E of this Part. If you are requesting a fee waiver as part of your initial request, include the statement described at § 1515.34(a).

(6) If applicable, include a signed letter on your institution's official

letterhead, stating that you believe you qualify for a reduction of fees, as described in § 1515.33, because you are a representative of a non-commercial scientific institution, a representative of an educational institution, or a member of the news media.

(c) If you are requesting information that is subject to the Privacy Act of 1974 (*i.e.*, records about you that CEQ maintains in a system of records), you must follow the procedures under part 1516 of this chapter, instead of the procedures in this part.

(d) If you are requesting copies of ethics-related documents that CEQ makes available pursuant to section 105 of the Ethics in Government Act of 1978 (such as CEQ employees' public financial disclosure reports), you must follow the procedures at 5 CFR 2634.603, instead of the procedures in this part. For more information, visit the U.S. Office of Government Ethics website at <https://www.oge.gov>.

(e) If CEQ determines that your request does not reasonably describe the records you are seeking, such that CEQ would not be able to locate the records you have requested with a reasonable amount of effort, CEQ will notify you and explain what additional information you need to provide regarding the records that you seek.

(1) For example, if you request all records related to a broad subject or all communications between CEQ and a third party, we will generally ask you to clarify the scope of your request.

(2) Furthermore, your request must seek existing records of CEQ; we will not create new records or compile new information in order to respond to a FOIA request.

(3) If you have not provided a way to contact you, or you do not respond to our inquiry within 30 working days (*i.e.*, excepting Saturdays, Sundays, and Federal holidays), CEQ will administratively close your request. If possible, we will notify you of the closure.

§ 1515.12 Will CEQ keep my request confidential?

No, CEQ will not keep your request confidential. A FOIA request, including the requester's identity, is generally a matter of public record. CEQ publishes logs of requests and requesters at <https://www.whitehouse.gov/ceq/foia/>.

§ 1515.13 When will CEQ respond to my request?

(a) CEQ's Chief FOIA Officer or the Chief FOIA Officer's designee will make an initial determination of how CEQ will respond to your request within 20 working days from the date that CEQ

received your request, except as provided in this section.

(b) If CEQ is unable to make a determination within the 20-day period because of "unusual circumstances," we may extend the period of time in which we will respond to your request.

(1) "Unusual circumstances" exist when, in order to properly process your request, CEQ must search for, collect, and appropriately examine a voluminous amount of separate and distinct records, or CEQ must consult with another agency or another component of the Executive Office of the President.

(2) In determining whether "unusual circumstances" are present, CEQ may treat multiple requests on clearly related matters from you (or from other persons acting in concert with you) as a single request.

(3) Before the conclusion of the 20-day period, CEQ will notify you of the "unusual circumstances" that apply and the date by which we estimate we will complete processing your request.

(4) When the extension will exceed 10 working days, CEQ will provide you the opportunity to modify the request or arrange an alternative time period for processing the original or modified request.

(c) If CEQ reasonably requires additional information from you to clarify your request or to resolve fee-related matters, we may toll (*i.e.*, pause) the 20-day period, or any extension of that period, from the date we request information from you until the date you respond. We will only toll the response period one time for the purpose of clarifying your request, but we may toll the response period more than once to resolve fee-related matters.

§ 1515.14 What if my request is urgent?

(a) You may ask CEQ to expedite the processing of your FOIA request or appeal. If CEQ agrees to expedite processing of your request or appeal, we will process it with priority over non-expedited requests and appeals and respond to you as quickly as possible.

(b) CEQ will expedite requests or appeals if:

(1) Failing to expedite the request or appeal could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(2) You are primarily engaged in disseminating information (*e.g.*, you are a member of the news media), and you have an urgent need to inform the public about an actual or alleged Federal Government activity, beyond the public's right to know about government activity generally.

(c) You may ask for expedited processing when you make your initial request or appeal, or at any later time.

(d) In order to ask for expedited processing, you must submit a statement, certified to be true and correct, that explains in detail why your request or appeal satisfies the requirements of paragraph (b)(1) or (b)(2) of this section. If you believe that you have an urgent need to inform the public about an actual alleged Federal Government activity, you should provide examples of other coverage of the same or related subjects, if possible. CEQ may waive the formal certification requirement at its discretion.

(e) CEQ will notify you within 10 calendar days whether we will grant or deny you expedited processing.

(f) If CEQ denies you expedited processing, you may appeal that determination using the procedures in subpart C of this part. We will process your appeal as promptly as we can.

§ 1515.15 How will CEQ process my request?

(a) If your request does not reasonably describe the records you seek; the information you have requested is not a record subject to FOIA; CEQ has already published the information you are requesting; or your request does not follow the procedures described in the regulations in this part, we will deny your request in accordance with § 1515.19.

(b) If your request reasonably describes the records you seek and otherwise comports with the procedures described in this part, CEQ will process your request as follows:

(1) CEQ will acknowledge your request in writing and assign it an individualized tracking number. The written acknowledgment will include CEQ's estimate of the date on which we will respond to your request.

(2) CEQ will search for agency records that respond to your request. CEQ ordinarily will search records in our possession as of the date that we begin our search. We will notify you if we use a different date.

(3) If CEQ finds records that you have requested, we will determine whether grant your request (*i.e.*, provide you with the records you have requested) or to deny it (*i.e.*, withhold the relevant records from disclosure in accordance with § 1515.16).

(4) Once CEQ has determined whether to grant your request in full, grant it in part and deny it in part, or deny it in full, we will notify you of our determination in writing.

(c) If CEQ determines that it has a voluminous amount of records

responsive to your request, or if your request requires CEQ to search for records in multiple locations (electronic or physical), CEQ may provide you with one or more interim responses, releasing responsive records to you on a rolling basis.

§ 1515.16 How does CEQ determine when to withhold records or portions of a record?

(a) If CEQ finds records that are responsive to your request, we will review the records to determine whether to withhold any of the records or portions of individual records.

(b) The FOIA identifies nine exemptions to the requirement that agencies provide agency records upon request. CEQ will withhold a record or a portion of a record if disclosing it would harm an interest that one of these FOIA exemptions protects. In determining the interests at stake in disclosing or withholding CEQ records, we bear in mind that Congress, in creating CEQ, intended for the CEQ Chair to serve as a confidential advisor to the President and the President's immediate advisors on matters of environmental policy.

(c) CEQ will also withhold a record, or a portion of a record, if disclosing it would violate another provision of the FOIA or a law other than the FOIA.

(d) If the record concerns another government agency, CEQ generally will involve the other agency in determining whether to withhold the record or portions of the record, using the procedures at § 1515.17.

§ 1515.17 What if I request records that involve another government office or agency?

(a) If CEQ determines that any of the CEQ records you have requested involve another agency in the Federal Government, including another component of the Executive Office of the President, we generally will involve the other agency in reviewing that record in either of two ways.

(1) CEQ may consult with the other agency regarding the record to obtain the other agency's views on whether the record or portions of the record are exempt from disclosure under the FOIA. We will take the other agency's views into consideration when making a final determination of whether to withhold the record or any portions of the record.

(2) CEQ may refer the record to the other agency, in which case the other agency will determine whether the record or portions of the record are exempt from disclosure under the FOIA, and will respond directly to you regarding your request for the record. If CEQ determines to refer records you

have requested to another agency, we will notify you of the referral and explain how to contact the other agency's FOIA officials.

(b) CEQ will choose between consulting with another agency about a record and referring the record to the other agency according to the following principles:

(1) Ordinarily, CEQ will use consultation procedures for records that originated with CEQ but that contain information of interest to another agency or office, and CEQ will refer records that originated with another agency to that agency.

(2) CEQ will typically refer a classified record (or a portion of a record) or a record that may be appropriate for classification to the agency that either classified the information or should consider the information for classification.

(c) CEQ may make agreements with other agencies about how CEQ will handle records involving that agency or how that agency will handle records involving CEQ. Any agreement we make will comply with the FOIA and these rules.

§ 1515.18 What happens if CEQ grants my request in full or in part?

Once you have paid the fees that are due under subpart E of this part (if any), CEQ will promptly provide you with a copy of the records you requested, except for the records or portions of records we have determined to withhold under § 1515.16. We will follow the procedures in § 1515.19 with respect to those records or portions of records.

§ 1515.19 What happens if CEQ denies my request in full or in part?

(a) CEQ may deny your request in full or in part for these reasons, among others:

(1) CEQ determines to withhold all or a portion of the records you requested under § 1515.16;

(2) Your request does not reasonably describe the records you seek;

(3) The information you requested is not a record subject to the FOIA;

(4) CEQ has already published the information you are requesting;

(5) The records you requested do not exist, cannot be located, or have been destroyed;

(6) The records you requested are not readily reproducible in the form or format you seek; or

(7) Your request does not comport with the procedures set forth in these regulations.

(b) If CEQ denies your request regarding expedited processing or fee-related matters, we will also treat that as

a denial of your request in part and follow the procedures in this section.

(c) If CEQ determines to deny your request in full or in part, we will notify you of the basis for the denial. The notification will include the following information:

(1) The name and title or position of the person responsible for the denial;

(2) A brief statement of the reasons for the denial, including any FOIA exemption CEQ applied in determining to withhold records (or portions thereof) under § 1515.16;

(3) An estimate of the volume of the records CEQ is withholding, unless the volume is indicated by markings we have made on the records we are providing;

(4) A statement that you may appeal the denial to CEQ, under subpart C of this part, and an explanation of what you must do to appeal; and

(5) A reminder that you can obtain assistance from CEQ's FOIA Public Liaison and dispute resolution services from the National Archives and Records Administration's Office of Government Information Services.

(d) For each record CEQ discloses in part, we will mark the record clearly to show which portions we are withholding and the FOIA exemptions we applied in determining to withhold those portions, unless doing so would harm an interest protected by an applicable FOIA exemption. If technically feasible, we will mark the record to indicate the location of the portions we are withholding.

Subpart C—Appealing a FOIA Request

§ 1515.20 Can I appeal CEQ's response to my request?

(a) Yes. You may appeal CEQ's response if you disagree with any determination that CEQ made in responding to your request, including CEQ's determination to deny your request in whole or in part. CEQ's determination to deny you expedited processing, CEQ's determination of how to conduct the search for records, and fee-related determinations.

(b) CEQ must receive your appeal within 90 calendar days of the date on which CEQ notified you of the relevant determination in writing.

(c) You must make your appeal by email to efoia@ceq.eop.gov. If you are not able to make your appeal by email, please contact CEQ's FOIA Public Liaison for assistance.

(1) You must include "Freedom of Information Act Appeal" in the subject line. If your email includes attachments, you also must explain your request in the body of the email, in addition to the attachment.

(2) If you are not able to make your appeal by email, please contact CEQ's FOIA Public Liaison for assistance.

(d) Your appeal must include your request's individualized tracking number and must identify the specific CEQ determinations you are appealing.

(e) If you fail to properly appeal a determination that CEQ made in processing your request, you may lose your right to challenge that determination in Federal court.

§ 1515.21 How will CEQ process my appeal?

(a) CEQ will review the determinations you have appealed and determine if they are consistent with applicable law and policy. CEQ will conduct this review *de novo*, which means that CEQ will not presume that its prior determinations were correct.

(b) CEQ will respond to your appeal within 20 working days from the date that CEQ received your appeal.

(c) If CEQ determines to uphold a determination that you have appealed, CEQ's response will:

(1) Include a statement that identifies our reasons for affirming the decision, including any FOIA exemption CEQ applied in determining to affirm our determination to withhold a record or a portion of a record; and

(2) Explain how to challenge our determination by filing a lawsuit in Federal court and how to seek dispute resolution services from the National Archives and Records Administration's Office of Government Information Services.

(d) If CEQ determines to reverse or modify a determination that you have appealed, we will reprocess your request in accordance with the reversed or modified determination, using the procedures set forth at § 1515.15.

Subpart D—Fees for FOIA Requests and Appeals

§ 1515.31 Can CEQ charge fees for processing FOIA requests and appeals?

(a) Yes. CEQ may charge fees for processing your FOIA request.

(b) CEQ will determine whether to charge a fee and the amount of the fee by using the rules in this subpart and the Office of Management and Budget's Uniform Freedom of Information Act Fee Schedule and Guidelines, as amended.¹

(c) CEQ will not charge fees for deciding whether to grant or deny your appeal. If CEQ grants your appeal, we will charge fees for any additional searching, reviewing, or duplication that we carry out as a result of your appeal.

For instance, if you appeal our determination of how to conduct the search for records, and we grant your appeal, we will conduct a new search in the manner you requested and will charge you fees accordingly.

§ 1515.32 What is the amount of the fee for processing a request?

(a) CEQ will charge fees equal to:

(1) The basic hourly rate of pay for each employee who participates in searching for records, reviewing records, or duplicating records (including contract employees), multiplied by the total number of hours that the employee worked on your request (rounded to the nearest quarter of an hour), plus 16 percent (to account for employee benefits); plus

(2) The total direct costs that CEQ incurs in searching for, reviewing, or duplicating records, such as the cost of operating computers and other electronic equipment, but excluding overhead expenses such as the cost of office space, heating, and lighting; plus

(3) An additional fee equal to the total direct costs of any additional services that you and CEQ agree upon, such as providing multiple copies of a record.

(b) In determining the fee under paragraph (a) of this section, CEQ will use the following guidelines:

(1) "Searching for records" is the process of looking for and retrieving the records you requested (including by electronic search) and determining whether individual records contain the information that you seek. CEQ will charge fees for searching for records even if we do not locate any records that respond to your request, or even if we determine not to disclose any of the records that we locate.

(2) "Reviewing records" is the process of examining records to determine whether to withhold them, in accordance with § 1515.16, and preparing records for disclosure (for instance, by marking records to indicate which portions CEQ is withholding).

(i) "Reviewing records" also includes the time CEQ spends obtaining and considering the views of other government agencies under § 1515.17 and the time CEQ spends obtaining and considering formal objections to disclosure under § 1515.41.

(ii) "Reviewing records" does not include time CEQ spends resolving general legal or policy questions regarding the application of exemptions.

(iii) CEQ will charge fees for reviewing records even if we determine not to disclose any of the records that we review.

(3) "Duplicating records" is the process of reproducing records,

including scanning or printing records as necessary, in order to provide you with a copy.

(4) CEQ may include employee costs and direct costs that another component of the Executive Office of the President incurs in assisting CEQ with your request.

(c) CEQ will not charge fees if the total is less than \$25.00, or if we determine that the cost of collecting the fee would exceed the amount of the fee.

(d) If CEQ reasonably determines that you (or other persons acting in concert with you) have submitted multiple requests on related matters for the purpose of avoiding fees, we may aggregate those requests and charge fees accordingly.

§ 1515.33 Are there any exceptions for special requesters?

(a) Yes. CEQ makes the following exceptions for special requesters:

(1) CEQ will not charge you fees for searching for records if you are an educational institution, a noncommercial scientific institution, or a representative of the news media. Otherwise, CEQ will not charge you fees for the first 2 hours of searching for records, unless you are a commercial requester.

(2) CEQ will not charge you fees for reviewing records, unless you are a commercial requester.

(3) CEQ will not charge you fees for the first 100 pages of duplication (or an equivalent cost for duplication in other media), unless you are a commercial requester.

(b) For purposes of applying these exceptions:

(1) You are a representative of a non-commercial scientific institution if your institution operates solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry, and your request is in furtherance of scientific research.

(2) You are a representative of an educational institution if you work for or study at a school that operates a program of scholarly research and your request is in furtherance of scholarly research.

(3) You are a representative of the news media if you or your employer gathers information of potential interest to a segment of the public, uses editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience, and your request is in furtherance of these activities. For the purposes of this paragraph (b)(3), "news" means information that is about events of current interest to the public.

(i) If you are a freelance journalist, CEQ will consider you a representative

¹ 52 FR 10016 (Mar. 27, 1987).

of the news media if you can demonstrate that you have a solid basis to expect that a news media entity will publish the work to which your request relates, such as a publishing contract or a strong record of past publications.

(ii) If you are a representative of the news media, CEQ will ordinarily presume that your request does not primarily further a commercial interest for purposes of this section and § 1515.34.

(4) You are a commercial requester if you do not qualify as a special requester under paragraphs (b)(1), (b)(2), or (b)(3) of this section and your request furthers a commercial, trade, or profit interest or supports litigation in furtherance of those interests.

(c) If you claim to be a representative of a non-commercial scientific institution, an educational institution, or the news media, CEQ may require you to verify your status by providing reasonable documentation, such as a signed letter on official letterhead. If you claim that your request is non-commercial for another reason, CEQ may require you to explain why it is non-commercial.

§ 1515.34 Can I apply for a fee waiver?

(a) Yes. You can apply for a waiver of fees (or a reduction of fees) by submitting a written statement that explains why disclosing the information will meet the conditions in paragraph (c) of this section.

(b) You can apply for a fee waiver at any time before CEQ completes processing your request or an appeal of your request. You can apply for a fee waiver with respect to a part of the records you seek or with respect to all of them.

(c) CEQ will grant you a fee waiver if all of the following conditions are met:

(1) Disclosure of the requested information would shed light on the operations or activities of the government. The connection between the subject matter of your request, on the one hand, and identifiable operations or activities of the Federal Government, on the other, must be direct and clear, not remote or attenuated.

(2) Disclosure of the requested information would likely contribute significantly to public understanding of those operations or activities, because it would satisfy both of the following criteria:

(i) Disclosure of the requested records would be meaningfully informative about government operations or activities. (The disclosure of information that already is in the public domain, in either the same or a

substantially identical form, would not be meaningfully informative if nothing new would be added to the public's understanding.)

(ii) The disclosure would contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to your own individual understanding. (CEQ will presume that your request satisfies this criterion if you are a representative of the news media; otherwise, we will consider your expertise in the subject area as well as your ability and intention to effectively convey information to the public.)

(3) Disclosure of the requested information would not primarily advance your commercial, trade, or profit interests.

(d) CEQ will determine whether to grant or deny your request for a fee waiver if and when we would otherwise charge you fees. If we determine prior to that time that we are unlikely to grant your request for a fee waiver, we may notify you of our determination so that you may modify your request.

§ 1515.35 When will CEQ contact me about fee-related matters?

(a) If CEQ determines or estimates that we will charge you more than \$25.00 in fees, we will notify you of our determination or estimate, unless you have already told us that you are willing to pay fees equal to or in excess of the amount we have determined or estimated.

(1) If CEQ can only estimate a part of the fee, we will explain that in the notice.

(2) If you are entitled to 2 hours of searching and 100 pages of duplication for free for the reasons described in § 1515.33, CEQ will advise you of this and explain whether we have already provided these entitlements.

(3) CEQ may ask you to tell us the maximum amount you are willing to pay in fees in writing, in which case we will toll the period for processing your request until you respond.

(b) If CEQ determines or estimates that the fee will exceed the maximum amount you previously told us you were willing to pay, we will inquire with you about modifying your request or increasing the maximum, and we will toll the period for processing your request until you respond.

(c) If you have not provided a way to contact you regarding fee matters, or you do not respond to a fee-related inquiry within 30 calendar days, CEQ will deny your request.

§ 1515.36 Do I have to pay fees if CEQ misses the deadline for responding to my request?

CEQ will not charge search fees or duplication fees if we have failed to grant or deny your request within the period described in § 1515.13, unless:

(a) CEQ determines that unusual circumstances are present, as described in § 1515.13, and

(1) CEQ finishes processing your request within 10 working days of the original deadline; or

(2) Your request seeks more than 5,000 pages of records; CEQ has provided you timely written notice of the unusual circumstances; and we have discussed with you how you could effectively limit the scope of your request (or we made at least three attempts in good faith to do so); or

(b) A court grants CEQ additional time to process your request due to exceptional circumstances, and we finish processing your request within the period set forth in a court order.

§ 1515.37 When are fees due and how do I pay them?

(a) Ordinarily, CEQ will bill you for fees at the time we respond to your FOIA request.

(b) When CEQ determines or estimates that the total fee for your request will exceed \$250, we may require that you pay all or part of the anticipated fee in advance before we will process (or continue to process) your request.

(c) If you have previously failed to pay a FOIA fee that was due to any government agency within 30 calendar days of the billing date, CEQ may require you to pay the outstanding fee (including interest) and make an advance payment of the anticipated fee for your current request before we will process (or continue to process) your request.

(d) If CEQ requires you to make an advance payment under this section, we will toll the period for processing your request until we receive the payment. If you do not pay within 30 calendar days, we will deny your request.

(e) CEQ will inform you of how to make a payment at the time that we bill you or require you to make an advance payment.

§ 1515.38 What will CEQ do if I do not promptly pay the fee?

If you do not pay a fee within 30 calendar days of the date of the bill:

(a) CEQ may charge interest, at the rate provided for in 31 U.S.C. 3717, from the 31st day following the date of billing through the date we receive your payment; and

(b) CEQ will follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97–365, 96 Stat. 1749), as amended, including its administrative procedures, which provide for the use of consumer reporting agencies, collection agencies, and offset.

Subpart E—Confidential Commercial Information and Preservation of Records

§ 1515.41 How does CEQ handle confidential commercial information?

(a) At the time that a person or entity outside the Federal Government (a submitter) directly or indirectly provides information to CEQ, the submitter must mark or otherwise designate any part of its submission that it considers in good faith to be confidential commercial information.

(1) “Confidential commercial information” means commercial or financial information that comes within the scope of Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

(2) “In good faith” means not frivolously.

(3) The submitter also must explain how long CEQ should consider the information to be confidential commercial information, or else CEQ will presume that the designation expires after 10 years.

(b) Prior to disclosing information in response to a FOIA request, CEQ will provide written notice to the submitter if:

(1) The submitter has properly designated the information as confidential commercial information pursuant to paragraph (a) of this section; or

(2) CEQ requires the submitter's views on whether the information is confidential commercial information.

(c) Each notice under paragraph (b) of this section will either describe the information in question or include a copy of the requested records (or portions of records) containing the information. If the matter involves a large number of submitters, CEQ may post or publish the notice in a place or manner reasonably likely to inform the submitters of the potential disclosure, instead of sending individual notifications.

(d) CEQ will not provide a notice under paragraph (b) of this section if:

(1) CEQ has determined to withhold the information under § 1515.16;

(2) Someone other than CEQ has already lawfully published the information; or

(3) A law other than the FOIA requires CEQ to disclose the information.

(e) When CEQ provides a notice under paragraph (b) of this section:

(1) CEQ will give the submitter a reasonable period in which to reply.

(2) If the submitter objects to CEQ disclosing the information (in whole or in part), the submitter must reply to CEQ with a detailed explanation of which FOIA exemptions it believes apply to the information and why the information comes within the scope of those FOIA exemptions. CEQ will consider the submitter's reply, if any, in determining whether to disclose the information in question in response to a FOIA request.

(3) If the submitter does not reply to CEQ during the period stated in the notice, CEQ will deem the submitter to have no objection to CEQ's disclosure of the information, except that CEQ may consider late replies in its discretion.

(f) If CEQ determines to disclose information over a submitter's objection, CEQ will notify the submitter in writing.

(1) The notice will explain why CEQ disagreed with the submitter's objections and describe the information CEQ will disclose (or include a copy of the relevant agency records in the form in which CEQ will release them).

(2) The notice will indicate the date on which CEQ will disclose the information, which will be a reasonable number of calendar days following the date of the notice unless the FOIA requires us to disclose the information more promptly.

(3) CEQ will also provide the notice described in this paragraph (f) when CEQ determines to disclose information that a submitter designated as confidential commercial information not in good faith.

(g) CEQ will notify a submitter who has designated confidential commercial information pursuant to paragraph (b) of this section if a requester files a lawsuit seeking to compel CEQ to disclose the information under the FOIA.

(h) CEQ will notify the relevant FOIA requester whenever it provides a notice under paragraph (b) or (f) of this section, and whenever a submitter files a lawsuit to prevent the disclosure of information.

PART 1516—PRIVACY ACT IMPLEMENTATION

Sec.

1516.1 What is the purpose of these rules?

1516.2 What records do these rules cover?

1516.3 When will CEQ disclose records about me?

1516.4 How can I obtain access to CEQ's records about me?

1516.5 How can I get information about how CEQ has used its records about me?

1516.6 How can I ask CEQ to correct my records?

1516.7 How can I appeal CEQ's decision to deny my request to access or correct records about me?

1516.8 Will CEQ charge me a fee for a copy of my records?

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

§ 1516.1 What is the purpose of these rules?

(a) This part explains how the Council on Environmental Quality (CEQ) manages certain records about individuals under the Privacy Act of 1974 (the Privacy Act). You can find the text of the Privacy Act at 5 U.S.C. 552a.

(b) This part explains how you, a citizen or lawful permanent resident of the United States, can request access to records about yourself, request that CEQ amend or correct those records, or request that CEQ inform you about how it has used those records.

§ 1516.2 What records do these rules cover?

(a) This part covers any records about you that CEQ maintains in a system of records.

(b) A record is any item, collection, or grouping of information about you that contains your name or another piece of information that identifies you (for example, your social security number).

(c) CEQ maintains your record in a system of records if CEQ:

(1) Maintains, collects, uses, or disseminates the record as part of a larger group of records; and

(2) Organizes the group by individuals' names or by another piece of information that identifies individuals (such as their social security numbers).

§ 1516.3 When will CEQ disclose records about me?

CEQ will only disclose records about you that it maintains in system of records if:

(a) You or your authorized representative submit a request for your own records or agree in writing that CEQ may disclose the records to someone else;

(b) CEQ is making the disclosure as part of one of CEQ's routine uses of the records, which CEQ must have previously established in a written public notice; or

(c) The disclosure qualifies for one of the other exceptions described in section 3 of the Privacy Act, which you can find at 5 U.S.C. 552a(b).

§ 1516.4 How can I obtain access to CEQ's records about me?

(a) You can obtain access to CEQ's records about you by submitting a request by email to efoia@ceq.eop.gov. If you are not able to make your request

by email, please contact CEQ's Office of the General Counsel for assistance by calling 202-395-5750.

(b) Your request must describe the records that you want, in enough detail to enable CEQ to locate them with a reasonable amount of effort.

(1) You should name or describe the system of records you want CEQ to search.

(2) If you are not sure which system of records you are interested in, you may request that CEQ inform you which of its systems of records, if any, contain records about you.

(c) To protect the privacy of your records, CEQ will require you to verify your identity before processing your request. CEQ may require you to:

(1) Provide a statement that contains your name, your current address, and your date and place of birth, and sign the statement before a notary public;

(2) Verify your identity using an electronic authentication process; or

(3) Supply additional information as necessary in order to verify your identity.

(d) CEQ may deny your request if:

(1) CEQ prepared the records you are seeking in reasonable anticipation of a civil action or proceeding (that is, a lawsuit or a similar proceeding); or

(2) The Privacy Act exempts the system containing your records from the requirement that CEQ provide those records upon request.

(e) If CEQ grants your request, you may arrange to review your records in person, obtain a copy from CEQ, or both. If you choose to review your records in person, you may choose one person to accompany you, except that CEQ may first require you to authorize CEQ to discuss your records in that person's presence.

(f) If CEQ denies your request in whole or in part, CEQ will give you the reason for its decision in writing and explain how you can challenge the denial.

§ 1516.5 How can I get information about how CEQ has used its records about me?

You can request information about how CEQ has used its records about you—called an “accounting of disclosures”—using the same procedures you would use to make a request for access to your records under § 1516.4.

§ 1516.6 How can I ask CEQ to correct my records?

(a) You can request that CEQ correct or update its records about you using the same procedures you would use to make a request for access to your records under § 1516.4.

(b) In your request, you must explain exactly what change you are requesting and point out specific pieces of information in your CEQ records that are inaccurate, irrelevant, outdated, or incomplete.

(c) CEQ will review your request, decide whether to grant or deny it, and inform you of the decision within 10 working days (*i.e.*, excepting Saturdays, Sundays, and Federal holidays).

(d) If CEQ denies your request, CEQ will give you the reason for its decision in writing and explain how you can appeal the denial.

§ 1516.7 How can I appeal CEQ's decision to deny my request to access or correct records about me?

(a) If CEQ denies your request to access or correct CEQ's records about you, you can appeal the decision using the same procedures you would use to make a request for access to your records under § 1516.4.

(b) In your appeal, you must include a copy of CEQ's decision denying your request and explain exactly why you believe the decision was wrong.

(c) The General Counsel of CEQ (or the General Counsel's designee) will review your appeal, decide whether to grant or deny it, and inform you of the decision within 30 working days. If it is necessary to extend the time for making a decision, the Chair of CEQ (or the Chair's designee) will explain why in writing.

(d) If CEQ's General Counsel (or designee) denies your appeal, you may provide CEQ with a concise statement that explains your disagreement with the decision, and you may bring a civil lawsuit against CEQ.

(1) If CEQ subsequently discloses the disputed record under § 1516.4, we will clearly identify the disputed portion of the record and attach a copy of your statement of disagreement.

(2) For more information about filing a civil lawsuit, see 5 U.S.C. 552a(g)(1).

§ 1516.8 Will CEQ charge me a fee for a copy of my records?

If you request a copy of CEQ's records about you, CEQ may charge you a fee of no more than 10 cents per page, which you must pay before CEQ provides you with a copy of your records.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-R1-ES-2024-0005; FXES1113090FEDR-245-FF09E22000]

RIN 1018-BG68

Endangered and Threatened Wildlife and Plants; Reclassification of the Rough Popcornflower From Endangered to Threatened With a Section 4(d) Rule

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to reclassify the rough popcornflower (*Plagiobothrys hirtus*) from endangered to threatened (downlist) under the Endangered Species Act of 1973, as amended (Act). The proposed downlisting is based on our evaluation of the best available scientific and commercial information, which indicates that the species' status has improved such that it is not currently in danger of extinction throughout all or a significant portion of its range, but that it is still likely to become so within the foreseeable future. We also propose protective regulations under the authority of section 4(d) of the Act that are necessary and advisable to provide for the conservation of the rough popcornflower.

DATES: We will accept comments received or postmarked on or before February 10, 2025. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. eastern time on the closing date. We must receive requests for public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by January 27, 2025.

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: <https://www.regulations.gov>. In the Search box, enter FWS-R1-ES-2024-0005, 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-R1-ES-2024-0005, 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 Information Requested, below, for more information).

Availability of supporting materials: This proposed rule and supporting documents, including the 5-year reviews, the Recovery Plan, and the species status assessment (SSA) report are available at <https://www.regulations.gov> at Docket No. FWS–R1–ES–2024–0005.

FOR FURTHER INFORMATION CONTACT:

Kessina Lee, State Supervisor, U.S. Fish and Wildlife Service, Oregon Fish and Wildlife Office, 2600 SE 98th Avenue, Suite 100, Portland, OR 97266; telephone: (503) 231–6179. 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. Please see Docket No. FWS–R1–ES–2024–0005 on <https://www.regulations.gov> for a document that summarizes this proposed rule.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Act, a species warrants reclassification from endangered to threatened if it no longer meets the definition of an endangered species (in danger of extinction throughout all or a significant portion of its range). The rough popcornflower is listed as endangered, and we are proposing to reclassify (downlist) the rough popcornflower as threatened. We have determined the rough popcornflower does not meet the Act's definition of an endangered species, but it does meet the Act's definition of a threatened species (likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range). Reclassifying a species as a threatened species can be completed only by issuing a rule through the Administrative Procedure Act rulemaking process (5 U.S.C. 551 *et seq.*).

What this document does. This rule proposes to downlist the rough popcornflower from endangered to

threatened, with a rule issued under section 4(d) of the Act (a “4(d) rule”), based on the species' current status, which has been improved through implementation of conservation actions.

The basis for our action. Under the Act, we may determine that a species is an endangered species or a threatened species because of any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. We may reclassify a species if the best available commercial and scientific data indicate the species no longer meets the applicable definition in the Act. Based on the status review, the current threats analysis, and evaluation of conservation measures discussed in this proposed rule, we conclude that the rough popcornflower no longer meets the Act's definition of an endangered species and should be reclassified to a threatened species. The species is no longer in danger of extinction throughout all or a significant portion of its range, but it is likely to become so within the foreseeable future.

We have determined that rough popcornflower is a threatened species due to the following threats: destruction or alteration of habitat by development and hydrological changes, competition from native and nonnative plant species, and impacts due to climate change.

Information Requested

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other governmental agencies, Native American Tribes, the scientific community, industry, or any other interested parties concerning this proposed rule.

We particularly seek comments concerning:

(1) Reasons we should or should not downlist the rough popcornflower as a threatened species.

(2) New information on the historical and current status, range, distribution, and population size of the species.

(3) New information on the known and potential threats to the species, including habitat loss, habitat modification, competition, or climate change.

(4) New information regarding the life history, ecology, and habitat use of the species.

(5) Current or planned activities within the geographic range of the species that may have adverse or beneficial impacts on the species.

(6) Information to assist with applying or issuing protective regulations under section 4(d) of the Act that may be necessary and advisable to provide for the conservation of the rough popcornflower.

(a) In particular, information concerning the extent to which we should include any of the section 9 prohibitions in the 4(d) rule; or

(b) whether we should consider any additional or different exceptions from the prohibitions in the 4(d) rule.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Please note that submissions merely stating support for, or opposition to, the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or a threatened species must be made solely on the basis of the best scientific and commercial data available.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via <https://www.regulations.gov>, your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on <https://www.regulations.gov>.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on <https://www.regulations.gov>.

Our final determination may differ from this proposal because we will consider all comments we receive during the comment period, as well as any information that may become available after this proposal. Based on the new information we receive (and if relevant, any comments on that new

information), we may conclude that the species should remain listed as endangered instead of being reclassified as threatened, or we may conclude that the species no longer warrants listing as either an endangered species or a threatened species. In addition, we may change the parameters of the prohibitions or the exceptions to those prohibitions in the protective regulations under section 4(d) of the Act if we conclude it is appropriate in light of comments and new information received. For example, we may expand the prohibitions if we conclude that the protective regulation as a whole, including those additional prohibitions, is necessary and advisable to provide for the conservation of the species. Conversely, we may establish additional or different exceptions to the prohibitions in the final rule if we conclude that the activities would facilitate or are compatible with the conservation and recovery of the species. In our final rule, we will clearly explain our rationale and the basis for our final decision, including why we made changes, if any, that differ from this proposal.

Public Hearing

Section 4(b)(5) of the Act provides for a public hearing on this proposal, if requested. Requests must be received by the date specified in **DATES**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule a public hearing on this proposal, if requested, and announce the date, time, and place of the hearing, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing. We may hold the public hearing in person or virtually via webinar. We will announce any public hearing on our website, in addition to the **Federal Register**. The use of these virtual public hearings is consistent with our regulations at 50 CFR 424.16(c)(3).

Previous Federal Actions

Section 12 of the Act directed the Secretary of the Smithsonian Institution to prepare a report on plants considered to be endangered, threatened, or extinct in the United States. This report, designated as House Document No. 94–51, was presented to Congress on January 9, 1975. On July 1, 1975, we published a notice in the **Federal Register** (40 FR 27823) of our acceptance of the report as a petition within the context of section 4(c)(2) (now section 4(b)(3)) of the Act and our intention to review the status of the plant species named in the report.

On June 16, 1976, we published a proposed rule in the **Federal Register** (41 FR 24523) to designate approximately 1,700 vascular plant species, including rough popcornflower, as endangered pursuant to section 4 of the Act. In 1978, amendments to the Act required that all proposals over 2 years old be withdrawn. On December 10, 1979, we published a notice in the **Federal Register** (44 FR 70796) of the withdrawal of that portion of the June 16, 1976, proposal that had not been made final, along with four other proposals that had expired.

On December 15, 1980, we published an updated notice of review for plants in the **Federal Register** (45 FR 82480) that included rough popcornflower as a category 1 candidate species. On November 28, 1983, we published a supplement to the December 15, 1980, notice of review in the **Federal Register** (48 FR 53640) in which we changed the status of rough popcornflower to a category 2 candidate species, and this species remained a category 2 candidate species until 1996. On January 20, 1984, we published a notice in the **Federal Register** (49 FR 2485) that the petitioned listing of this species was warranted but precluded by other pending listing actions. On February 28, 1996, we published a notice of review in the **Federal Register** (61 FR 7596) that discontinued the designation of category 2 species as candidates. In that notice of review, we retained rough popcornflower as a candidate species.

On November 20, 1997, we published a proposed rule in the **Federal Register** (62 FR 61953) to list this species as an endangered species under the Act, and on January 22, 1998, we announced a public hearing on, and reopened and extended the comment period for, that proposal (63 FR 3301). On January 25, 2000, we published a final rule in the **Federal Register** (65 FR 3866) to list the rough popcornflower as an endangered species without designating critical habitat.

On January 28, 2003, we published in the **Federal Register** (68 FR 4228) a notice of availability of the draft recovery plan for the rough popcornflower (hereafter “recovery plan”). We published the notice of availability for the final recovery plan on September 25, 2003 (68 FR 55410). On October 25, 2019, we published a notice of availability of a draft amendment updating the recovery criteria in the recovery plan (84 FR 57468), and that recovery plan amendment was signed on December 20, 2019.

On April 29, 2008, we published in the **Federal Register** (73 FR 23264) a

notice of initiation of a 5-year review for rough popcornflower. A 5-year review was completed on August 11, 2010, recommending no change in the plant’s endangered status. On February 12, 2016, we again published in the **Federal Register** (81 FR 7571) a notice of initiation of a 5-year review for rough popcornflower. In the most recent 5-year status review completed on April 14, 2021, we determined the species no longer met the Act’s definition of an endangered species and should be reclassified to a threatened species. The 2021 5-year status review is available at <https://www.regulations.gov> under Docket No. FWS–R1–ES–2024–0005 and at https://ecosphere-documents-production-public.s3.amazonaws.com/sams/public_docs/species_nonpublish/949.pdf.

For additional details on previous Federal actions, see <https://ecos.fws.gov/ecp/species/2500> for the species profile for this plant.

Peer Review

A species status assessment (SSA) team prepared an SSA report for the rough popcornflower. The SSA team was composed of Service biologists, in consultation with other species experts. The SSA report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the species.

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review in listing actions under the Act, we solicited independent scientific review of the information contained in the rough popcornflower SSA report. We sent the SSA report to three independent peer reviewers and received two responses. The peer reviews can be found at <https://www.regulations.gov>. In preparing this proposed rule, we incorporated the results of these reviews, as appropriate, into the SSA report, which is the foundation for this proposed rule.

Summary of Peer Reviewer Comments

As discussed above in Peer Review, we received comments from two peer reviewers on the draft SSA report. We reviewed all comments we received from the peer reviewers for substantive issues and new information regarding the information contained in the SSA report. The peer reviewers generally concurred with our methods and provided additional information,

clarifications, and editorial suggestions. Two specific comments were to include a description of the role of natural disturbances in the species' habitat and to offer an explanation of the downlisting criteria as they relate to a minimum population size. We clarified these aspects in the SSA report. Otherwise, no substantive changes to our analysis and conclusions within the SSA report were deemed necessary, and

peer reviewer comments are addressed in version 1.0 of the SSA report (USFWS 2021, entire).

Proposed Reclassification Determination

Background

Rough popcornflower (*Plagiobothrys hirtus*) is an herbaceous plant in the borage or "forget-me-not" family

(Boraginaceae) and is endemic to the Umpqua River basin in Douglas County, Oregon. Rough popcornflower is closely associated with emergent wetlands within seasonally wet meadows or prairie and relatively level, open habitats formed from poor draining clay-loam soils, concentrated in the Sutherlin Creek sub-watershed in Oregon (see figure 1, below).

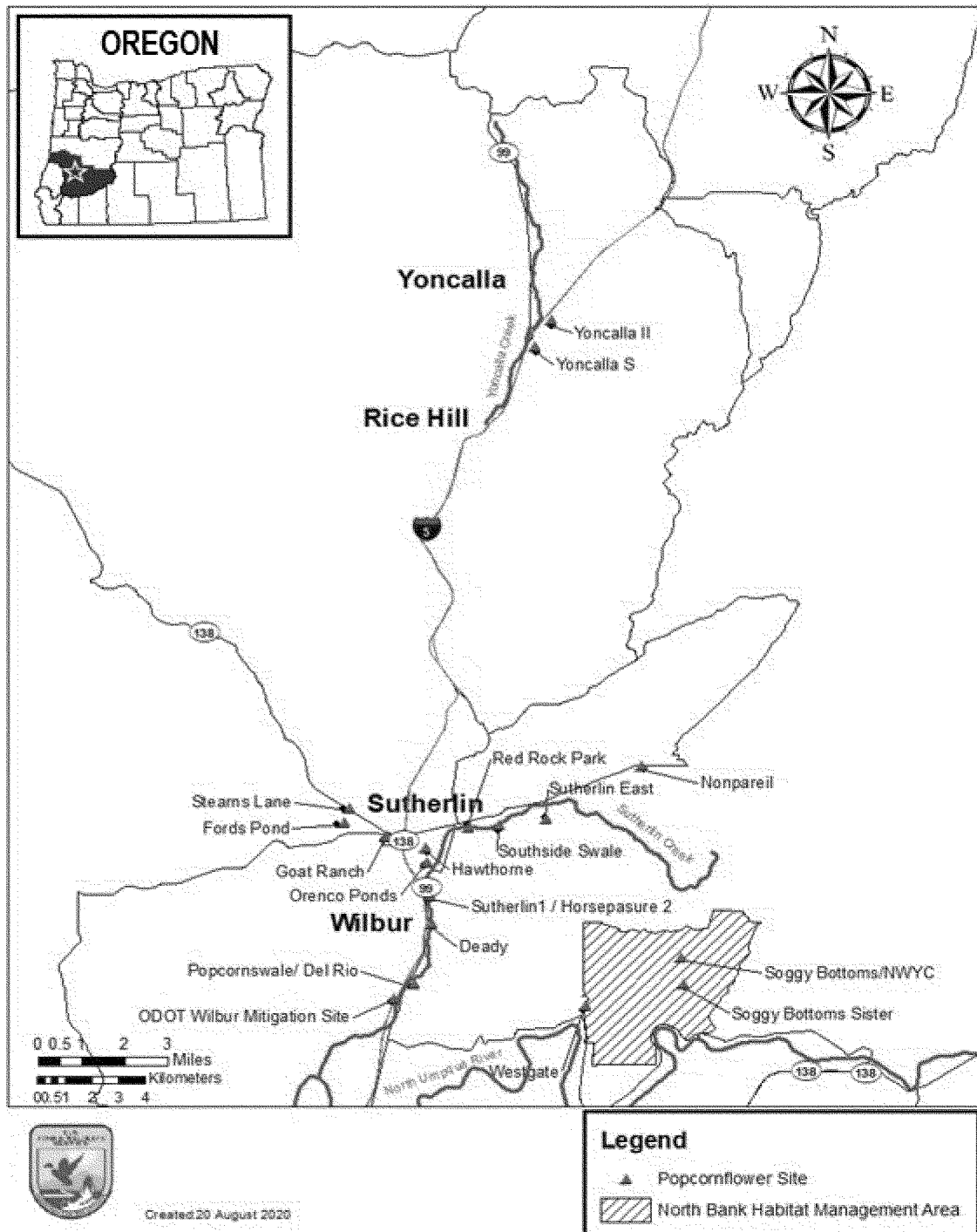


Figure 1. Distribution of rough popcornflower in Douglas County, Oregon.

Rough popcornflower can be either an annual or a short-lived perennial. Individual rough popcornflower plants are between 2.75 inches (in) (7 centimeters (cm)) and 23.6 in (60 cm) tall, with narrow, bright-green leaves. Their trumpet-shaped, non-fragrant flowers consist of five fused petals, and are mostly white with yellow centers. Rough popcornflower plants, whether annual or perennial, reach sexual maturity and produce fruits in their first year. The plants generally germinate in the fall, bloom in late spring and early summer, produce seed beginning in late June, and then senesce between July and November. The species is capable of either self-fertilization or cross-fertilization; however, generalist insect pollination appears to be the predominant vector enabling rough popcornflower reproduction (Amsberry and Meinke 2001, pp. 12–13). A thorough review of the taxonomy, life history, and ecology of the rough popcornflower is presented in the SSA report, version 1.0 (USFWS 2021, entire).

Recovery Criteria

Section 4(f) of the Act directs us to develop and implement recovery plans for the conservation and survival of endangered and threatened species unless we determine that such a plan will not promote the conservation of the species. Under section 4(f)(1)(B)(ii), recovery plans must, to the maximum extent practicable, include objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of section 4 of the Act, that the species be removed from the Lists of Endangered and Threatened Wildlife and Plants.

Recovery plans provide a roadmap for us and our partners on methods of enhancing conservation and minimizing threats to listed species, as well as measurable criteria against which to evaluate progress towards recovery and assess the species' likely future condition. However, they are not regulatory documents and do not substitute for the determinations and promulgation of regulations required under section 4(a)(1) of the Act. A decision to revise the status of a species, or to delist a species, is ultimately based on an analysis of the best scientific and commercial data available to determine whether a species is no longer an endangered species or a threatened species, regardless of whether that

information differs from the recovery plan.

There are many paths to accomplishing recovery of a species, and recovery may be achieved without all of the criteria in a recovery plan being fully met. For example, one or more criteria may be exceeded while other criteria may not yet be accomplished. In that instance, we may determine that the threats are minimized sufficiently and that the species is robust enough that it no longer meets the definition of an endangered species or a threatened species. In other cases, we may discover new recovery opportunities after having finalized the recovery plan. Parties seeking to conserve the species may use these opportunities instead of methods identified in the recovery plan. Likewise, we may learn new information about the species after we finalize the recovery plan. The new information may change the extent to which existing criteria are appropriate for identifying recovery of the species. The recovery of a species is a dynamic process requiring adaptive management that may, or may not, follow all of the guidance provided in a recovery plan.

We completed a final recovery plan for the rough popcornflower in 2003 (USFWS 2003, entire) and amended the plan in 2019 (USFWS 2019, entire). The objective of the original recovery plan for rough popcornflower was to reduce the threats and increase population viability to the point that the species could be downlisted to threatened status (USFWS 2003, p. 21). The original recovery plan assigned each known natural population to one of three recovery units (Calapooya Creek, Sutherlin Creek, and Yoncalla Creek). The recovery units each corresponded to a drainage basin within the Lower North Umpqua system and represented groups of populations which share phenotypic similarities and are potentially genetically similar to one another. The original recovery plan also established recovery criteria for downlisting (USFWS 2003, pp. 21–22). At that time, the information available was insufficient to identify recovery criteria for delisting. The 2019 recovery plan amendment evaluated the adequacy of existing recovery criteria, amended downlisting criteria, added delisting criteria, and presented rationale supporting the recovery plan modification (USFWS 2019, entire).

Below are the downlisting criteria for the rough popcornflower as amended in 2019 (USFWS 2019, pp. 4–6), and the progress made to date toward achieving each criterion.

Criterion 1 for Downlisting

Criterion 1 states that at least 9 reserves, containing a minimum of 5,000 plants each, are protected and managed to assure their long-term survival. A reserve refers to one or more patches of rough popcornflower located within 0.6 miles (mi) (1 kilometer (km)) of each other that are protected from development and managed for the continued existence of the species (USFWS 2019, p. 3). The minimum population size of 5,000 individuals per reserve is intended to provide sufficient resiliency to withstand stochastic events (Culotta 1995, pp. 31–32; Traill et al. 2007, p. 164). The number of reserves is intended to provide sufficient redundancy such that rough popcornflower is not at risk of extinction due to catastrophic events. The maximum distance between patches within a reserve provides connectivity for pollinator-mediated gene flow across the population (USFWS 2019, p. 4).

At the time of listing, our knowledge of rough popcornflower abundance and distribution was limited to roughly 7,000 known plants in 8 populations (USFWS 2021 p. 9). Since then, many conservation partners have made significant contributions to rough popcornflower recovery efforts. For example, the Oregon Department of Agriculture has collected seed, sown seed for use by multiple partners, augmented existing populations, conducted monitoring, and provided technical expertise. Other conservation partners, such as the Douglas County Soil and Water Conservation District, City of Sutherlin, and Bureau of Land Management, have entered into formal agreements to perform habitat restoration followed by seeding on a number of properties. Recent surveys (USFWS 2021, appendix 3; USFWS 2022, entire; USFWS 2023a, entire) documented a total of 12 rough popcornflower reserves. Eleven of those reserves are protected and managed while one reserve (a privately owned parcel containing over 700,000 plants) is currently adequately managed but is not protected (see table 1, below). Ten of the 12 reserves meet the minimum population size of 5,000 individuals per reserve to fully satisfy criterion 1. This number of plants and the distribution of populations is expected to enable rough popcornflower to withstand both stochastic and catastrophic events, and to maintain the capacity to adapt to future environmental changes. As such, we conclude that this downlisting criterion has been met and exceeded.

Criterion 2 for Downlisting

Criterion 2 states a minimum of 5,382 square feet (ft²) (500 square meters (m²)) is occupied by the rough popcornflower within each of the 9 reserves meeting criterion 1. The intent of this criterion is to have multiple populations large enough to maintain sufficient resiliency to withstand stochastic events.

Seven of the 10 reserves that meet criterion 1 contain at least 5,382 ft² (500 m²) of occupied habitat to meet the description of criterion 2. Two other populations (Deady and Southside Swale) also meet or exceed the area coverage parameter but do not satisfy the criterion as they are either not considered to be a protected population or do not meet the minimum number of plants to be considered a reserve (see table 1, below). Although this criterion is not fully met as identified in the recovery plan, there are nine populations that meet or exceed the area coverage parameter. We conclude that the intent of this criterion has been met because having 9 populations with 5,382 ft² (500 m²) occupied by rough popcornflower distributed across the species' range is expected to enable rough popcornflower to withstand both stochastic and catastrophic events, and to maintain the capacity to adapt to future environmental changes.

Criterion 3 for Downlisting

Criterion 3 states that a minimum of nine reserves, each meeting criteria 1 and 2, are distributed across the recovery units, with a minimum of five reserves in the Sutherlin Creek recovery unit and at least one reserve each in the Yoncalla Creek and Calapooya Creek recovery units. The remaining two reserves may be located within any of

the natural recovery units, or elsewhere within the watersheds containing the recovery units. The intent of this criterion is to provide sufficient redundancy of populations across the species' range to allow the species to withstand catastrophic events.

Of the seven reserves meeting criteria 1 and 2, four are in the Sutherlin Creek recovery unit, one is in the Yoncalla Creek recovery unit, and two are in the Umpqua Management Area, which includes introduced populations of rough popcornflower in the Bureau of Land Management (BLM)'s North Bank Habitat Management Area.

Criterion 3 has not been fully met because the number of reserves fully meeting both criteria 1 and 2 is not met. However, the distribution of 11 populations that exceed 5,000 plants (10 protected) across all recovery units and the Umpqua Management Area, and 9 populations that exceed 5,382 ft² (500 m²) occupied by rough popcornflower, demonstrate that relatively large populations are spatially distributed across the species' range such that rough popcornflower is expected to withstand both stochastic and catastrophic events, and to maintain the capacity to adapt to future environmental changes, lead us to conclude that the intent of this downlisting criterion has been met.

Criterion 4 for Downlisting

Criterion 4 states that over a 5-year period, with a minimum of 3 individual years of monitoring, demographic data indicate at least seven of the nine reserves referenced in criterion 1 have average population numbers that are stable or increasing, without decreasing trends lasting more than 2 years. Stable or increasing populations are an

indicator of resiliency. While some inter-annual variability is expected due to demographic and environmental stochasticity, this criterion is intended to provide sufficient confidence that large, sustained declines will not occur. Population monitoring, which entails taking a full plant census, takes place in late spring or early summer either annually or biannually. We monitor populations on private, city, or county land when authorized to do so. Alternatively, we provide funding through the Cooperative Endangered Species Conservation Fund to the Oregon Department of Agriculture to monitor populations. Conservation partners including the Bureau of Land Management, Oregon Department of Transportation, and The Nature Conservancy monitor populations on their lands biennially.

Five of the 10 rough popcornflower reserves that meet criterion 1 also currently meet this criterion (see table 1, below). Although the remaining five reserves meeting criterion 1 have not been monitored with sufficient frequency to satisfy all of the requirements of this criterion, they have maintained relatively stable population numbers between monitoring events from 2011 to 2023 (USFWS 2021 pp. 13–16; USFWS 2022, entire; USFWS 2023a, entire). Having all 10 of the reserve populations exhibiting stable or increasing numbers across the range of the species demonstrates that rough popcornflower has sufficient resiliency to respond to inter-annual environmental variability and is unlikely to experience sustained declines across its range. As such, we conclude that the intent of this downlisting criterion has been met.

TABLE 1—ROUGH POPCORNFLOWER DOWNLISTING CRITERIA AND STATUS BY RECOVERY UNITS/AREA, DOUGLAS COUNTY, OREGON
[✓ = criterion met]

Population	Recovery unit	Downlisting criteria					
		#1			#2	#3	#4
		Plants >5,000 (# of plants)	Managed or protected	Patches within 1 km	Area >500 m ² (size in m ²)	DC #1 and #2 met ⁴	3 survey yrs. w/in last 5 yrs.; no 2-yr decrease
1. Horsepasture 2	Sutherland Creek ..	✓ (700,000)	✓	✓	✓ (10,700)	✓	.....
2. TNC ¹ Oerding/ODOT ² Del Rio	Sutherland Creek ..	✓ (29,681)	✓	✓	✓ (800)	✓	✓
3. ODOT ² Wilbur Mitigation site	Sutherland Creek ..	✓ (42,511)	✓	✓	✓ (1,810)	✓	.....
4. Hawthorne	Sutherland Creek ..	✓ (250)	.....	✓	✓ (150)	.....	.....
5. Orenco Ponds	Sutherland Creek ..	✓ (14,380)	✓	✓	✓ (1,500)	✓	✓
6. Red Rock	Sutherland Creek ..	✓ (5,092)	✓	✓	✓ (372)	.....	✓
7. Southside Swale	Sutherland Creek ..	✓ (525)	✓	✓	✓ (550)	.....	✓
8. Deady	Sutherland Creek ..	✓ (6,000)	.....	✓	✓ (500)	.....	.....

TABLE 1—ROUGH POPCORNFLOWER DOWNLISTING CRITERIA AND STATUS BY RECOVERY UNITS/AREA, DOUGLAS COUNTY, OREGON—Continued
[✓ = criterion met]

Population	Recovery unit	Downlisting criteria				
		#1			#2	#3
		Plants >5,000 (# of plants)	Managed or protected	Patches within 1 km	Area >500 m ² (size in m ²)	DC #1 and #2 met ⁴
9. Sutherland East	Sutherland Creek ..	(1,000)	.....	✓	(6)	.....
10. Ford's Pond	Callapooya Creek ..	✓ (5,082)	✓	✓	(450)	.....
11. Stearns Lane	Callapooya Creek ..	(0)	.....	✓	(0)	.....
12. Nonpareil	Callapooya Creek ..	(0)	.....	✓	(0)	.....
13. Goat Ranch	Callapooya Creek ..	(75)	.....	✓	(5)	.....
14. ODOT ² Yoncalla South	Yoncalla Creek	✓ (5,800)	✓	✓	(350)	.....
15. ODOT ² Yoncalla 2	Yoncalla Creek	✓ (5,595)	✓	✓	✓ (800)	✓
16. Soggy Bottoms Patch	Umpqua Mgmt. Area ³	(3,363)	✓	✓	(108)	.....
17. Middle Barn/Soggy Bottoms Sister	Umpqua Mgmt. Area ³	✓ (11,222)	✓	✓	✓ (1,000)	✓
18. Westgate	Umpqua Mgmt. Area ³	✓ (6,000)	✓	✓	✓ (600)	✓
Total .....	.....	836,576 plants	.....	.....	19,701 m ²	.....

¹ TNC means The Nature Conservancy.

² ODOT means the Oregon Department of Transportation.

³ The Umpqua Management Area is not an official recovery unit. This area is an additional recovery management area that includes introduced populations of rough popcornflower in the Bureau of Land Management (BLM)'s North Bank Habitat Management Area.

⁴ Downlisting Criterion 3 states that a minimum of nine reserves, each meeting the requirements in Downlisting Criteria 1 and 2, are distributed with at least one reserve each in the Calapooya Creek and Yoncalla Creek recovery units, and a minimum of five reserves in the Sutherlin Creek recovery unit.

Regulatory and Analytical Framework

Regulatory Framework

Section 4 of the Act (16 U.S.C. 1533) and the implementing regulations in title 50 of the Code of Federal Regulations set forth the procedures for determining whether a species is an endangered species or a threatened species, issuing protective regulations for threatened species, and designating critical habitat for threatened and endangered species.

The Act defines an “endangered species” as a species that is in danger of extinction throughout all or a significant portion of its range, and a “threatened species” as a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects. We consider these same five factors in downlisting a species from endangered to threatened.

We use the term “threat” to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term “threat” includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term “threat” may encompass—either together or separately—the source of the action or condition or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an “endangered species” or a “threatened species.” In determining whether a species meets either definition, we must evaluate all identified threats by considering the species' expected response and the effects of the threats—in light of those

actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species—such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an “endangered species” or a “threatened species” only after conducting this cumulative analysis and describing the expected effect on the species.

The Act does not define the term “foreseeable future,” which appears in the statutory definition of “threatened species.” Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis which is further described in the 2009 Memorandum Opinion on the foreseeable future from the Department of the Interior, Office of the Solicitor (M-37021, January 16, 2009; “M-Opinion,” available online at <https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37021.pdf>). The foreseeable future extends as far into the future as the U.S. Fish and Wildlife Service and

National Marine Fisheries Service (hereafter, the Services) can make reasonably reliable predictions about the threats to the species and the species' responses to those threats. We need not identify the foreseeable future in terms of a specific period of time. We will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability. In other words, the foreseeable future is the period of time over which we can make reasonably reliable predictions. "Reliable" does not mean "certain"; it means sufficient to provide a reasonable degree of confidence in the prediction, in light of the conservation purposes of the Act.

Analytical Framework

The SSA report documents the results of our comprehensive biological review of the best scientific and commercial data regarding the status of the species, including an assessment of the potential threats to the species. The SSA report does not represent our decision on whether the species should be reclassified as a threatened species under the Act. However, it does provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act and its implementing regulations and policies.

To assess the rough popcornflower's viability, we used the three conservation biology principles of resiliency, redundancy, and representation (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency is the ability of the species to withstand environmental and demographic stochasticity (for example, wet or dry, warm or cold years), redundancy is the ability of the species to withstand catastrophic events (for example, droughts, large pollution events), and representation is the ability of the species to adapt to both near-term and long-term changes in its physical and biological environment (for example, climate conditions, pathogens). In general, species viability will increase with increases in resiliency, redundancy, and representation (Smith et al. 2018, p. 306). Using these principles, we identified the species' ecological requirements for survival and reproduction at the individual, population, and species levels, and described the beneficial and risk factors influencing the species' viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated individual

species' life-history needs. The next stage involved an assessment of the historical and current condition of the species' demographics and habitat characteristics, including an explanation of how the species arrived at its current condition. The final stage of the SSA involved making predictions about the species' responses to positive and negative environmental and anthropogenic influences. Throughout all of these stages, we used the best available information to characterize viability as the ability of a species to sustain populations in the wild over time. We use this information to inform our regulatory decision.

The following is a summary of the key results and conclusions from the SSA report; the full SSA report (USFWS 2021, entire) can be found on <https://www.regulations.gov> under Docket No. FWS–R1–ES–2024–0005.

Summary of Biological Status and Threats

In this discussion, we review the biological condition of the species and its resources, and the threats that influence the species' current and future condition, in order to assess the species' overall viability and the risks to that viability. In addition, the SSA report (USFWS 2021, entire) documents our comprehensive biological status review for the species, including an assessment of the potential threats to the species.

The following is a summary of this status review and the best available information gathered since that time that have informed this decision.

Ecological Needs

Rough popcornflower typically occupies seasonally wet meadows or prairie, seasonally-ponding mudflats, and Oregon ash (*Fraxinus latifolia*) swale openings dominated by native wetland-associated plants in valley lowlands where the ground is moist well into the summer season. Rough popcornflower requires early seral habitat and is not associated with dense tree or shrub canopies. Periodic disturbance (e.g., flooding, fire, mowing, or grazing) is necessary to control nonnative and native plant competitors and maintain the early seral and open habitat conditions in which rough popcornflower populations thrive. Several insects are known to pollinate rough popcornflower: honey bees (*Apis* spp.); bumble bees (*Bombus* spp.); halictid and megachilid bees; Hemiptera (true bugs); bombyliid, syrphid, and tachinid flies; and red-shouldered ctenucha moths (*Ctenucha rubroscapus*). These insects require

diverse native vegetation and minimal pesticide exposure.

Resilient rough popcornflower populations need enough individuals to withstand stochastic events and disturbances. The minimum viable population size for rough popcornflower has not been identified. However, the recovery plan characterizes 500 plants as an effective population size and expanded that effective population size by a factor of 10 to determine a minimum population size estimate of 5,000 plants. This number represents the population size resilient to most disturbances and capable of resisting inbreeding depression (USFWS 2003, p. 17; USFWS 2019, p. 4). Though some current populations may have fewer than 5,000 plants, taking into consideration other factors such as habitat quantity, habitat quality, connectivity, management, protection, reproduction, they may still be considered to have high resiliency (USFWS 2021, p. 31).

For rough popcornflower to be considered viable as a species, it must be able to withstand catastrophic events and adapt to environmental changes. This can be achieved with enough resilient populations distributed across the species' geographic range, representing the range of ecological settings in which the species is known to exist. The minimum number of populations required for rough popcornflower has not been determined. However, distribution and abundance goals laid out in the recovery plan (USFWS 2003, pp. 21–22; USFWS 2019, pp. 4–8) and described above under Recovery Criteria provide a benchmark for evaluating the species' condition.

Factors Influencing the Species

When we listed rough popcornflower as endangered (65 FR 3866; January 25, 2000), the primary threats included habitat alteration by wetland filling and development, livestock grazing (or herbivory), and competition from native and nonnative species. Small, isolated populations were identified as making the species more vulnerable to these threats. Overcollection for scientific or horticultural purposes, vandalism, the inadequacy of regulatory mechanisms, road maintenance, fire, and flooding were also identified as potential threats (65 FR 3866 at 3870–3872; January 25, 2000), but the available information does not indicate that these factors pose a threat to the species (USFWS 2003, p. 13; USFWS 2023b, entire). Climate change was recognized as an additional threat in 2010 (USFWS 2010, p. 28).

Habitat Loss and Fragmentation

In the final listing rule (65 FR 3866 at 3869; January 25, 2000), we described how rough popcornflower populations had become fragmented due to draining and filling of wetlands from properties being developed. At the time of listing, only five populations of rough popcornflower were protected from detrimental land-use activities. Currently, 11 of the 18 known populations are under Federal, State, municipal, or land trust protections; one is not protected but is on adequately managed land. Education efforts have increased recognition of rough popcornflower habitat, as well as avoidance, minimization, or mitigation of development impacts. Because 11 of the 18 known populations are now protected, the threat posed by detrimental land use activities has been significantly reduced since the time of listing. However, because formal commitments for the long-term beneficial management of rough popcornflower have not been secured for 7 populations (approximately 84 percent of the total number of individuals nationwide) this threat may increase in the future.

Small Population Size

In the final listing rule (65 FR 3866 at 3869–3870; January 25, 2000), we described the distribution of the rough popcornflower as 17 small patches of 1 to 3,000 plants (8 populations with approximately 7,000 plants total) that were threatened by natural (*i.e.*, flood) and/or anthropogenic (*e.g.*, herbicide treatment) events. At that time, the species' small population size was considered a threat because a single natural or human-caused event could have the potential to extirpate rough popcornflower patches.

Since that time, rough popcornflower occurrences have expanded to 18 populations and more than 800,000 plants (see table 1, above). Twelve of the 18 current individual populations have 3,000 or more plants, 11 of which have more than 5,000 plants. Although small populations occur that remain vulnerable to extirpation, individual populations are broadly distributed and the likelihood of a large-scale event affecting them collectively is unlikely. During years with below average precipitation, drought, or fires, seed set could fall short of what is needed to maintain population stability. However, with a large amount of seed produced by plants, it is likely that any periodic depletion of seed bank will be short-term and the seed bank will be replenished (USFWS 2021, p. 7). One

population thought to be extirpated for several years was documented flowering after 3 years of species absence (Amsberry and Meinke 2008, p. 14).

At the time of listing, data also indicated that small, isolated populations may not be able to sustain adequate genetic variation, and that a lack of connectivity between isolated patches and populations would limit pollinator-mediated gene flow. Our current analysis of connectivity for the 18 rough popcornflower populations ranked 11 populations as having high connectivity (within 950 meters (m) (3,117 feet (ft)) or less) and 3 populations as having medium connectivity (between 950 and 1,500 m (3,117 and 4,921 ft)) (USFWS 2021, p. 35), indicating that rough popcornflower populations are less isolated than at the time of listing. Overall, while the connectivity of small populations is still of some concern, the species is much less vulnerable to the effects of small population size and genetic isolation than when it was listed in 2000.

Herbivory

Herbivory by Columbian white-tailed deer (*Odocoileus virginianus leucurus*), black-tailed deer (*Odocoileus hemionus columbianus*), rodents, and livestock has been documented and was identified as a threat to rough popcornflower (65 FR 3866 at 3871; January 25, 2000). Although high densities of white-tailed and black-tailed deer overlap with the distribution of rough popcornflower, the best available information does not indicate that deer herbivory is adversely impacting rough popcornflower populations (USFWS 2021, p. 23).

Grazing by livestock may or may not be consistent with rough popcornflower conservation. Grazing of rough popcornflower during its growing period can be detrimental to the species. However, grazing can help control native and nonnative plant competitors and provide a measure of disturbance that maintains the preferable early seral and open habitat conditions for rough popcornflower. Four rough popcornflower populations with more than 5,000 plants are on privately-owned grazing lands; the largest single population (more than 700,000 plants) is on a private horse ranch where grazing is managed in a manner compatible with the long-term survival of rough popcornflower (USFWS 2021, p. 16). Depending on how grazing is managed, it can adversely impact or benefit individual populations of rough popcornflower. With 12 of the 18 populations considered protected or on

adequately managed land, livestock herbivory is not currently considered a threat to the species overall. However, because formal commitments for long-term management of livestock grazing for the benefit of rough popcornflower have not been secured for some populations (including the largest population of over 700,000 plants), this threat may increase in the future.

Native and Nonnative Plant Encroachment

Native and nonnative plants, including pennyroyal (*Mentha pulegium*), teasel (*Dipsacus* spp.), creeping thistle (*Cirsium arvense*), and reed canary grass (*Phalaris arundinacea*), are a primary threat to the establishment and maintenance of rough popcornflower due to their encroachment of habitat and elimination of bare ground, which popcornflower seeds require to germinate. Pennyroyal is present at many rough popcornflower sites, and teasel and creeping thistle control require constant conservation efforts at the North Bank Habitat Management Area (NBHMA), Yoncalla South and TNC Popcorn Swale Preserve populations.

Rough popcornflower is conservation reliant, and when natural disturbance events are lacking, active management (*e.g.*, manual weeding, herbicide application, mowing, and strategic grazing) is necessary to control competing vegetation and maintain early seral habitats to help maintain many of the rough popcornflower populations into the future (USFWS 2010, p. 27). Invasive plants appear to be less of a concern on private lands due to livestock grazing (USFWS 2020, p.2). Strategic grazing by livestock, in terms of seasonal grazing periods and intensity, when closely monitored, can benefit rough popcornflower populations by reducing plant competition and creating open ground that facilitates seed germination and enables population expansion (USFWS 2021, p. 24).

While competition with native and nonnative plants remains an ongoing threat to rough popcornflower, this threat can be successfully managed through continued investments in the adaptive management practices that have resulted in flourishing populations across the species' range (USFWS 2021, appendices 3 and 4).

Fire

At the time of listing, fire was considered a natural event key to the formation and maintenance of rough popcornflower habitat (65 FR 3866 at

3867; January 25, 2000). In late September 2003, an accidental fire burned across the North Bank/Soggy Bottoms rough popcornflower population at moderate intensity. The year following the burn, staff noted that individual rough popcornflower plants were much larger and robust, and the population had increased. The population dropped significantly during the following 5 years, although that was considered likely due to changed site hydrology. While the effects of fire in rough popcornflower habitat restoration are still unknown (USFWS 2010, p. 27), data collected after the 2003 fire suggest that low- to moderate-intensity fire can have at least short-term beneficial effects to the species.

Climate Change

The likely impacts of climate change on rough popcornflower’s ecological processes are closely connected to the availability of water. Due to their shallow and ephemeral nature, wet swales in southwestern Oregon are particularly sensitive to increases in evaporation or reductions in rainfall. Strong climate variability is likely to persist in the Pacific Northwest, owing in part to the annual and decadal climate variability associated with the Pacific Ocean (May et al. 2018, p. 1039). Models project periods of prolonged drought interspersed with years featuring heavy rainfall driven by powerful atmospheric rivers and strong El Niño winters (May et al. 2018, p. 1039). Even modest temperature increases could result in more water

runoff in winter and less in spring and summer, more winter flooding, and drier summer soils, thereby altering the seasonality and duration of wetland hydration (Field et al. 2017, p. 18). Reduced soil moisture due to evaporation and transpiration may exacerbate drought effects (Field et al. 2017, p. 18). Drought-mediated decreases in water depth and inundation periods could increase the frequency at which wetlands dry before rough popcornflower has completed its flowering and fruiting stages. However, Southern Oregon, along with other areas in the western United States, has been experiencing a prolonged drought for several years (Fleishman 2023, p. 52) and rough popcornflower continued to demonstrate stable or increasing population trends. Climate change could also cause temperatures to exceed those suitable for growth of the species (USFWS 2010, p. 28).

The impact of climate change on rough popcornflower will likely vary depending on site-specific conditions and annual precipitation variation. Rough popcornflower individuals are naturally adaptive to fall and winter inundation and depend on soil moisture until their seed has matured. An earlier warming trend may result in a limited seed set because the soil will dry out quicker and may benefit nonnative plants. Habitat management using herbicides and prescribed burning would likely increase with an increase in nonnative plants. However, if climate change in Oregon results in wetter

winters and springs as predicted (Fleishman 2023, pp. 11–12), then the additional precipitation may lengthen seed set and favor popcornflower survival over competitors unable to adapt to saturated soils.

Current Condition

Resiliency

Resiliency, the ability of populations to withstand stochastic events, is commonly determined as a function of metrics such as population size, growth rate, or habitat quality and quantity. We evaluated the current resiliency of rough popcornflower populations based on the population size, habitat quantity, connectivity, habitat quality, management frequency, reproductive success, and the degree of protection afforded to each population (see tables 2 through 8, below). Populations with over 5,000 mature plants were determined to be in high condition based on the downlisting criteria outlined in the species’ recovery plan. Populations of over 1,000 plants were considered to be in medium condition, and those with under 200 plants were considered to be in low condition. We then assigned numerical values to each of those condition category rankings in order to categorize the current overall resiliency of each rough popcornflower population (see table 9, below). A complete description of our analytical approach to current condition is available in the SSA report (USFWS 2021, pp. 34–37).

TABLE 2—POPULATION SIZE RANKINGS OF ROUGH POPCORNFLOWER POPULATIONS FROM THE SSA REPORT AND SUBSEQUENT SURVEYS

Population size (# of plants)	Number of populations in 2021	Number of populations in 2023
High (≥5,000)	13	11
Medium (1,000–4,999)	2	2
Low (1–999)	3	5

TABLE 3—HABITAT QUANTITY RANKINGS OF ROUGH POPCORNFLOWER POPULATIONS FROM THE SSA REPORT AND SUBSEQUENT SURVEYS

Habitat quantity (amount)	Number of populations in 2021	Number of populations in 2023
High (>5,382 ft²/1640 m²)	7	9
Medium (820–5,382 ft²/250–1640 m²)	3	3
Low (<820 ft²/250 m²)	8	6

TABLE 4—CONNECTIVITY RANKINGS OF ROUGH POPCORNFLOWER POPULATIONS FROM THE SSA REPORT AND SUBSEQUENT SURVEYS

Connectivity (proximity to next population) *	Number of populations in 2021	Number of populations in 2023
High (<3,117 ft/950 m)	11	No change reported.
Medium (3,120–4921 ft/950–2000 m)	3	No change reported.
Low (>6,562 ft/2000 m)	4	No change reported.

* Scores are not strictly distance-based if populations are separated by barriers such as development, roads, or expanses of unsuitable habitat.

TABLE 5—HABITAT QUALITY RANKINGS OF ROUGH POPCORNFLOWER POPULATIONS FROM THE SSA REPORT AND SUBSEQUENT SURVEYS

Habitat quality (presence of invasive species)	Number of populations in 2021	Number of populations in 2023
High (no invasive species)	5	No change reported.
Medium (1–2 invasive species)	8	No change reported.
Low (dominated by invasive species)	5	No change reported.

TABLE 6—MANAGEMENT FREQUENCY RANKINGS OF ROUGH POPCORNFLOWER POPULATIONS FROM THE SSA REPORT AND SUBSEQUENT SURVEYS

Management frequency (interval)	Number of populations in 2021	Number of populations in 2023
High (continuous, annual, or biennial)	10	No change reported.
Medium (3–5 years)	5	No change reported.
Low (5 years)	3	No change reported.

TABLE 7—REPRODUCTIVE SUCCESS RANKINGS OF ROUGH POPCORNFLOWER POPULATIONS FROM THE SSA REPORT AND SUBSEQUENT SURVEYS

Reproductive success (measures)	Number of populations in 2021	Number of populations in 2023
High (>5,000 plants and 100 percent seed production)	15	No change reported.
Medium (3,000–5,000 plants, 75–99 percent seed production)	1	No change reported.
Low (<3,000 plants, 0–74 percent seed production)	2	No change reported.

TABLE 8—PROTECTED STATUS RANKINGS OF ROUGH POPCORNFLOWER POPULATIONS FROM THE SSA REPORT AND SUBSEQUENT SURVEYS

Protected status	Number of populations in 2021	Number of populations in 2023
Yes	12	No change reported.
No	6	No change reported.

TABLE 9—OVERALL RESILIENCY RANKINGS OF ROUGH POPCORNFLOWER POPULATIONS FROM THE SSA REPORT AND SUBSEQUENT SURVEYS

Overall resiliency	Number of populations in 2021	Number of populations in 2023
High	11	10
Moderate	3	3
Low	4	5

As shown above in table 9, at the time of the SSA report in 2021, 11 (61 percent) of the 18 rough popcornflower

populations scored high for resiliency, 3 (17 percent) scored moderate, and 4 (22 percent) scored low. Changes in

condition category rankings as a result of additional surveys conducted from 2021–2023 (USFWS 2022, entire;

USFWS 2023a, entire) resulted in overall resiliency rankings of 10 (55 percent) high, 3 (17 percent) moderate, and 5 (28 percent) low. These results demonstrate relatively high resiliency across the range of the rough popcornflower.

Redundancy

Redundancy is a species' ability to withstand catastrophic events and is a function of the number and resilience of populations, as well as their distribution and connectivity. At the time of listing, there were eight known rough popcornflower populations. Currently, there are 18 known populations. Some of this increase is due to newly discovered populations; however, since the time of listing, habitat restoration, reintroductions, and habitat protection have collectively improved the status of the species. Of the 18 known populations, 10 populations score high for overall resiliency and are distributed across the range of the species, with 6 in the Sutherlin Creek recovery unit, 2 in the Yoncalla Creek recovery unit, and 2 in the Umpqua Management Area. The eight populations with moderate or low resiliency contribute to the species' redundancy to a lesser degree and are distributed across the Calapooya Creek and Sutherlin Creek recovery units and the Umpqua Management Area. The distribution of 10 populations with high resiliency across two of the three recovery units and the management area demonstrates good redundancy for the species.

Representation

Representation refers to the ability of a species to adapt to change, and is assessed using geographic, genetic, ecological, and niche diversity data. Ecological diversity and genetic variation based on habitat differences, differences in annual and biennial life histories, and differences in growth forms may be inferred from the rough popcornflower's distribution across different sub-watersheds. Multiple populations with high resiliency throughout the species' range, along with populations of lesser resiliency, facilitate the preservation of the genetic diversity present within each recovery unit. Although populations with fewer than 5,000 plants may have lower genetic variation, rough popcornflower's wide variety of possible pollinators (Amsberry and Meinke 2001, pp. 12–13) assists in gene transfer and could boost the genetic variation of these populations.

Natural and reintroduced rough popcornflower populations are currently distributed in multiple sub-

watersheds across the species' historical range, and plants demonstrate diversity within and between populations, including different growth forms and flowering times. Additionally, rough popcornflower seeds do not all germinate every year, and a portion of the seed bank likely remains in the ground. The presence of a long-term seed bank allows rough popcornflower to persist through periods of adverse environmental conditions. In combination, these factors indicate that the species has the capacity to adapt to a variety of environmental conditions and has good representation.

Future Condition

To assess the future viability of rough popcornflower, we considered the factors that will influence the species within the foreseeable future. We define the foreseeable future as 30 years, as we consider this a reasonable timeframe to make reliable predictions about the threats to this species and its response to those threats due to this plant's reproductive strategy as an annual or short-lived perennial. Our viability assessment is characterized in terms of the resiliency, redundancy, and representation of the species as projected under various plausible future conditions (Shaffer and Stein 2000 pp. 306–310; Wolf et al. 2015, entire; Smith et al. 2018, pp. 304, 306–307). We projected the viability of rough popcornflower from 2020 to 2050 under three plausible future scenarios based on potential trends with conservation partners, climate patterns, and population demographics. Scenario A represented improvements over current conditions. Scenario B represented the most likely conditions if current trends continue. Scenario C represented conditions that are worse than current conditions.

Scenario A assumes continued conservation support for the rough popcornflower, including from private landowners throughout the species' range, as well as additional funding for outplanting and invasive vegetation control. Scenario B is the most likely scenario for the rough popcornflower based on current agency commitments, outplanting successes, the current ability to place conservation agreements, and species' population demographic trends. We discuss Scenario B further below. Scenario C assumes diminished habitat conditions and management actions (e.g., mowing, manual or chemical control of non-native herbaceous plants, prescribed burning), falling short of what is needed, resulting in the reduction of the species' resiliency, redundancy, and

representation over the next 30 years. For further details on all three scenarios, see the SSA report (USFWS 2021, pp. 41–47).

We determined that rough popcornflower is expected to continue to be influenced by the factors that have historically influenced and are currently influencing the species, at rates most closely associated with Scenario B. Scenario B represents the most likely conditions if current trends continue (USFWS 2021, pp. 44–45).

In Scenario B, we made several assumptions about ongoing conservation support within the foreseeable future. Several conservation partners (government agencies, nonprofit conservation organizations, academic institutions, and private landowners) have made significant contributions to recovery efforts for rough popcornflower. We assume that these partners will continue to collaborate and contribute conservation resources to rough popcornflower and its habitat based on current regulations and agency commitments, outplanting successes, and our ability to obtain conservation agreements. Continued outreach efforts are likely to support awareness of the species among private landowners and the public and to generate support for conservation. We also assume that development projects will continue to be evaluated and modified by the Service, the Oregon Department of State Lands, and the Oregon Department of Agriculture, to minimize or mitigate impacts to rough popcornflower and its habitats.

Under a continually increasing greenhouse gas emission scenario, Oregon's annual average temperature is projected to increase by 5 degrees Fahrenheit (°F) (2.8 degrees Celsius (°C)) by the 2050s (Fleishman 2023, p. 11). In this scenario, the amount of annual precipitation is projected to be highly uncertain. Summers are expected to warm more than the annual average and are likely to become drier. Extreme heat and precipitation events are expected to become more frequent (Dalton et al. 2017, p. 8). The effects of climate change on rough popcornflower populations are expected to be relatively moderate. Most rough popcornflower plants are expected to adjust to warmer temperatures by dispersing to moister habitats (via ungulates, other mammals, or birds), flowering earlier, and shortening their flowering period (USFWS 2021, p. 42). Climate change may limit rough popcornflower's growing season and habitat as well as moisture availability, though the species would continue to maintain viability within the three recovery units and the

introduced populations at the Umpqua Management Area (USFWS 2021, p. 45). We acknowledge that some populations may fare better than others under future conditions.

For species resiliency in Scenario B, we expect there will be a total of 20 rough popcornflower populations. At

least 10 of those populations are anticipated to be in protected areas (reserves), contain populations that meet or exceed 5,000 plants, and exhibit stable or increasing population counts in 7 out of 10 years (see table 10, below).

In terms of redundancy, protected rough popcornflower populations are

expected to continue to be distributed in all three recovery units. With a total of 20 populations distributed across the species' range, we conclude that the rough popcornflower will be able to withstand catastrophic events.

TABLE 10—FUTURE VIABILITY OF ROUGH POPCORNFLOWER UNDER THE MOST LIKELY SCENARIO, FUTURE SCENARIO B

Viability elements	Expected condition
Population Resilience	Protected populations (≥ 10) meet or exceed criterion of $\geq 5,000$ individual stems and show stable or positive demographic trends. The total population number is 20. Stable or increasing population counts occur 7 out of 10 years.
Species Redundancy	Redundancy is provided by having 20 populations present across the range to withstand catastrophic events.
Species Representation	20 populations, distributed across the range of the species, would provide genetic and ecological diversity for the species. No evidence of inbreeding depression.
Overall Viability	Moderate: The species is able to adapt to climate change, and species receives adequate monitoring to inform management needs. Species requires continued management.

For species representation, rough popcornflower populations are expected to be well distributed across all three recovery units and the Umpqua Management Area. We expect genetic diversity to be maintained in the foreseeable future because there has been no evidence of inbreeding depression or genetic drift detected in any of the populations (Amsberry and Meinke 2017, p. 2).

Collectively, our analysis of the resiliency, redundancy, and representation under this scenario indicates that the viability of the rough popcornflower is not likely to be significantly reduced over the next 30 years.

We note that, by using the SSA framework to guide our analysis of the scientific information documented in the SSA report, we have analyzed the cumulative effects of identified threats and conservation actions on the species. To assess the current and future condition of the species, we evaluate the effects of all the relevant factors that may be influencing the species, including threats and conservation efforts. Because the SSA framework considers not just the presence of the factors, but to what degree they collectively influence risk to the entire species, our assessment integrates the cumulative effects of the factors and replaces a standalone cumulative-effects analysis.

Conservation Efforts and Regulatory Mechanisms

Rough popcornflower is a conservation-reliant species, meaning that the species will require continued conservation efforts to survive due to continuous encroachment from natural seral succession (USFWS 2010, p. 30).

Since listing the species in 2000, we have coordinated with local, State, and Federal stakeholders on conservation actions for the species, some of which we supported with funding.

Mowing in rough popcornflower habitat to control competing native and nonnative plant species, and subsequent outplanting of rough popcornflower, has occurred regularly at several sites. Other conservation actions include fencing to protect populations from anthropogenic disturbance; population introductions and augmentations; and stakeholder workshops in which species needs, recovery targets, and habitat conservation were discussed to raise landowner awareness. Agencies and property owners who have made commitments to protect or manage rough popcornflower and its habitat are the City of Sutherlin, Oregon; Douglas Soil and Water Conservation District, Oregon; Oregon Department of Agriculture (ODA), Native Plant Conservation Program; the BLM; the Native Plant Society of Oregon, Umpqua Valley Chapter; and The Nature Conservancy.

In the 2007 City of Sutherlin Conservation Agreement and Conservation Plan (ODA 2007, entire), the cooperators (the Service, the City of Sutherlin, ODA, the Umpqua Valley Chapter of the Native Plant Society of Oregon, the Sutherlin Stampede Association, and the Sutherlin Blackberry Festival, Inc.) agreed to the following measures:

- Prohibit activities that would disturb or destroy existing populations of rough popcornflower, or their habitat, on land owned or managed by the City of Sutherlin;
- Contract or coordinate appropriately timed surveys for new

populations of rough popcornflower on city-owned or -managed land prior to initiating ground-disturbing projects;

- Contact the ODA Native Plant Conservation Program if a new population of rough popcornflower is found during a pre-project survey; cooperate with the ODA Native Plant Conservation Program to develop conservation-based alternatives to proposed projects that would impact rough popcornflower populations or their habitat; and

- Cooperate with the ODA Native Plant Conservation Program to implement a management plan promoting the conservation of the populations of rough popcornflower at the Red Rock Park (formerly Timber Days Grounds).

Signatories of the agreement include the Service, the City of Sutherlin, ODA, the Umpqua Valley Chapter of the Native Plant Society of Oregon, the Sutherlin Stampede Association, and the Sutherlin Blackberry Festival, Inc. Since 2007, implementation of this agreement has provided fencing to protect rough popcornflower populations, reduced competitive and invasive species, and increased population numbers. This agreement was updated in 2023. In the updated agreement, entitled "Conservation Agreement for Rough Popcornflower," the City of Sutherlin agreed to continue to protect the plant and to extend the protection to Ford's Pond, a property acquired after the original signing in 2007. The 2023 agreement also allows introduction of the species at Ford's Pond (USFWS 2023c, p. 8).

The biological opinion on the North Bank Habitat Management Area issued by the Service in 2001 evaluated the effects of proposed management actions

and conservation measures conducted by the BLM for three rough popcornflower populations occurring in the management area (USFWS 2001, p. 15). Proposed management actions included manual and mechanical removal of competitive vegetation and the use of integrated pest management techniques to control noxious weeds. Proposed conservation measures included retaining existing populations and introducing additional populations into suitable habitat. To date, the BLM has consistently implemented these management actions and conservation measures, and the BLM is expected to continue to maintain and enhance habitat for this species into the future.

The Oregon Department of Transportation (ODOT) has established the Special Management Areas program to protect State-listed and federally listed endangered and threatened plant species identified on ODOT rights-of-way (ODOT 2017, p. 4). Special Management Areas are marked with signs that instruct ODOT maintenance crews on allowable activities. ODOT entered a statewide habitat conservation plan (HCP) with the Service in 2017 (USFWS 2017, entire). Under the HCP, the Special Management Areas identify the known populations of rare plants along ODOT rights-of-way that they have agreed to avoid impacting. In most cases, only periodic maintenance is necessary in Special Management Areas, and site-specific restrictions have been developed to protect listed species.

All federally listed plants in Oregon are also protected by State law under the Oregon Endangered Species Act, and their protection and conservation are administered by the ODA. The Oregon Endangered Species Act protects many other plant species in addition to those protected under the Federal Endangered Species Act. All State and municipal agencies, including City of Sutherlin, Douglas County, Douglas Soil and Water Conservation Service, and ODOT, must consult with ODA when a proposed action on land owned or leased by the State, or for which the State holds a recorded easement, has the potential to appreciably reduce the likelihood of the survival or recovery of any listed plant species.

While we do not have a specific agreement in place with The Nature Conservancy that guarantees a commitment to future management, they have actively managed the rough popcornflower habitat at their property (the Popcornswale preserve) since 1995, by monitoring populations, controlling nonnative and invasive species, managing habitat by reducing tree cover, mowing, and augmenting the

population with seeding. The Nature Conservancy has continued to manage the Popcornswale preserve multiple times a year since 1995, and is expected to continue these efforts.

These and other conservation efforts have increased the number of protected sites and vastly improved the number of plants in the overall population (from 7,000 to over 800,000). Currently, 11 of the 18 known populations throughout the species' range are under Federal, State, municipal, or land trust protections offering indefinite protection from habitat conversion to other uses. The remaining 7 populations (approximately 84 percent of the total number of individuals) do not have formal commitments for the long-term beneficial management of rough popcornflower but are benefitting from voluntary management practices employed by land management agencies and private landowners.

Determination of Rough Popcornflower's Status

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets the definition of an endangered species or a threatened species. The Act defines an endangered species as a species "in danger of extinction throughout all or a significant portion of its range," and a threatened species as a species "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." The Act requires that we determine whether a species meets the definition of an endangered species or a threatened species because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

Status Throughout All of Its Range

After evaluating threats to the species and assessing the cumulative effect of the threats under the Act's section 4(a)(1) factors, we find that the primary threats to rough popcornflower, since the time of listing, have been the destruction and/or alteration of habitat by development and hydrological changes (e.g., wetland fills, draining, construction), competition from native and nonnative plant species, impacts due to climate change (e.g., winter flooding, drier summer soils, and

decreased fruit production), and lack of (or noncompliance with) regulatory mechanisms. The best available information does not indicate that overcollection (Factor B) or herbivory (Factor C) are threats to the viability of the rough popcornflower. Our current analysis also indicates that the habitat threats (Factor A) and threats from the inadequacy of regulatory mechanisms (Factor D) have decreased since the time of listing, while climate change (Factor E) related threats have increased.

Habitat-related threats (destruction and/or alteration of habitat and competition from native and nonnative plant species), identified as drivers of rough popcornflower's status, are still present on the landscape; however, their magnitude and scope have decreased from historical levels and have been offset by a variety of management and conservation measures by many conservation partners since the rough popcornflower was listed as an endangered species (see 65 FR 3866; January 25, 2000), and these conservation actions continue today (USFWS 2021, p. 25 and appendix 3). Improvements in habitat management practices and extensive habitat restoration have been implemented, which have improved population resiliency and redundancy at several sites. Increased public awareness of the species has resulted in increased stewardship across lands with rough popcornflower populations and improved regulatory compliance. Greater understanding and compliance along with improvements in habitat management practices and extensive habitat restoration have helped ameliorate threats to the species, resulting in population increases and greater distribution. A majority of the rough popcornflower population sites (12 of 18) are protected by public ownership or managed to benefit the species; with these site protections and increased public knowledge of the species, compliance with regulatory mechanisms has increased significantly.

At the time of listing, rough popcornflower was known to exist in only 8 populations totaling 7,000 plants. There are currently 18 known populations totaling more than 800,000 plants. Although a majority (700,000) of the plants are within a single population, there are 17 other populations comprising more than 100,000 rough popcornflower plants distributed across the range of the species. Although the plants and populations are not distributed precisely as identified in recovery plan downlisting criteria (USFWS 2019, pp. 4–6), the population size (both the

number of plants and the physical area covered) in two of the three recovery units and the additional recovery management area exceed the target population size by unit/area, and six of the populations have stable and/or increasing trends. Our viability analysis determined that the species currently has high resiliency, good redundancy, and sufficient representation (USFWS 2021, pp. 32–41). Thus, after assessing the best available information, we conclude that the rough popcornflower is not in danger of extinction throughout all of its range.

We therefore proceed with determining whether the rough popcornflower is likely to become endangered within the foreseeable future throughout all of its range.

The best available information indicates that, at the species level, the most influential factors affecting rough popcornflower into the future are habitat-related threats (destruction and/or alteration of habitat and competition from native and nonnative plant species) (Factor A) and climate change (Factor E), which will likely cause more winter flooding, drier summer soils, and decreased fruit production. In our analysis of future viability (USFWS 2021, pp. 41–47), under Scenarios A and B, we project the species' resiliency, redundancy, and representation to be stable or increasing within the next 30 years. While a continuation of current conservation efforts as modeled under Scenario B is most likely, 7 of the 18 known populations (approximately 84 percent of the total number of plants) do not have formal commitments for long-term beneficial management of rough popcornflower and continued beneficial management is not assured.

Additionally, under Scenario C, we project the species' resiliency, redundancy, and representation to diminish within the next 30 years. Although this scenario is considered the least likely to occur, diminished habitat conditions along with reduced management actions and agency commitments are plausible and would likely to lead to long-term demographic declines, reductions in the number of populations, and reduced genetic diversity.

Thus, after assessing the best available information, we conclude that rough popcornflower is not currently in danger of extinction but is likely to become in danger of extinction within the foreseeable future throughout all of its range.

Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so within the foreseeable future throughout all or a significant portion of its range. The court in *Center for Biological Diversity v. Everson*, 435 F. Supp. 3d 69 (D.D.C. 2020) (*Everson*), vacated the provision of the Final Policy on Interpretation of the Phrase “Significant Portion of Its Range” in the Endangered Species Act’s Definitions of “Endangered Species” and “Threatened Species” (hereafter “Final Policy”; 79 FR 37578, July 1, 2014) that provided that if the Service determines that a species is threatened throughout all of its range, the Service will not analyze whether the species is endangered in a significant portion of its range.

Therefore, we proceed to evaluating whether the species is endangered in a significant portion of its range—that is, whether there is any portion of the species' range for which both (1) the portion is significant; and (2) the species is in danger of extinction in that portion. Depending on the case, it might be more efficient for us to address the “significance” question or the “status” question first. We can choose to address either question first. Regardless of which question we address first, if we reach a negative answer with respect to the first question that we address, we do not need to evaluate the other question for that portion of the species' range.

Following the court's holding in *Everson*, we now consider whether there are any significant portions of the species' range where the species is in danger of extinction now (*i.e.*, endangered). In undertaking this analysis for rough popcornflower, we choose to address the status question first—we consider information pertaining to the geographic distribution of both the species and the threats that the species faces to identify portions of the range where the species may be endangered.

We evaluated the range of the rough popcornflower to determine if the species is in danger of extinction in any portion of its range. The range of a species can theoretically be divided into portions in an infinite number of ways. We focused our analysis on portions of the species' range that may meet the definition of an endangered species. For rough popcornflower, we considered whether the threats or their effects on the species are greater in any biologically meaningful portion of the species' range than in other portions

such that the species is in danger of extinction now in that portion. As discussed above, we divided the range of the rough popcornflower in several ways (*e.g.*, populations, recovery units) for the purposes of our viability analyses. We divide the range into three recovery units (Sutherland Creek, Yoncalla Creek, and Callapooya Creek) that correspond to drainage basins within the Lower North Umpqua system, and represent groups of populations which share phenotypic similarities and are potentially genetically similar to one another. This scale is appropriate for considering whether the species may be in danger of extinction in any portion of the range.

We examined the following threats: habitat loss and fragmentation, small population size, native and invasive plant encroachment, fire, and climate change, including cumulative effects. We considered the effects of these threats on the rough popcornflower within each of the three recovery units.

As discussed above, through recovery efforts from multiple stakeholders, the rough popcornflower has increased to over 883,154 plants in 18 populations. In each recovery unit there are at least two populations that meet or exceed the resiliency criterion size of 5,000 individuals exceeding a patch size of 5,382 ft² (500 m²), indicating they have a high probability of persistence over the next 30 years.

The rough popcornflower has a current distribution that is analogous to its historical range in all three recovery units (USFWS 2021, p. 39). Near-term threats are similar for all populations distributed throughout the recovery units. The rough popcornflower is a conservation reliant species, and in each recovery unit populations receive some form of habitat management in the form of mowing, grazing, prescribed burning, or invasive plant control to address the near-term threats (USFWS 2021, p. 38).

Given the distribution of resilient populations across recovery units, the uniformity of the near-term threats to the species within each unit and ongoing conservation measures addressing those threats, there is no one recovery unit that has a different status from its range-wide status. In summary, we found no portion of the rough popcornflower's range where threats are impacting individuals differently from how they are affecting the species elsewhere in its range, or where the biological condition of the species differs from its condition elsewhere in its range such that the status of the species in that portion does not differ from any other portion of the species' range.

Therefore, no portion of the species' range provides a basis for determining that the species is in danger of extinction in a significant portion of its range, and we determine that the species is likely to become in danger of extinction within the foreseeable future throughout all of its range. This does not conflict with the courts' holdings in *Desert Survivors v. U.S. Department of the Interior*, 321 F. Supp. 3d 1011, 1070–74 (N.D. Cal. 2018) and *Center for Biological Diversity v. Jewell*, 248 F. Supp. 3d 946, 959 (D. Ariz. 2017) because, in reaching this conclusion, we did not apply the aspects of the Final Policy, including the definition of "significant" that those court decisions held were invalid.

Determination of Status

Based on the best scientific and commercial data available, we determine that the rough popcornflower meets the Act's definition of a threatened species. Therefore, we propose to downlist the rough popcornflower as a threatened species in accordance with sections 3(20) and 4(a)(1) of the Act.

Protective Regulations Under Section 4(d) of the Act

Section 4(d) of the Act contains two sentences. The first sentence states that the Secretary shall issue such regulations as she deems necessary and advisable to provide for the conservation of species listed as threatened species. Conservation is defined in the Act to mean the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Additionally, the second sentence of section 4(d) of the Act states that the Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife, or section 9(a)(2), in the case of plants. With these two sentences in section 4(d), Congress delegated broad authority to the Secretary to determine what protections would be necessary and advisable to provide for the conservation of threatened species, and even broader authority to put in place any of the section 9 prohibitions, for a given species.

The courts have recognized the extent of the Secretary's discretion under this standard to develop rules that are appropriate for the conservation of a species. For example, courts have upheld, as a valid exercise of agency authority, rules developed under section

4(d) that included limited prohibitions against takings (see *Alsea Valley Alliance v. Lautenbacher*, 2007 WL 2344927 (D. Or. 2007); *Washington Environmental Council v. National Marine Fisheries Service*, 2002 WL 511479 (W.D. Wash. 2002)). Courts have also upheld 4(d) rules that do not address all of the threats a species faces (see *State of Louisiana v. Verity*, 853 F.2d 322 (5th Cir. 1988)). As noted in the legislative history when the Act was initially enacted, "once an animal is on the threatened list, the Secretary has an almost infinite number of options available to [her] with regard to the permitted activities for those species. [She] may, for example, permit taking, but not importation of such species, or [she] may choose to forbid both taking and importation but allow the transportation of such species" (H.R. Rep. No. 412, 93rd Cong., 1st Sess. 1973).

The provisions of this species' proposed protective regulations under section 4(d) of the Act are one of many tools that we would use to promote the conservation of the rough popcornflower. The proposed protective regulations would apply only if and when we make final the reclassification of the rough popcornflower as a threatened species. Nothing in 4(d) rules change in any way the recovery planning provisions of section 4(f) of the Act, the consultation requirements under section 7 of the Act, or the ability of the Service to enter into partnerships for the management and protection of the rough popcornflower.

Section 7(a)(2) states that each Federal action agency shall, in consultation with the Secretary, ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. Each Federal agency shall review its action at the earliest possible time to determine whether it may affect listed species or critical habitat. If a determination is made that the action may affect listed species or critical habitat, formal consultation is required (50 CFR 402.14(a)), unless the Service concurs in writing that the action is not likely to adversely affect listed species or critical habitat. At the end of a formal consultation, the Service issues a biological opinion, containing its determination of whether the Federal action is likely to result in jeopardy or adverse modification.

Examples of discretionary actions for the rough popcornflower that may be subject to consultation procedures under section 7 are management of

Federal lands administered by the BLM, as well as actions that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or actions funded by Federal agencies such as the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency. Federal actions not affecting listed species or critical habitat—and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or carried out by a Federal agency—do not require section 7 consultation. Federal agencies should coordinate with the local Service Field Office (see **FOR FURTHER INFORMATION CONTACT**) with any specific questions on section 7 consultation and conference requirements.

These requirements are the same for a threatened species regardless of what is included in its 4(d) rule. Section 7 consultation is required for Federal actions that "may affect" a listed species regardless of whether take caused by the activity is prohibited or excepted by a 4(d) rule (under application of a "blanket rule" (for more information, see 89 FR 23919, April 5, 2024) or a species-specific 4(d) rule). A 4(d) rule does not change the process and criteria for informal or formal consultations and does not alter the analytical process used for biological opinions or concurrence letters. For example, as with an endangered species, if a Federal agency determines that an action is "not likely to adversely affect" a threatened species, it will require the Service's written concurrence (50 CFR 402.13(c)). Similarly, if a Federal agency determines that an action is "likely to adversely affect" a threatened species, it will require formal consultation and the formulation of a biological opinion (50 CFR 402.14(a)). Because consultation obligations and processes are unaffected by 4(d) rules, we may consider developing tools to streamline future intra-Service and inter-Agency consultations for actions that result in forms of take that are not prohibited by the 4(d) rule (but that still require consultation). These tools may include consultation guidance, online consultation processes via the Service's digital project planning tool (Information for Planning and Consultation; <https://ipac.ecosphere.fws.gov/>), template language for biological opinions, or programmatic consultations.

Exercising the Secretary's authority under section 4(d) of the Act, we are applying the protections for the rough popcornflower through our regulations at 50 CFR 17.71(a). In our April 5, 2024, final rule revising those regulations (89 FR 23919, at 23922–23923), we found that applying those regulations as a whole satisfies the requirement in section 4(d) of the Act to issue regulations deemed necessary and advisable to provide for the conservation of threatened species. We have not identified any ways in which a protective regulation for this threatened species would need to differ from the regulations at 50 CFR 17.71(a) in order to contain the protections that are necessary and advisable to provide for the conservation of the rough popcornflower. Therefore, the regulations at 50 CFR 17.71(a) apply. This means that except as provided in a permit issued pursuant to 50 CFR 17.72, all of the provisions of 50 CFR 17.61 for endangered plants, except § 17.61(c)(2) through (4), apply to the rough popcornflower, and the provisions of 50 CFR 17.71(b) concerning exceptions for certain entities also apply to the species.

Required Determinations

Clarity of the Rule

We are required by E.O.s 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (1) Be logically organized;
- (2) Use the active voice to address readers directly;
- (3) Use clear language rather than jargon;
- (4) Be divided into short sections and sentences; and
- (5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell

us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

Regulations adopted pursuant to section 4(a) of the Act are exempt from the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) and do not require an environmental analysis under NEPA. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This includes listing, delisting, and reclassification rules, as well as critical habitat designations and species-specific protective regulations promulgated concurrently with a decision to list or reclassify a species as threatened. The courts have upheld this position (*e.g.*, *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995) (critical habitat); *Center for Biological Diversity v. U.S. Fish and Wildlife Service*, 2005 WL 2000928 (N.D. Cal. Aug. 19, 2005) (concurrent 4(d) rule)).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), E.O. 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with federally recognized Tribes on a government-to-government basis. In accordance with Secretary's Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not

subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. We will continue to work with Tribal entities during the development of a final downlisting determination for the rough popcornflower.

References Cited

A complete list of references cited in this rulemaking is available on the internet at <https://www.regulations.gov> and upon request from the Oregon Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rule are the staff members of the Fish and Wildlife Service's Species Assessment Team and the Oregon Fish and Wildlife Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Plants, Reporting and recordkeeping requirements, Transportation, Wildlife.

Proposed Regulation Promulgation

Accordingly, the U.S. Fish and Wildlife Service proposes to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

- 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

- 2. Amend § 17.12(h) by revising the entry for “*Plagiobothrys hirtus*” under FLOWERING PLANTS on the List of Endangered and Threatened Plants to read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Scientific name	Common name	Where listed	Status	Listing citations and applicable rules
Flowering Plants				
* <i>Plagiobothrys hirtus</i>	* Rough popcornflower	* Wherever found	* T	* [Federal Register citation when published as a final rule];
*	*	*	*	*

Gary Frazer,
Acting Director, U.S. Fish and Wildlife
Service.
[FR Doc. 2024–28351 Filed 12–10–24; 8:45 am]
BILLING CODE 4333–15–P

Notices

Federal Register

Vol. 89, No. 238

Wednesday, December 11, 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 COMMERCE

Foreign-Trade Zones Board

[B-45-2024]

Foreign-Trade Zone (FTZ) 121; Authorization of Production Activity; Curia New York, Inc.; (Pharmaceutical APIs); Rensselaer, New York

On August 8, 2024, Curia Global, Inc. submitted a notification of proposed production activity to the FTZ Board for its subsidiary Curia New York, Inc. within Subzone 121A, in Rensselaer, New York.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (89 FR 66342, August 15, 2024). On December 6, 2024, the applicant was notified of the FTZ Board's decision that no further review of the activity is warranted at this time. The production activity described in the notification was authorized, subject to the FTZ Act and the FTZ Board's regulations, including section 400.14.

Dated: December 6, 2024.

Elizabeth Whiteman,
Executive Secretary.

[FR Doc. 2024-29087 Filed 12-10-24; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B-44-2024]

Foreign-Trade Zone (FTZ) 61; Authorization of Production Activity; Boehringer Ingelheim Animal Health Puerto Rico LLC; (Animal Health Products); Barceloneta, Puerto Rico

On August 8, 2024, Boehringer Ingelheim Animal Health Puerto Rico LLC submitted a notification of proposed production activity to the FTZ

Board for its facility within Subzone 61AC, in Barceloneta, Puerto Rico.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (89 FR 66032, August 14, 2024). On December 6, 2024, the applicant was notified of the FTZ Board's decision that no further review of the activity is warranted at this time. The production activity described in the notification was authorized, subject to the FTZ Act and the FTZ Board's regulations, including section 400.14.

Dated: December 6, 2024.

Elizabeth Whiteman,
Executive Secretary.

[FR Doc. 2024-29086 Filed 12-10-24; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-570-918]

Steel Wire Garment Hangers From the People's Republic of China: Final Results of the Expedited Third 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 steel wire garment hangers (steel hangers) 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 10, 2024.

FOR FURTHER INFORMATION CONTACT: Kabir Archuletta, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482-2953.

SUPPLEMENTARY INFORMATION:

Background

On October 6, 2008, Commerce published the AD *Order* on steel

hangers from China.¹ On July 1, 2024, Commerce published the notice of initiation of the five-year sunset review of the *Order*, pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).² On July 10, 2024, Commerce received a notice of intent to participate in this review from M&B Metal Products Company, 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 manufacturer, producer, or wholesaler of a domestic like product in the United States.

On July 18, 2024, the domestic interested party provided a timely substantive response for this review within the 30-day deadline specified in 19 CFR 351.218(d)(3)(i).⁴ We received no substantive responses from any other interested parties, nor was a hearing requested. On August 21, 2024, Commerce notified the U.S. International Trade Commission (ITC) that it did not receive an adequate substantive response from respondent interested parties.⁵ 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 this *Order*. On July 22, 2024, Commerce tolled certain deadlines in this administrative proceeding by seven days.⁶ The deadline for the final results is now November 5, 2024.

Scope of the Order

The merchandise subject to this *Order* is steel hangers. For a complete description of the scope of the *Order*, see the Issues and Decision Memorandum.⁷

¹ See *Notice of Antidumping Duty Order: Steel Wire Garment Hangers from the People's Republic of China*, 73 FR 58111 (October 6, 2008) (*Order*).

² See *Initiation of Five-Year (Sunset) Reviews*, 89 FR 54435 (July 1, 2024).

³ See Domestic Interested Party's Letter, "Notice of Intent to Participate," dated July 10, 2024.

⁴ See Domestic Interested Party's Letter, "Substantive Response to Notice of Initiation," dated July 18, 2024.

⁵ See Commerce's Letter, "Sunset Review for July 2024," dated August 21, 2024.

⁶ See Memorandum, "Tolling of Deadlines for Antidumping and Countervailing Duty Proceedings," dated July 22, 2024.

⁷ See Memorandum, "Issues and Decision Memorandum for the Final Results of the Expedited Third Sunset Review of the Antidumping Duty Order on Certain Steel Wire Garment Hangers from

Continued

Analysis of Comments Received

All issues raised in this review, including the likelihood of continuation or recurrence of dumping in the event of revocation and the magnitude of the margins likely to prevail if the *Order* were revoked, are addressed 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 at <https://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 antidumping duty order on steel hangers from China would be likely to lead to the continuation or recurrence of dumping, and that the magnitude of the margins likely to prevail would be weighted-average dumping margins up to 187.25 percent.

Administrative Protective Order (APO)

This notice serves as the only reminder to interested parties subject to an APO of their responsibility concerning the return or destruction 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 and notice in accordance with sections 751(c), 752(c), and 777(i)(1) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2) and 19 CFR 351.221(c)(5)(ii).

the People's Republic of China" (Issues and Decisions Memorandum), dated concurrently with these results and hereby adopted by this notice.

⁸ *Id.*

Dated: November 5, 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. 2024–29056 Filed 12–10–24; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

Open Meeting of the President's Advisory Council on Doing Business in Africa

AGENCY: U.S. Department of Commerce, International Trade Administration.

ACTION: Notice.

SUMMARY: The President's Advisory Council on Doing Business in Africa (PAC-DBIA or Council) will hold a meeting to deliberate and adopt a report commemorating the 10-year anniversary of the establishment of the PAC-DBIA. The PAC-DBIA will present summaries of past recommendations across twelve key topics: Infrastructure, Financing, Technology & Digital Economy, Energy & Environment, Health, Agribusiness & Food-Water Security, Trade Facilitation & Supply-Value Chains, Bilateral Engagement Mechanisms, Public Procurement, Workforce & Skills Development, SMEs & Women Entrepreneurs, and the African Growth and Opportunity Act (AGOA). U.S. Government principals will provide feedback summarizing actions taken by departments, agencies, and programs that have address the PAC-DBIA's recommendations. The PAC-DBIA will also present a review of key fact-finding activities conducted and analytical reports produced over the 10 years of the PAC-DBIA's existence. Finally, the PAC-DBIA will present forward-looking recommendations regarding utilization of the PAC-DBIA and U.S.-Africa commercial engagement in general. The final agenda for the meeting will be posted prior to the meeting on the Council's website at <http://trade.gov/pac-dbia>.

DATES: December 13, 2024, time to be determined and posted in advance on the PAC-DBIA website at <http://trade.gov/pac-dbia>.

ADDRESSES: The President's Advisory Council on Doing Business in Africa meeting will be broadcast to the public via live webcast on the internet at <http://whitehouse.gov/live>.

FOR FURTHER INFORMATION CONTACT: Giancarlo Cavallo, Designated Federal Officer, President's Advisory Council on Doing Business in Africa, Department of Commerce, 1401 Constitution Ave. NW, Room 22004, Washington, DC 20230, telephone: 202–766–8044; email: dbia@trade.gov, Giancarlo.Cavallo@trade.gov.

SUPPLEMENTARY INFORMATION:

Background: The PAC-DBIA was established on August 5, 2014, to advise the President, through the Secretary of Commerce, on strengthening commercial engagement between the United States and Africa. The Council's charter was renewed for a fifth two-year term in December 2023. The Council was established in accordance with the provisions of the Federal Advisory Committee Act, as amended, 5 U.S.C. App.

Exceptional Circumstances: Pursuant to 41 CFR 102–3.150(b), the notice for this meeting is given less than 15 calendar days prior to the meeting because of the exceptional circumstances of the two-year anniversary of the 2022 U.S.–Africa Leaders Summit and Business Forum being on December 14, 2024, and the need for the PAC-DBIA's 10-year review of the Council's input to the U.S. Government to be incorporated into public messaging about progress and accomplishments in U.S.-Africa commercial engagement over the past two years.

Public Participation: Members of the public are invited to submit written statements to the Council for consideration in advance of this meeting by 12:00 p.m. ET on December 13, 2024. Members of the public are encouraged to submit written comments via email to ensure timely receipt, but may submit by either of the following methods:

a. Electronic Submissions

Submit statements electronically to Giancarlo Cavallo, Designated Federal Officer, President's Advisory Council on Doing Business in Africa, via email: dbia@trade.gov.

b. Paper Submissions

Send paper statements to Giancarlo Cavallo, Designated Federal Officer, President's Advisory Council on Doing Business in Africa, Department of

Commerce, 1401 Constitution Ave. NW, Room 22004, Washington, DC 20230.

Statements will be provided to PAC–DBIA members in advance of the meeting for consideration and may be posted on the Council website (<http://trade.gov/pac-dbia>). Any business proprietary information should be clearly designated as such. All statements received, including attachments and other supporting materials, are part of the public record and subject to public disclosure.

Meeting transcripts: Copies of the Council’s meeting transcript and a video recording of the meeting will be available within ninety (90) days of the meeting on the Council’s website at <http://trade.gov/pac-dbia>.

Giancarlo Cavallo,

Deputy Director, Office of Africa.

[FR Doc. 2024–29050 Filed 12–10–24; 8:45 am]

BILLING CODE 3510–FP–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–557–828]

Ferrosilicon From Malaysia: Amended Preliminary Determination of Sales at Less Than Fair Value and Amended Preliminary Negative Determination of Critical Circumstances

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) is amending the preliminary affirmative determination in the less-than-fair-value (LTFV) investigation of ferrosilicon from Malaysia to correct significant ministerial errors. The period of investigation (POI) is January 1, 2023, through December 31, 2023.

DATES: Applicable December 11, 2024.

FOR FURTHER INFORMATION CONTACT:

Jacob Waddell, 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) 482–1369.

SUPPLEMENTARY INFORMATION:

Background

On November 6, 2024, Commerce published in the *Federal Register* its preliminary affirmative determination in the LTFV investigation of ferrosilicon from Malaysia.¹ On November 8 and 12, 2024, the petitioners² timely alleged that Commerce made significant ministerial errors in the *Preliminary Determination* with respect to calculation of the preliminary weighted-average dumping margins for OM Materials Sarawak Sdn. Bhd (OMSA) and Pertama Ferroalloys Sdn. Bhd (Pertama),³ respectively.

Scope of the Investigation

The product covered by this investigation is ferrosilicon from Malaysia. For a complete description of the scope of this investigation, see the *Preliminary Determination*.

Legal Framework

Pursuant to 19 CFR 351.224(e), Commerce will correct any significant ministerial error by amending the preliminary determination. A ministerial error is defined as including errors “in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which {Commerce} considers ministerial.”⁴ A ministerial error is considered to be “significant” if its correction, either singly or in combination with other errors, would result in: (1) a change of at least five absolute percentage points in, but not less than 25 percent of, the weighted-average dumping margin calculated in the preliminary determination; or (2) a difference between a weighted-average dumping margin of zero (or *de minimis*) and a weighted-average dumping margin of greater than *de minimis* or vice versa.⁵

Analysis of Significant Ministerial Errors

In the *Preliminary Determination*, Commerce made significant ministerial errors within the meaning of section 735(3) of the Act and 19 CFR 35.224(f)–

(g) in calculating the weighted-average dumping margins for OMSA and Pertama. Specifically, for OMSA, we included an incorrect currency conversion for OMSA’s home market costs.⁶ For Pertama, an error in our aggregation of five third-country market databases resulted in a distortion of the results of the arm’s-length test in the comparison market program.⁷

We find that these errors meet the definition of “ministerial errors,” and that the corrections of the errors for OMSA and Pertama result in a change that is at least five absolute percentage points in, and not less than 25 percent of, the margins calculated for OMSA and Pertama in the *Preliminary Determination*. As such, they constitute significant errors within the meaning of 19 CFR 351.224(g). Accordingly, pursuant to 19 CFR 224(e), Commerce is amending the *Preliminary Determination* to correct these significant ministerial errors by revising the rates for OMSA, Pertama, and all other producers and/or exporters.⁸

For a complete discussion of the alleged ministerial errors, see the Preliminary Ministerial Error Memorandum.

Amended Preliminary Negative Determination of Critical Circumstances

Because we have revised the rates calculated for OMSA, Pertama, and all other producers and/or exporters, we have also amended our preliminary analysis of critical circumstances. In accordance with section 733(e) of the Act and 19 CFR 351.206, Commerce preliminarily finds that critical circumstances do not exist for OMSA, Pertama, and all other companies not individually examined. For a full description of the results of Commerce’s critical circumstances analysis, see the Ministerial Error Memorandum.

Amended Preliminary Determination

As a result of correcting the significant ministerial errors, Commerce determines the following estimated weighted-average dumping margins exist:

¹ See *Ferrosilicon from Malaysia: Preliminary Affirmative Determination of Sales at Less than Fair Value, Preliminary Negative Determination of Critical Circumstances, Postponement of Final Determination, and Extension of Provisional Measures*, 89 FR 88010 (November 6, 2024) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum.

² The petitioners are CC Metals and Alloys, LLC and Ferrolobe USA, TNC.

³ See Petitioners’ Letter, “Ministerial Error Allegation Pertaining to OMSA in the Preliminary

Determination,” dated November 8, 2024 (Petitioners’ OMSA Ministerial Error Allegation); see also “Ministerial Error Allegation Pertaining to Pertama in the Preliminary Determination,” dated November 12, 2024 (Petitioners’ Pertama Ministerial Error Allegation).

⁴ See section 735(e) of the Tariff Act of 1930, as amended (the Act); see also 19 CFR 351.224(f).

⁵ See 19 CFR 351.224(g).

⁶ See Petitioners’ OMSA Ministerial Error Allegation; see also Commerce’s Memorandum,

“Preliminary Analysis Memorandum for OM Materials Sarawak Sdn. Bhd,” dated October 31, 2024.

⁷ See Petitioners’ Pertama Ministerial Error Allegation; see also Commerce’s Memorandum, “Preliminary Analysis Memorandum for Pertama Ferroalloys Sdn. Bhd,” dated October 31, 2024.

⁸ See Memorandum, “Analysis of Ministerial Error Allegations,” dated concurrently with, and hereby adopted by, this notice (Ministerial Error Memorandum).

Exporter/producer	Weighted-average dumping margin (percent)	Cash deposit rate (adjusted for subsidy offsets(s)) (percent)
OM Sarawak Sdn. Bhd	19.48	18.80
Pertama Ferroalloys Sdn. Bhd	38.19	37.91
All Others	27.73	27.17

Disclosure

We intend to disclose the calculations performed for this amended preliminary determination to parties within five days after 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.

Amended Cash Deposits and Suspension of Liquidation

The collection of cash deposits and suspension of liquidation will be revised according to the rates calculated in this amended preliminary determination, in accordance with section 733(d) of the Act. Because this amended preliminary determination results in increased cash deposit rates, these rates will be effective on the date of publication of this notice in the **Federal Register**. These suspension of liquidation instructions will remain in effect until further notice.

Notification of U.S. International Trade Commission

In accordance with section 703(f) of the Act, we intend to notify the U.S. International Trade Commission of our amended preliminary determination.

Notification to Interested Parties

This notice is issued and published pursuant to sections 703(f) and 777(i) of the Act and 19 CFR 351.205(c).

Dated: December 5, 2024.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2024–29114 Filed 12–10–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–523–810]

Polyethylene Terephthalate Resin From the Sultanate of Oman: Final Results 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) determines that

the sole producer/exporter under administrative review, OCTAL SAOC FZC (OCTAL), did not sell subject merchandise at less than normal value during the period of review (POR), May 1, 2022, through April 30, 2023.

DATES: Applicable December 11, 2024.

FOR FURTHER INFORMATION CONTACT: Jeff Pedersen, 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) 482–2769.

SUPPLEMENTARY INFORMATION:

Background

On June 5, 2024, Commerce published the *Preliminary Results* in the **Federal Register**.¹ For a complete description of the events that occurred since Commerce issued the *Preliminary Results*, see the Issues and Decision Memorandum.² Commerce conducted this administrative review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).

Scope of the Order³

The merchandise covered the *Order* is polyethylene terephthalate resin (PET resin) from the Sultanate of Oman (Oman). For a full description of the scope of the *Order*, see the Issues and Decision Memorandum.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs that interested parties filed in this administrative review are listed in the in the appendix to this notice and addressed in the Issues and Decision Memorandum. The Issues and

¹ See *Polyethylene Terephthalate Resin from the Sultanate of Oman: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review; 2022–2023*, 89 FR 48153 (June 5, 2024) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

² See Memorandum, “Issues and Decision Memorandum for the Final Results of the 2022–2023 Administrative Review of the Antidumping Duty Order on Polyethylene Terephthalate Resin From the Sultanate of Oman,” dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

³ See *Certain Polyethylene Terephthalate Resin from Canada, the People’s Republic of China, India, and the Sultanate of Oman: Amended Final Affirmative Antidumping Determination (Sultanate of Oman) and Antidumping Duty Orders*, 81 FR 27979 (May 6, 2016) (*Order*).

Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance’s Antidumping and Countervailing Duty Centralized Electronic Services 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 assessed directly at <https://access.trade.gov/public/FRNoticesListLayout.aspx>.

Changes Since the Preliminary Results

Based on our review of the record and interested parties’ comments on the *Preliminary Results*, we revised certain language in the program that we used to calculate OCTAL’s dumping margin to accurately reclassify certain sales as constructed export price sales. For a discussion of these changes, see the Issues and Decision Memorandum.

Final Results of Review

Commerce determines that the following estimated weighted-average dumping margin exists for the period, May 1, 2022, through April 30, 2023:

Producer or exporter	Weighted-average dumping margin (percent)
OCTAL SAOC FZC	0.00

Disclosure

Commerce intends to disclose its calculations and analysis performed in these final results of review to parties to the proceeding within five days after the date of any public announcement of the final results or, if there is no public announcement of the final results, within five days after the date of publication of this notice in the **Federal Register** in accordance with 19 CFR 351.224(b).

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Act and 19 CFR 351.212(b)(1), Commerce has determined the antidumping duty assessment rate on all appropriate entries of subject merchandise during the POR. Because OCTAL’s *ad valorem* weighted-average dumping margin is zero, we will instruct U.S. Customs and Border

Protection (CBP) to liquidate the appropriate entries without regard to antidumping duties.

Pursuant to a refinement to Commerce's assessment practice, where sales of subject merchandise that was produced or exported by an individually examined respondent were not reported in the U.S. sales data submitted by the respondent, but the merchandise was entered for consumption into the United States during the POR, we will instruct CBP to liquidate any entries of such merchandise at the all-others rate (*i.e.*, 7.62 percent) ⁴ if there is no rate for the intermediate company(ies) involved in the transaction.⁵

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of this notice of the final results of review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.*, within 90 days of publication).

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of this notice in the **Federal Register**, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for OCTAL will be zero percent; (2) for merchandise exported by a company that is not under review and the company has a company-specific cash deposit rate from a completed segment of this proceeding, the cash deposit rate will continue to be the company-specific cash deposit rate from a completed segment of the proceeding that is currently applicable to the company; (3) if the exporter of the subject merchandise was not covered by this review or a previously completed segment of this proceeding, but the producer of the subject merchandise was covered, then the cash deposit rate will be equal to the company-specific cash deposit rate from a completed segment of this proceeding that is currently applicable to the producer of the subject merchandise; and (4) if neither the exporter nor the producer of the subject merchandise was covered by this review or a previously completed

segment of this proceeding, then the cash deposit rate will be 7.62 percent *ad valorem*,⁶ the all-others rate established in the less-than-fair-value investigation. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Administrative Protective Order (APO)

This notice serves as the only reminder to parties subject to an APO of their responsibility concerning the return or destruction of proprietary information disclosed under the 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 the terms of an APO is a violation subject to sanction.

Notification to Interested Parties

We are issuing and publishing these final results of review and this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(5).

Dated: December 5, 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. Discussion of the Issues
 - Comment 1: The Appropriate Date of Sale for Spot Sales
 - Comment 2: Whether Commerce Should Adjust a U.S. Selling Expense
 - Comment 3: Whether Commerce Made an Error in the Preliminary Calculations
- V. Recommendation

[FR Doc. 2024–29111 Filed 12–10–24; 8:45 am]

BILLING CODE 3510–DS–P

⁶ See Order, 81 FR 27982.

DEPARTMENT OF COMMERCE

International Trade Administration

[C–552–824]

Laminated Woven Sacks From the Socialist Republic of Vietnam: Final Results of the Expedited First Sunset Review of the Countervailing Duty Order

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 Laminated Woven Sacks (LWS) from the Socialist Republic of Vietnam (Vietnam) would be likely to lead to continuation or recurrence of countervailing subsidies at the levels indicated in the “Final Results of Sunset Review” section of this notice.

DATES: Applicable December 10, 2024.

FOR FURTHER INFORMATION CONTACT: Luke Caruso, 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) 482–2081.

SUPPLEMENTARY INFORMATION:

Background

On June 4, 2019, Commerce published in the **Federal Register** the CVD order on LWS from Vietnam.¹ On May 1, 2024, Commerce initiated the first sunset review of the Order, pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).² On May 10, 2024, Commerce received a timely notice of intent to participate from Polytex Fiber LLC and ProAmpac Holdings Inc. (collectively, the domestic interested parties) within the 15-day deadline specified in 19 CFR 351.218(d)(1)(i).³ The domestic interested parties claimed interested party status under sections 771(9)(E) and (F) of the Act.

On May 30, 2024, Commerce received an adequate substantive response to the *Initiation Notice* from the domestic interested parties within the 30-day deadline specified in 19 CFR

¹ See *Laminated Woven Sacks from the Socialist Republic of Vietnam: Antidumping Duty and Countervailing Duty Orders*, 84 FR 25753 (June 4, 2019) (Order).

² See *Initiation of Five-Year (Sunset) Reviews*, 89 FR 35073 (May 1, 2024) (*Initiation Notice*).

³ See Domestic Interested Parties' Letter, “Domestic Interested Party Notice Of Intent To Participate,” dated May 10, 2024.

⁴ See Order, 81 FR 27982.

⁵ For a full discussion of this practice, see *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).

351.218(d)(3)(i).⁴ We received no substantive responses from any other interested parties, including the Government of Vietnam, and no interested party requested a hearing. On June 21, 2024, Commerce notified the U.S. International Trade Commission that it did not receive an adequate substantive response from respondent interested parties, and that Commerce would conduct an expedited (120-day) sunset review of the *Order*,⁵ pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(B)–(C).

Scope of the Order

The product covered by the *Order* is LWS. For a complete description of the scope of the *Order*, see the Issues and Decision Memorandum.⁶

Analysis of Comments Received

All issues raised in this sunset review are addressed in the accompanying Issues and Decision Memorandum. A list of the issues discussed in the Issues and Decision Memorandum is attached as the 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/FRNotices/ListLayout.aspx>.

Final Results of Sunset Review

Pursuant to sections 751(c)(1) and 752(b) of the Act, Commerce determines that revocation of the *Order* would likely lead to continuation or recurrence of countervailable subsidies at the following net countervailable subsidy rates:

Company	Subsidy Rate (percent <i>ad valorem</i>)
Duong Vinh Hoa Packaging Company Limited	3.02
Xinsheng Plastic Industry Co., Ltd	198.87
All Others	3.02

⁴ See Domestic Interested Parties’ Letter, “Domestic Interested Party Substantive Response,” dated May 30, 2024 (Substantive Response).
⁵ See Commerce’s Letter, “Sunset Reviews Initiated on May 1, 2024,” dated June 21, 2024.
⁶ See Memorandum, “Decision Memorandum for the Final Results of the Expedited First Sunset Review of the Countervailing Duty Order on Laminated Woven Sacks from Vietnam,” dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

Administrative Protective Order

This notice serves as the only 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). Timely written notification of the 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

Commerce is issuing and publishing these final results and notice in accordance with sections 751(c), 752(b), and 777(i)(1) of the Act and 19 CFR 351.218.

Dated: September 5, 2024.
Abdelali Elouaradia,
Deputy Assistant Secretary for Enforcement and Compliance.

Editorial Note: This document was received for publication by the Office of the Federal Register on December 6, 2024.

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
 - 2. Net Countervailable Subsidy Rates Likely to Prevail
 - 3. Nature of the Subsidies
- VII. Final Results of Sunset Review
- VIII. Recommendation

[FR Doc. 2024–29055 Filed 12–10–24; 8:45 am]
BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–552–823]

Laminated Woven Sacks From the Socialist Republic of Vietnam: Final Results of 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 Laminated Woven Sacks (LWS) from the Socialist Republic of Vietnam (Vietnam) would likely lead to continuation or recurrence of dumping

at the levels indicated in the “Final Results of the Sunset Review” section of this notice.

DATES: Applicable December 11, 2024.
FOR FURTHER INFORMATION CONTACT: Luke Caruso, 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) 482–2081.

SUPPLEMENTARY INFORMATION:

Background

After Commerce initiated the sunset review¹ of the *Order*,² pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act), domestic interested parties³ timely submitted complete notices of intent to participate in,⁴ and adequate substantive responses regarding, the review.⁵ The domestic interested parties claimed domestic interested party status under section 771(9)(C) of the Act as producers of the domestic like product in the United States.⁶ Commerce did not receive a substantive response from any respondent interested party, nor was a hearing requested. On June 21, 2024, Commerce notified the U.S. International Trade Commission that it did not receive adequate substantive responses from respondent interested parties.⁷ 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 merchandise covered by the *Order* is laminated woven sacks.. For a complete description of the scope of the *Order*, see the Issues and Decision Memorandum.⁸

¹ See *Initiation of Five-Year (Sunset) Reviews*, 89 FR 35073 (May 1, 2024).
² See *Laminated Woven Sacks from the Socialist Republic of Vietnam: Antidumping Duty and Countervailing Duty Orders*, 84 FR 753 (June 4, 2019) (*Order*).
³ The domestic interested parties are Polytex Fiber LLC and ProAmpac Holdings Inc.
⁴ See Domestic Interested Parties’ Letter, “Domestic Interested Party Notice Of Intent To Participate,” dated May 10, 2024.
⁵ See Domestic Interested Parties’ Letter, “Domestic Interested Party Substantive Response,” dated May 30, 2024 (Substantive Response).
⁶ *Id.*
⁷ See Commerce’s Letter, “Sunset Reviews initiated on May 1, 2023,” dated June 21, 2024.
⁸ See Memorandum, “Decision Memorandum for the Final Results of the First Expedited Sunset Review of the Antidumping Duty Order on Laminated Woven Sacks from the Socialist Republic of Vietnam,” dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

Analysis of Comments Received

A complete discussion of all issues raised in this sunset review is contained in the accompanying Issues and Decision Memorandum.⁹ 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 directly accessed at <https://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 likely lead to continuation or recurrence of dumping, and that the magnitude of the dumping margins likely to prevail are weighted-average margins up to a weighted-average margin of up to 292.61 percent.

Administrative Protective Order

This notice serves as the only reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a). 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 of sunset review in accordance with sections 751(c), 752(c), and 777(i)(1) of the Act, and 19 CFR 351.218(e)(1)(ii)(C)(2) and 19 CFR 351.221(c)(5)(iii).

Dated: September 5, 2024.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Editorial Note: This document was received for publication by the Office of the Federal Register on December 6, 2024.

⁹ *Id.*

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 of Dumping Likely to Prevail
- VII. Final Results of Sunset Review
- VIII. Recommendation

[FR Doc. 2024–29054 Filed 12–10–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–823–816]

Carbon and Alloy Steel Wire Rod From Ukraine: 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 carbon and alloy steel wire rod (wire rod) from Ukraine for the period of review (POR) March 1, 2023 through February 29, 2024.

DATES: Applicable December 11, 2024.

FOR FURTHER INFORMATION CONTACT: Brittany Bauer, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3860.

SUPPLEMENTARY INFORMATION:

Background

On March 14, 2018, Commerce published in the *Federal Register* the AD order on wire rod from Ukraine.¹ On March 1, 2024, Commerce published in the *Federal Register* a notice of opportunity to request an administrative review of the *Order*.² On April 1, 2024, Commercial Metals Company and Nucor Corporation (collectively, the petitioners) submitted a timely request

¹ See *Carbon and Alloy Steel Wire Rod from the Republic of South Africa and Ukraine: Antidumping Duty Orders*, 83 FR 11175 (March 14, 2018) (*Order*).

² See *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review and Join Annual Inquiry Service List*, 89 FR 15157 (March 1, 2024).

that Commerce conduct an administrative review of the *Order*.³ On May 8, 2024, Commerce published in the *Federal Register* its notice of initiation of an administrative review of the *Order*, 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

This review covers subject merchandise exported and/or produced by the following six companies: (1) ArcelorMittal Steel Kryvyi Rih; (2) Public Joint Stock Company Yenakieve Iron and Steel Works; (3) PrJSC Electrometallurgical Works Dnepropetsstal; (4) PJSC Dneprovsky Iron & Steel Integrated Works; (5) Metinvest Holding LLC; and (6) Variant Agro Build Ltd.⁵ On May 10, 2024, we placed on the record U.S. Customs and Border Protection (CBP) data for entries of wire rod from Ukraine during the POR, showing no reviewable POR entries for any company listed in the *Initiation Notice*.

On November 6, 2024, Commerce notified all interested parties of its intent to rescind the instant review because there were no reviewable, suspended entries of subject merchandise by any of the companies subject to this review during the POR, and we invited interested parties to comment.⁶ We did not receive any comments.

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.⁷ Normally, upon completion of an administrative review, the suspended entries are liquidated at the AD assessment rate calculated for the review period.⁸ 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

³ See Petitioners' Letter, "Request for Administrative Review," dated April 1, 2024.

⁴ See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 89 FR 38867 (May 8, 2024) (*Initiation Notice*).

⁵ *Id.*, 89 FR 38871.

⁶ See Memorandum, "Notice of Intent to Rescind Review," dated November 6, 2024.

⁷ 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 4154 (January 24, 2023).

⁸ See 19 CFR 351.212(b)(1).

calculated for the review period.⁹ As noted above, there were no entries of subject merchandise for the companies subject to this review 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 of wire rod from Ukraine. Antidumping duties shall be assessed at rates equal to the cash deposit rate of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). Commerce intends to issue appropriate assessment instructions to CBP no earlier than 35 days after the date of publication of this rescission notice in the **Federal Register**.

Administrative Protective Order (APO)

This notice also serves as the only reminder to parties subject to 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 sanctionable violation.

Notification to Interested Parties

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.213(d)(4).

Dated: December 5, 2024.

Scot Fullerton,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2024–29124 Filed 12–10–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Environmental Policy Act; Proposed Implementing Procedures and Categorical Exclusions

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice; request for comments.

SUMMARY: Federal agencies are required to develop procedures to implement the National Environmental Policy Act (NEPA) and the Council on Environmental Quality (CEQ) regulations implementing NEPA. Consistent with these requirements, the National Institute of Standards and Technology (NIST) is proposing new NEPA implementing procedures (NEPA Procedures), including the establishment of new categorical exclusions (CEs) as part of its NEPA Procedures. CEs are categories of actions that an agency has determined normally do not have a significant effect on the human environment, individually or in the aggregate. CEs are a form of review that agencies use to comply with NEPA for proposed actions that normally have no or minimal environmental effects. NIST requests the views of the public on its draft NEPA Procedures as well as its substantiation record for the proposed CEs.

DATES: Submit written comments on or before January 10, 2025.

ADDRESSES: The draft NEPA Procedures and CE substantiation record are available for review at <https://www.nist.gov/chips/national-environmental-policy-act-nepa>. Submit all electronic public comments via email to CHIPSNEPA@chips.gov citing “NEPA Procedures” in the subject line. NIST will accept comments in attached Word or PDF formats or within the body of the email.

Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NIST. All comments received are a part of the public record; commenters should not include personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information. NIST will accept anonymous comments. The most helpful comments include a specific recommendation, explain the reason for any recommended change, and provide supporting information. NIST will consider all relevant comments received on or before the closing date.

FOR FURTHER INFORMATION CONTACT: David Frenkel, NIST, telephone number 240–204–1960, email David.Frenkel@chips.gov.

SUPPLEMENTARY INFORMATION:

Legal Framework

The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, requires Federal agencies to consider the environmental effects of their proposed actions in their decision-

making processes and inform and engage the public in that process. Section 101(a) of NEPA sets forth a national policy to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which humans and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans. 42 U.S.C. 4331(a). Section 102 of NEPA directs agencies to interpret and administer Federal policies, regulations and laws consistent with NEPA’s policies. 42 U.S.C. 4332.

NEPA also created the Council on Environmental Quality (CEQ), which has issued regulations implementing NEPA, 40 CFR parts 1500 through 1508 (CEQ regulations). CEQ also has issued numerous guidance documents to facilitate agency implementation of NEPA. See CEQ, CEQ Guidance Documents, <https://ceq.doe.gov/guidance/guidance.html>.

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 categorical exclusion (CE). 40 CFR 1501.3. If a proposed action is likely to have significant environmental effects, the agency must prepare an EIS and document its decision in a record of decision. 40 CFR 1501.3(c)(3), part 1502, 1505.2. If the proposed action is not likely to have significant environmental effects or the effects are unknown, the agency may instead prepare an EA, which is a concise public document used to support agency decision making. 40 CFR 1501.3(c)(2), 1501.5, 1508.1(j). After completing the analysis in the EA, the agency may conclude that the action will have no significant effects and document that conclusion in a finding of no significant impact, or conclude that the action is likely to have significant effects and therefore requires preparation of an EIS. 40 CFR 1501.6(a), 1508.1(j).

Under NEPA and the CEQ regulations, a Federal agency may establish CEs—categories of actions that the agency has determined normally do not have a significant effect on the human environment, individually or in the aggregate—in its agency NEPA procedures. 42 U.S.C. 4336(e)(1); 40 CFR 1501.4(a), 1507.3(c)(8), 1508.1(e). If an agency determines that a CE established in its agency NEPA procedures covers a proposed action, it then evaluates the proposed action for

⁹ See 19 CFR 351.213(d)(3).

extraordinary circumstances, which are factors or circumstances that indicate a normally categorically excluded action may have a significant effect. 40 CFR 1501.4(b), 1508.1(o). If an extraordinary circumstance exists, the agency nevertheless may apply the CE if it conducts an analysis and determines that the proposed action does not in fact have the potential to result in significant effects notwithstanding the extraordinary circumstance, or the agency modifies the action to avoid the potential to result in significant effects. 40 CFR 1501.4(b)(1). In these cases, the agency must document such determination. *Id.* If the agency cannot categorically exclude the proposed action, it will prepare an EA or EIS, as appropriate. 40 CFR 1501.4(b)(2).

On May 1, 2024, CEQ finalized its “Bipartisan Permitting Reform Implementation Rule” to revise its regulations for implementing the procedural provisions of NEPA, including the amendments to NEPA in the Fiscal Responsibility Act. Under the revised regulations, each Federal agency must, by July 1, 2025, develop procedures to implement NEPA and the CEQ regulations, facilitate efficient decision making, and ensure that the agencies make decisions in accordance with the policies and requirements of NEPA. 40 CFR 1507.3. As part of their procedures, agencies must establish CEs and identify extraordinary circumstances. 40 CFR 1507.3(c)(8). When establishing new or revising existing CEs in agency NEPA procedures, agencies must substantiate the proposed new or revised CEs with sufficient information to conclude that each category of actions does not have a significant effect, individually or in the aggregate, on the human environment, and provide this substantiation in a written record that is made publicly available as part of the notice and comment process for developing or revising proposed agency procedures. *See* 40 CFR 1507.3(b), (c)(8). In developing NEPA procedures, agencies must consult with CEQ and provide an opportunity for public review. 40 CFR 1507.3(b)(1), (2). Before publishing final procedures, agencies must receive a determination from CEQ that the procedures conform with NEPA and the CEQ regulations. *See* 40 CFR 1507.3(b)(2).

Background

Founded in 1901, NIST’s mission is to promote U.S. innovation and industrial competitiveness by advancing measurement science, standards, and technology in ways that enhance economic security and improve our

quality of life. Historically, NIST has carried out this mission through operation of the NIST Laboratories, which conduct world-class research, often in close collaboration with industry, that advances the nation’s technology infrastructure and helps U.S. companies continually improve products and services.

In August 2022, Congress passed the CHIPS Act of 2022, which amended title XCIX of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, 15 U.S.C. 4651 *et seq.*, also known as the Creating Helpful Incentives to Produce Semiconductors (CHIPS) for America Act. The law provides the Department of Commerce with \$50 billion for a suite of programs to strengthen and revitalize the U.S. position in semiconductor research, development, and manufacturing. The CHIPS for America program encompasses two offices within NIST responsible for implementing the law: the CHIPS Research and Development Office is investing \$11 billion into developing a robust domestic semiconductor R&D ecosystem, while the CHIPS Program Office is dedicating \$39 billion to provide incentives for investment in semiconductor facilities and equipment in the United States. NIST is uniquely positioned to successfully administer the CHIPS for America program because of the bureau’s strong relationships with U.S. industries, its deep understanding of the semiconductor ecosystem, and its reputation as fair and trustworthy.

NEPA may apply to activities conducted by NIST, including on its campuses in Gaithersburg, MD, and Boulder, CO, as well as to activities for which NIST provides financial assistance. NIST’s NEPA Procedures are intended to make the NEPA process more useful to both NIST and the public and will serve as a repository for guidance and resources to aid NIST in implementation of NEPA.

As part of its NEPA Procedures, NIST is proposing 18 new CEs and has prepared a substantiation record to support establishment of each CE. The proposed CEs are supported by long-standing CEs and substantiation records that have been developed by other Federal agencies through processes consistent with NEPA regulatory requirements and CEQ guidance on the establishment of CEs. NIST identified existing CEs established by other federal agencies that are sufficiently described in supporting substantiation records to demonstrate that the actions covered by these existing CEs are similar in nature, scope, and impact on the human

environment to actions performed by NIST. NIST also reviewed and analyzed other past actions by NIST and other federal agencies, including supporting NEPA documentation, to develop the proposed CEs. The past actions were evaluated to demonstrate that the actions that would be covered by NIST’s proposed CEs normally do not have a substantial effect on the human environment, individually or in the aggregate. For a detailed discussion of and substantiation for each proposed CE, please refer to the substantiation record available at <https://www.nist.gov/chips/national-environmental-policy-act-nepa>.

In this notice, NIST is requesting public comment on its draft NEPA Procedures, including on the 18 new CEs proposed as part of those Procedures, and on the substantiation record supporting those new CEs. To facilitate public comment, NIST is reproducing those 18 proposed CEs in this Notice. Additionally, the Building CHIPS in America Act recently established a number of CEs for use by NIST, which are also reproduced below. The Procedures include an Appendix A that lists all CEs available for use by NIST. NIST has consulted with CEQ on its proposal and is seeking input from the public.

A. Proposed New Categorical Exclusions

I. Administrative Activities

I–1. Preparation, modification, and issuance of policy directives, rules, regulations, procedures, guidelines, guidance documents, bulletins, and informational publications that are of an administrative, financial, legal, technical, or procedural nature, for which the environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will be, in whole or part, subject later to the NEPA process, either collectively or on a case-by-case basis.

I–2. Planning, educational, informational, or advisory activities provided to other agencies, public and private entities, visitors, individuals, or the public, including training exercises and simulations conducted under appropriately controlled conditions and in accordance with all applicable laws, regulations, and requirements.

I–3. Preparation and dissemination of scientific results, studies, surveys, audits, reports, plans, papers, recommendations, and technical advice.

I–4. Technical assistance to other Federal, Tribal, State, and local agencies or the public.

I–5. Contracts, collaborative research agreements, cooperative research and development agreements, interagency agreements, and other agreements that do not concern environmental matters or where the environmental effects are negligible.

II. Operations

II–1. Routine procurement, use, storage, transportation, and disposal of non-hazardous goods and services in support of administrative, operational, or maintenance activities in accordance with Executive Orders and Federal procurement guidelines. Examples include office supplies and furniture; equipment; mobile assets (*i.e.*, vehicles, vessels, aircraft); utility services; and deployable emergency response supplies and equipment.

II–2. Routine use of hazardous materials (including procurement, transportation, distribution, and storage of such materials) and reuse, recycling, and disposal of solid, medical, radiological, or hazardous waste in a manner that is consistent with all applicable laws, regulations, and requirements. Examples include use of chemicals for laboratory applications; refueling of storage tanks; temporary storage and disposal of solid waste; disposal of waste through manufacturer return and recycling programs; and hazardous waste minimization activities, including source reduction activities and recycling.

II–3. Maintenance of facilities, equipment, and grounds. Examples include interior utility work, road maintenance, window washing, lawn mowing, landscaping, weed management/maintenance, trash collecting, facility cleaning, and snow removal.

III. Facility Modernization

III–1. Internal modifications, renovations, or additions (*e.g.*, computer facilities, relocating interior walls) to structures or buildings that do not result in a change in the functional use of the property.

* III–2. Exterior renovation, addition, repair, alteration, safety and environmental improvements, and demolition projects affecting buildings, roads, grounds, equipment, and other facilities, including subsequent disposal of debris, which may be contaminated with hazardous materials, lead, or asbestos. Hazardous materials must be disposed of at approved sites in accordance with all applicable laws, regulations, and requirements. These actions do not result in a significant change in the expected useful life, design capacity, or function of the

facility and during which operations may be suspended and then resumed, and they do not include rebuilding or modifying substantial portions of a facility (such as replacing a reactor vessel). Examples include the following:

- (a) Painting, roofing, siding, or alterations to an existing building;
- (b) Adding a small storage shed to an existing building;
- (c) Retrofitting for energy and water conservation and efficiency, including weatherization, installation of timers on hot water heaters, installation of energy efficient lighting, and installation of low flow plumbing fixtures.
- (d) Closing and demolishing a building not eligible for listing under the National Register of Historic Places; or

(e) Replacement/upgrade of control valves, in-core monitoring devices, facility air filtration systems, or substation transformers or capacitors; addition of structural bracing to meet earthquake standards and/or sustain high wind loading; and replacement of aboveground or belowground tanks and related piping, provided that there is no evidence of leakage, based on testing in accordance with applicable requirements (such as 40 CFR 265, “Interim Status Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities” and 40 CFR 280, “Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks”).

(f) 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); power storage (such as flywheels and batteries, generally less than 10 megawatt equivalent); 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.

* III–3. Minor improvements to existing steam plants and cooling water systems (including, but not limited to, modifications of existing cooling towers and ponds), provided that the improvements would not:

- (a) Create new sources of water or involve new receiving waters;
- (b) Have the potential to significantly alter water withdrawal rates;
- (c) Exceed the permitted temperature of discharged water; or
- (d) Increase introductions of, or involve new introductions of, hazardous substances, pollutants, contaminants, or Comprehensive Environmental Response, Compensation, and Liability Act-excluded (CERCLA) petroleum and natural gas products.

* III–4. Installation or relocation and operation of machinery and equipment (including, but not limited to, laboratory equipment, electronic hardware, manufacturing machinery, maintenance equipment, and health and safety equipment), provided that uses of the installed or relocated items are consistent with the general missions of the receiving structure. Covered actions include modifications to an existing building, within or contiguous to a previously disturbed or developed area, that are necessary for equipment installation and relocation. Such modifications would not appreciably increase the footprint or height of the existing building or have the potential to cause significant changes to the type and magnitude of environmental impacts.

IV. Real Property

* IV–1. Acquisition or use of existing facilities or portions thereof by purchase, lease, or use agreement where use or operation will remain unchanged. Examples include acquiring office space through lease, purchase, or use agreement, and acquisition of laboratory space through lease, purchase, or use agreement.

* IV–2. Decisions and actions to close facilities, decommission equipment, or temporarily discontinue use of facilities or equipment, where the facility or equipment, including office equipment, telecommunications equipment, and computer equipment, is not used to prevent or control environmental impacts.

V. Research

* V–1. Proposed new and recurring activities and operations conducted in laboratories and facilities where research practices and safeguards (including but not limited to environmental permits for operation) prevent environmental impacts, would

be consistent with previously established safety levels, and would not result in a change in use of the facility. Examples include types of research, development, testing, and evaluation activities, and laboratory operations conducted within existing facilities designed to support research and development activities. Not included in this category are demonstration actions, meaning actions that are undertaken at a scale to show whether a technology would be viable on a larger scale and suitable for commercial deployment.

* V–2. Outdoor research activities conducted in compliance with all applicable laws, regulations, and requirements. Examples include types of research, development, testing, and evaluation activities conducted outdoors where no new ground disturbance occurs and no sensitive resources (e.g., threatened or endangered species, archaeological sites, Tribal resources, wetlands, and waterbodies) are present, such as radar testing, radio noise measurements, and public safety communications research.

VI. Facility Construction

* VI–1. New construction or improvement of buildings or experimental equipment (e.g., trailers, prefabricated buildings, and test slabs) on previously disturbed ground, with no more than 1 acre (0.4 hectare) of ground disturbance in previously disturbed areas, where the proposed facility use is generally compatible with the surrounding land use and applicable zoning standards and will not require additional support infrastructure. Such facilities could be used for indoor small-scale research and development projects and small-scale pilot projects using nanoscale materials in accordance with applicable requirements (such as engineering, worker safety, procedural, and administrative regulations) necessary to ensure the containment of any hazardous materials.

VII. Federal Assistance

VII–1. Actions related to financial assistance administration performed at any stage during the financial assistance lifecycle, such as the development and issuance of guidance; announcements of availability of funds; project reviews for program eligibility; provision of technical assistance; conducting inspections, financial audits, and monitoring activities; development of information technology systems for financial assistance management; close-out activities; and actions taken in situations where an awardee is in non-conformance with program

requirements, such as disallowances, recoupment of funds, and debarment.

CEs labeled with an asterisk (*) require documentation in accordance with NIST's NEPA Procedures.

B. Categorical Exclusions Established by 15 U.S.C. 4652(d)(1)

Each of the following categorical exclusions was established for the National Institute of Standards and Technology with respect to a covered activity, defined as any activity relating to the construction, expansion, or modernization of a facility, the investment in which is eligible for Federal financial assistance under 15 U.S.C. 4652 or 4656, and is available for use by the Secretary:

A. Categorical exclusion 17.04.d (relating to the acquisition of machinery and equipment) in the document entitled 'EDA Program to Implement the National Environmental Policy Act of 1969 and Other Federal Environmental Mandates As Required' (Directive No. 17.02–2; effective date October 14, 1992).

- *EDA (d). Acquisition of machinery and equipment (M&E) unless these require applications for or amendments to existing air, water or solid waste permits.*

B. Categorical exclusion A9 in Appendix A to subpart D of part 1021 of title 10, Code of Federal Regulations, or any successor regulation.

- *DOE A9. Information gathering (including, but not limited to, literature surveys, inventories, site visits, and audits), data analysis (including, but not limited to, computer modeling), document preparation (including, but not limited to, conceptual design, feasibility studies, and analytical energy supply and demand studies), and information dissemination (including, but not limited to, document publication and distribution, and classroom training and informational programs), but not including site characterization or environmental monitoring. (See also B3.1 of appendix B to this subpart.)*

C. Categorical exclusions B1.24, B1.31, B2.5, and B5.1 in Appendix B to subpart D of part 1021 of title 10, Code of Federal Regulations, or any successor regulation.

- *DOE B1.24. Transfer, lease, disposition, or acquisition of interests in personal property (including, but not limited to, equipment and materials) or real property (including, but not limited to, permanent structures and land), provided that under reasonably foreseeable uses (1) there would be no potential for release of substances at a level, or in a form, that could pose a*

threat to public health or the environment and (2) the covered actions would not have the potential to cause a significant change in impacts from before the transfer, lease, disposition, or acquisition of interests.

- *DOE B1.31. Installation or relocation and operation of machinery and equipment (including, but not limited to, laboratory equipment, electronic hardware, manufacturing machinery, maintenance equipment, and health and safety equipment), provided that uses of the installed or relocated items are consistent with the general missions of the receiving structure. Covered actions include modifications to an existing building, within or contiguous to a previously disturbed or developed area, that are necessary for equipment installation and relocation. Such modifications would not appreciably increase the footprint or height of the existing building or have the potential to cause significant changes to the type and magnitude of environmental impacts.*

- *DOE B2.5. Safety and environmental improvements of a facility (including, but not limited to, replacement and upgrade of facility components) that do not result in a significant change in the expected useful life, design capacity, or function of the facility and during which operations may be suspended and then resumed. Improvements include, but are not limited to, replacement/upgrade of control valves, in-core monitoring devices, facility air filtration systems, or substation transformers or capacitors; addition of structural bracing to meet earthquake standards and/or sustain high wind loading; and replacement of aboveground or belowground tanks and related piping, provided that there is no evidence of leakage, based on testing in accordance with applicable requirements (such as 40 CFR part 265, "Interim Status Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities" and 40 CFR part 280, "Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks"). These actions do not include rebuilding or modifying substantial portions of a facility (such as replacing a reactor vessel).*

- *DOE B5.1. (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); power storage (such as flywheels and batteries, generally less than 10 megawatt equivalent); 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.

D. The categorical exclusions described in paragraphs (4) and (13) of section 50.19(b) of title 24, Code of Federal Regulations, or any successor regulation.

- HUD a(4). Public services that will not have a physical impact or result in any physical changes, including but not limited to services concerned with employment, crime prevention, child care, health, drug abuse, education, counseling, energy conservation and welfare or recreational needs.

- HUD a(13). Operating costs including maintenance, security, operation, utilities, furnishings, equipment, supplies, staff training and recruitment and other incidental costs; however, in the case of equipment, compliance with § 50.4(b)(1) is required.

E. Categorical exclusion (c)(1) in Appendix B to part 651 of title 32, Code of Federal Regulations, or any successor regulation.

- Army (c)(1). Construction of an addition to an existing structure or new construction on a previously undisturbed site if the area to be disturbed has no more than 5.0

cumulative acres of new surface disturbance. This does not include construction of facilities for the transportation, distribution, use, storage, treatment, and disposal of solid waste, medical waste, and hazardous waste.

F. Categorical exclusions A2.3.8 and A2.3.14 in Appendix B to part 989 of title 32, Code of Federal Regulations, or any successor regulation.

- USAF A2.3.8. Performing interior and exterior construction within the 5-foot line of a building without changing the land use of the existing building.

- USAF A2.3.14. Installing on previously developed land, equipment that does not substantially alter land use (i.e., land use of more than one acre). This includes outgrants to private lessees for similar construction.

Extraordinary Circumstances

NIST has identified a list of extraordinary circumstances in its draft NEPA Procedures. If NIST determines that a CE is appropriate for a proposed action, NIST must also evaluate the proposed action for the presence of extraordinary circumstances. 40 CFR 1501.4(b). Extraordinary circumstances are situations for which NIST has determined that further NEPA analysis may be required because they are circumstances in which a categorically excluded action may have significant effects. The mere presence of one or more extraordinary circumstances does not preclude the use of a CE. A determination of whether an action that is categorically excluded requires additional evaluation because of extraordinary circumstances focuses on the action's potential effects and considers the significance of those effects in terms of the context (the potentially affected region, interests, and resources) and the intensity (the degree or severity of the effects) of the action. Before applying a CE, NIST must consider whether the proposed action involves one or more of the following extraordinary circumstances:

1. The action has potential to adversely affect human health or safety;

2. The action is located in or may affect an area with unique environmental characteristics, such as historic or cultural resources; park, recreation or refuge lands; wilderness areas; wild or scenic rivers; national natural landmarks; sole or principal drinking water aquifers; prime farmlands; wetlands (E.O. 11990); floodplains (E.O. 11988); national monuments; and other ecologically significant or critical areas;

3. The action may affect a species that is listed, or proposed to be listed, as

threatened or endangered under the Endangered Species Act (ESA), or is located in the habitat of such a species;

4. The action has the potential to affect properties that are listed or eligible for listing on the National Register of Historic Places;

5. The action has the potential to affect lands owned by or held in trust for a Federally recognized Tribe;

6. The action has the potential to restrict access to and ceremonial use of Indian sacred sites on Federal lands by Indian religious practitioners or significantly adversely affect the physical integrity of such sacred sites (E.O. 13007);

7. The action has the potential to have a disproportionate and adverse effect on communities with environmental justice concerns (E.O. 14096);

8. The action has the potential to violate a Federal, State, Tribal, or local law or requirement imposed for protection of the environment;

9. The action involves unresolved conflicts concerning alternative uses of available resources;

10. The action has highly uncertain and potentially significant environmental effects or involves unique or unknown environmental risks;

11. The action has the potential to establish a precedent for future action or represents a decision in principle about future actions with potentially significant environmental effects; or

12. The action has the potential for significant cumulative impacts when the proposed action is combined with other past, present and reasonably foreseeable future actions, even though the impacts of the proposed action may not be significant by themselves.

For CEs that NIST has adopted from other Federal agencies under Section 109 of NEPA, NIST will consider extraordinary circumstances in the manner described in the **Federal Register** notice announcing the adoption. This process may require considering extraordinary circumstances identified by the agency that developed the CE in that agency's NEPA implementing procedures.

If NIST determines that an extraordinary circumstance exists, NIST may nonetheless determine that a CE is appropriate for the proposed action if NIST conducts an analysis and determines that the proposed action does not in fact have the potential to result in significant effects notwithstanding the extraordinary circumstance or modifies the action to avoid the potential to result in significant effects. In such cases, NIST will document the determination and

make it publicly available on a NIST website or through other means.

Documenting the Use of a CE

Some activities, such as routine personnel actions or purchases of small amounts of supplies, may carry no risk of significant environmental effects, such that there is no benefit from preparing additional documentation when applying a CE to those activities. NIST must, however, prepare a separate document to evaluate the applicability of a CE in each of the following cases:

1. For any application of a CE designated by NIST as requiring documentation, as indicated by an asterisk in the list of proposed new CEs;
2. For any application of a CE adopted from another Federal agency under Section 109 of NEPA; and
3. For any case in which NIST determines that a CE is appropriate notwithstanding the existence of an extraordinary circumstance.

Such documentation must include the following:

- (a) a description of the proposed action;
- (b) the CE category number, title, and CE text that applies to the action;
- (c) a brief summary of the agency's rationale for determining that the proposed action is consistent with the terms of the CE, including a description of how the action complies with any limitations in the CE (e.g., surface disturbance limitations);
- (d) a brief summary of the agency's review of the extraordinary circumstances (or, where applicable, the extraordinary circumstances identified by the agency that developed a CE adopted by NIST under Section 109 of NEPA); and
- (e) where the agency has determined that one or more extraordinary circumstance exists, the rationale for the agency's determination that the proposed action does not in fact have the potential to result in significant effects notwithstanding the extraordinary circumstance, or a description of the modifications that NIST has made to the action to avoid the potential to result in significant effects.

The document may take the form of a memorandum, a completed form, or other similar document, so long as the above components are included. Before the action is implemented, NIST must sign and date the document to indicate that use of the CE is appropriate. NIST must keep the original, signed document as part of the record for the action.

Request for Comments

NIST requests comments from the public on its draft NEPA Procedures and its proposal to establish new CEs. The agency will consider input from the public and consult with CEQ for a conformity determination before finalizing its proposal.

Alicia Chambers,

NIST Executive Secretariat.

[FR Doc. 2024–29088 Filed 12–10–24; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XE524]

Endangered Species; File No. 28262

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

ACTION: Notice; withdrawal of application.

SUMMARY: Notice is hereby given that Kori Johnsen, 1792 Harrison Avenue, Melbourne, FL 32935, has withdrawn their application for a permit to conduct research on green (*Chelonia mydas*), hawksbill (*Eretmochelys imbricata*), and Kemp's ridley (*Lepidochelys kempii*) sea turtles.

ADDRESSES: The application and related documents are available for review upon written request via email to NMFS.Pr1Comments@noaa.gov.

FOR FURTHER INFORMATION CONTACT: Erin Markin, Ph.D., or Amy Hapeman, (301) 427–8401.

SUPPLEMENTARY INFORMATION: On September 9, 2024, notice was published in the **Federal Register** (89 FR 73069) that a request for a permit to conduct research on green, hawksbill, and Kemp's ridley sea turtles had been submitted by the above-named applicant. The applicant has withdrawn the application from further consideration.

Dated: December 5, 2024.

Julia M. Harrison,

*Chief, Permits and Conservation Division,
Office of Protected Resources, National
Marine Fisheries Service.*

[FR Doc. 2024–29063 Filed 12–10–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XE508]

Fisheries of the Gulf of Mexico; Southeast Data, Assessment, and Review (SEDAR); Public Meeting

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

ACTION: Notice of SEDAR 88 Red Tide Topical Working Group Webinar IV for Gulf of Mexico Red Grouper.

SUMMARY: The SEDAR 88 assessment of Gulf of Mexico red grouper will consist of a series of webinars. See

SUPPLEMENTARY INFORMATION.

DATES: The SEDAR 88 Red Tide Topical Working Group Webinar IV will be held January 15, 2025, from 11 a.m. to 1 p.m., Eastern.

ADDRESSES: The meeting will be held via webinar. The webinar is open to members of the public. Those interested in participating should contact Julie A. Neer at SEDAR (see **FOR FURTHER INFORMATION CONTACT**) to request an invitation providing webinar access information. Please request webinar invitations at least 24 hours in advance of each webinar.

SEDAR address: 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Julie A. Neer, SEDAR Coordinator; phone: (843) 571–4366; email: Julie.neer@safmc.net.

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a multi-step process including: (1) Data Workshop; (2) Assessment Process utilizing webinars; and (3) Review Workshop. The product of the Data Workshop is a data report that compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Assessment Process is a stock assessment report that describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research

and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, HMS Management Division, and Southeast Fisheries Science Center. Participants include data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and NGO's; International experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion in the webinar are as follows:

Participants will discuss red tide modeling work and provide recommendations for its use in the assessment of Gulf of Mexico red grouper.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **ADDRESSES**) at least 10 business days prior to each workshop.

Note: The times and sequence specified in this agenda are subject to change.

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

Dated: December 6, 2024.

Key Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2024–29118 Filed 12–10–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Coastal Ocean Program Grants Proposal Application Package

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on 08/16/2024 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: National Oceanic and Atmospheric Administration, Commerce.

Title: Coastal Ocean Program Grants Proposal Application Package.

OMB Control Number: 0648–0384.

Form Number(s): None.

Type of Request: Revision and Extension of a current information collection.

Number of Respondents: 1,400.

Average Hours Per Response: 30 minutes each for a project summary, data management template, milestone Gantt chart and current and pending federal support; 5.5 hours for a semi-annual report; 5 hours for an annual report, 10 hours for a CRP final report, 10.5 hours for the RSP final report.

Total Annual Burden Hours: 1,912.5.

Needs and Uses: This request is for a revision and extension of a currently approved information collection. The National Oceanic and Atmospheric Administration's Coastal Ocean Program (COP) now known as the Competitive Research Program (CRP) under the National Centers for Coastal Ocean Science provides direct financial assistance through grants and cooperative agreements for research supporting the management of coastal ecosystems and the NOAA Restore Science Program. The statutory authority for COP is Public Law 102–567 sec. 201 (Coastal Ocean Program). NOAA was authorized to establish and administer the Restore Science Program,

in consultation with the U.S. Fish and Wildlife Service, by the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies (RESTORE) of the Gulf States Act of 2012 (Pub. L. 112–141, sec. 1604). Identified in the RESTORE Act as the Gulf Coast Ecosystem Restoration Science, Observation, Monitoring, and Technology Program, the Program is commonly known as the NOAA RESTORE Science Program (RSP). In addition to standard government application requirements, applicants for financial assistance are required to submit a project summary form, current and pending form and a Data Management form template for both programs. The Data Management form template is an addition to the application package. Data Management is a required element of the application package and the use of this form will reduce the public burden by providing a specific format instead of requiring each applicant to create their own format. The Key Contacts form has been removed from the collection. CRP recipients are required to file annual progress reports and a project final report using CRP formats. The RSP recipients are required to file semiannual progress reports, a final report and a Gantt chart showing project milestones using RSP formats. All of these requirements are needed for better evaluation of proposals and monitoring of awards.

Affected Public: Non-profit institutions; State, local, or Tribal government; business or other for-profit organizations.

Frequency: Annually, semi-annually, and on occasion.

Respondent's Obligation: Mandatory.

Legal Authority: The statutory authority for COP is Public Law 102–567 sec. 201 (Coastal Ocean Program). NOAA was authorized to establish and administer the Restore Science Program, in consultation with the U.S. Fish and Wildlife Service, by the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies (RESTORE) of the Gulf States Act of 2012 (Pub. L. 112–141, sec. 1604).

This information collection request may be viewed at www.reginfo.gov. Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website www.reginfo.gov/public/do/PRAMain. Find this particular information collection by

selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function and entering either the title of the collection or the OMB Control Number 0648–0384.

Sheleen Dumas,

Departmental PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2024–29021 Filed 12–10–24; 8:45 am]

BILLING CODE 3510–JE–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XE499]

Pacific Fishery Management Council; Public Meetings and Hearings

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

ACTION: Notice of availability of reports, public meetings, and hearings.

SUMMARY: The Pacific Fishery Management Council (Pacific Council) has begun its annual preseason management process for the 2025 ocean salmon fisheries. This document announces the availability of Pacific Council documents, as well as the anticipated dates and locations of upcoming Pacific Council meetings and public hearings hosted by the Pacific Council. These documents and events comprise the Pacific Council’s complete schedule for determining the annual proposed and final modifications to ocean salmon fishery management measures. The agendas for the March and April 2025 Pacific Council meetings will be published in subsequent **Federal Register** documents prior to the actual meetings.

DATES: Written comments on the salmon management alternatives must be submitted through the Pacific Council’s e-portal (<https://pfmc.psmfc.org>) and received by the public comment deadline prior to the April 2025 Council meeting. Information will be available on the Pacific Council’s website (<http://www.pcouncil.org>) as the date for the April Council meeting approaches.

ADDRESSES: Written documents will be available upon request from the Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384, telephone: (503) 820–2280 (voice) or (503) 820–2299 (fax).

Council address: Pacific Fishery Management Council, 7700 NE

Ambassador Place, Suite 101, Portland, OR 97220.

FOR FURTHER INFORMATION CONTACT: Ms. Angela Forristall, telephone: (503) 820–2419.

SUPPLEMENTARY INFORMATION:

Tentative Schedule for Document Completion and Availability

Mid-February 2025: “Review of 2024 Ocean Salmon Fisheries, Stock Assessment and Fishery Evaluation Document for the Pacific Coast Salmon Fishery Management Plan” is scheduled to be posted on the Pacific Council website at <https://www.pcouncil.org>.

Early March 2025: “Preseason Report I—Stock Abundance Analysis and Environmental Assessment Part 1 for 2025 Ocean Salmon Fishery Regulations” is scheduled to be posted on the Pacific Council website at <https://www.pcouncil.org>.

Late March 2025: “Preseason Report II—Proposed Alternatives and Environmental Assessment Part 2 for 2025 Ocean Salmon Fishery Regulations.” The report will include a description of the adopted salmon management alternatives and a summary of their biological and economic impacts. The public hearings schedule will also be included on the inside cover of the report and will be posted on the Pacific Council website at <https://www.pcouncil.org>.

April 24, 2025: “Preseason Report III—Council-Adopted Management Measures and Environmental Assessment Part 3 for 2025 Ocean Salmon Fishery Regulations” is scheduled to be posted on the Pacific Council website at <https://www.pcouncil.org>.

May 16, 2025: Federal regulations for 2025 ocean salmon regulations are published in the **Federal Register** and implemented.

Meetings and Hearings

January 21–24, 2025: The Salmon Technical Team (STT) will meet for a public work session to draft “Review of 2024 Ocean Salmon Fisheries, Stock Assessment and Fishery Evaluation Document for the Pacific Coast Salmon Fishery Management Plan” and to consider any other estimation or methodology issues pertinent to the 2025 ocean salmon fisheries. The STT may also discuss additional topics and work as time allows, including but not limited to salmon essential fish habitat review, salmon risk tables, or administrative matters on the Pacific Council’s March and April 2025 meetings. The meeting is scheduled to be held in-person at the Pacific Council

office located at 7700 NE Ambassador Place, Suite 101, Portland, OR 97220, however an online option to allow for the STT to be briefed on ancillary items may be added to support those particular discussions. Consult the Pacific Council’s website at <https://www.pcouncil.org> as the meeting date approaches to get the most current information.

February 18–21, 2025: The STT will meet for a public work session to draft “Preseason Report I—Stock Abundance Analysis and Environmental Assessment Part 1 for 2025 Ocean Salmon Fishery Regulations” and to consider any other estimation or methodology issues pertinent to the 2025 ocean salmon fisheries. The STT may also discuss additional topics as time allows, including but not limited to those identified in the description for the January 2025 STT work session. The meeting is scheduled to be held in-person at the Pacific Council office located at 7700 NE Ambassador Place, Suite 101, Portland, OR 97220. Consult the Pacific Council’s website at <https://www.pcouncil.org> as the meeting date approaches to get the most current information.

March 24–25, 2025: Three public hearings will be held to receive comments on the proposed 2025 ocean salmon fishery management alternatives adopted by the Pacific Council. Public hearings focusing on Washington and Oregon salmon fisheries are tentatively scheduled to occur simultaneously on March 24, and the public hearing for California salmon fisheries is tentatively scheduled for March 25. Each public hearing will be state-specific and begin at 7 p.m. The Washington and California public hearings are tentatively scheduled to be held in-person and occur in Westport, Washington and Santa Rosa, CA. The Oregon public hearing is scheduled to be held on-line. Consult the Pacific Council’s website at <https://www.pcouncil.org> as the meeting date approaches to get the most current information. A summary of oral comments heard at the hearings will be provided to the Pacific Council at its April meeting.

Written comments on the salmon management alternatives must be submitted through the Pacific Council’s e-portal (<https://pfmc.psmfc.org>) and received by the public comment deadline which is tentatively scheduled for 5 p.m. April 7, 2025, and prior to the start of the April 2025 Council meeting. Verbal comments on the salmon management alternatives are accepted during the Council meeting consistent with the Council’s April 2025 agenda dates for salmon topics. Information

will be available on the Pacific Council’s website (<https://www.pcouncil.org>) as the date for the April Council meeting approaches.

Specific meeting information, including instructions on how to join the meeting and system requirements will be provided in meeting announcements on the Pacific Council’s website (see www.pcouncil.org). You may send an email to Mr. Kris Kleinschmidt (kris.kleinschmidt@noaa.gov) or contact him at (503) 820–2412 for technical assistance.

Although non-emergency issues not contained in the STT meeting agendas may come before the STT for discussion, those issues may not be the subject of formal STT action during these meetings. STT action will be restricted to those issues specifically listed in this document and to any issues arising after publication of this document requiring emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the STT’s intent to take final action to address the emergency.

Special Accommodations

Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt (kris.kleinschmidt@noaa.gov; (503) 820–2412) at least 10 days prior to the meeting date.

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

Dated: December 6, 2024.

Rey Israel Marquez,
Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2024–29116 Filed 12–10–24; 8:45 am]

BILLING CODE 3510–22–P

ACTION: Notice; issuance of permits and permit amendments.

SUMMARY: Notice is hereby given that permits and permit amendments have been issued to the following entities under the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA), as applicable.

ADDRESSES: The permits and related documents are available for review upon written request via email to NMFS.Pr1Comments@noaa.gov.

FOR FURTHER INFORMATION CONTACT: Jennifer Skidmore (Permit No. 28223), Sara Young (Permit No. 22678–01), and Amy Hapeman (Permit No. 27911); at (301) 427–8401.

SUPPLEMENTARY INFORMATION: Notices were published in the **Federal Register** on the dates listed below that requests for a permit or permit amendment had been submitted by the below-named applicants. To locate the **Federal Register** notice that announced our receipt of the application and a complete description of the activities, go to <https://www.federalregister.gov> and search on the file number provided in table 1 below.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XE520]

Marine Mammals and Endangered Species

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

TABLE 1—ISSUED PERMITS, AND PERMIT AMENDMENTS

File No.	Version No.	RTID	Applicant	Previous Federal Register Notice	Issuance date
22678	01	X0648–A040	NMFS Marine Mammal Laboratory, 7600 Sand Point Way NE, Seattle, WA 98115 (Responsible Party: John Bengtson, Ph.D.).	85 FR 7978, February 12, 2020.	November 15, 2024.
27911	N/A	0648–XE175	Ari Friedlaender, Ph.D., University of California at Santa Cruz, 115 McAllister Way, Santa Cruz, CA 95060.	89 FR 66068, August 14, 2024.	November 20, 2024.
28223	N/A	0648–XE275	Steven Emslie, Ph.D., University of North Carolina Wilmington, 601 South College Road, Wilmington, NC 28403.	89 FR 73380, September 10, 2024.	November 15, 2024.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), a final determination has been made that the activities proposed are categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

As required by the ESA, as applicable, issuance of these permits were based on a finding that such permits: (1) were applied for in good faith; (2) will not operate to the disadvantage of such endangered species; and (3) are consistent with the purposes and policies set forth in section 2 of the ESA.

Authority: The requested permits have been issued under the MMPA of

1972, as amended (16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the ESA of 1973, as amended (16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226), as applicable.

Dated: December 5, 2024.

Julia M. Harrison,
Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2024–29047 Filed 12–10–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XE495]

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Pacific Fishery Management Council (Pacific Council) will host an online meeting of the Area 2A Pacific halibut governmental

management entities that is open to the public.

DATES: The online meeting will be held Thursday, January 16, 2025, from 10 a.m. until 11:30 a.m., Pacific time, or until business for the day has been completed.

ADDRESSES: This meeting will be held online. Specific meeting information, including directions on how to join the meeting and system requirements will be provided in the meeting announcement on the Pacific Council's website (see www.pcouncil.org). You may send an email to Mr. Kris Kleinschmidt (kris.kleinschmidt@noaa.gov) or contact him at (503) 820-2412 for technical assistance.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220-1384.

FOR FURTHER INFORMATION CONTACT: Ms. Angela Forristall, Staff Officer, Pacific Council; telephone: (503) 820-2419.

SUPPLEMENTARY INFORMATION: The primary purpose of the online meeting is to prepare and develop recommendations for the 2025 International Pacific Halibut Commission's (IPHC) annual meeting held in Vancouver, British Columbia, Canada from January 27 through January 31, 2025. Recommendations generated from the 2A managers' meeting will be communicated to the IPHC by the Pacific Council's representatives. Attendees may also address other topics relating to Pacific halibut management.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt (kris.kleinschmidt@noaa.gov; (503) 820-2412) at least 10 days prior to the meeting date.

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

Dated: December 6, 2024.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2024-29115 Filed 12-10-24; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XE506]

Fisheries of the Gulf of Mexico; Southeast Data, Assessment, and Review (SEDAR); Public Meeting

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

ACTION: Notice of SEDAR 87 Assessment Webinar V for Gulf of Mexico White, Pink, and Brown Shrimp.

SUMMARY: The SEDAR 87 assessment process of Gulf of Mexico white, pink, and brown shrimp will consist of a Data Workshop, a series of assessment webinars, and a Review Workshop. See **SUPPLEMENTARY INFORMATION**.

DATES: The SEDAR 87 Assessment Webinar V will be held Monday, January 6, 2025, from 1 p.m. to 5 p.m., eastern time.

ADDRESSES: The meeting will be held via webinar. The webinar is open to members of the public. Those interested in participating should contact Julie A. Neer at SEDAR (see **FOR FURTHER INFORMATION CONTACT**) to request an invitation providing webinar access information. Please request webinar invitations at least 24 hours in advance of each webinar.

SEDAR address: 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Julie A. Neer, SEDAR Coordinator; phone: (843) 571-4366; email: Julie.neer@safmc.net.

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a multi-step process including: (1) Data Workshop, (2) a series of assessment webinars, and (3) A Review Workshop. The product of the Data Workshop is a

report that compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The assessment webinars produce a report that describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The product of the Review Workshop is an Assessment Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, HMS Management Division, and Southeast Fisheries Science Center. Participants include data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and NGO's; International experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion during the Assessment Webinar V are as follows:

Participants will review the assessment modeling work to date and provide recommendations to the analytic team.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **ADDRESSES**) at least 5 business days prior to each workshop.

Note: The times and sequence specified in this agenda are subject to change.

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

Dated: December 6, 2024.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2024-29117 Filed 12-10-24; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE**National Telecommunications and Information Administration**

[Docket No. 241204–0309]

RIN 0660–XC064

Ethical Guidelines for Research Using Pervasive Data

AGENCY: National Telecommunications and Information Administration (NTIA), Department of Commerce.

ACTION: Notice, request for public comments.

SUMMARY: The National Telecommunications and Information Administration (NTIA) is seeking public input on the potential writing of ethical guidelines for the use of “pervasive data” in research. “Pervasive data” refers to data about people gathered through online services. NTIA will rely on these comments, along with stakeholder engagements, in considering whether to draft and issue non-binding guidelines to assist researchers working with pervasive data. Such guidelines, if warranted, would detail how researchers can work with pervasive data while meeting ethical expectations of research and protecting individuals’ privacy and other rights.

DATES: Interested persons are invited to submit comments on or before January 15, 2025.

ADDRESSES: All electronic public comments on this action, identified by *Regulations.gov* docket number NTIA–2024–0004, may be submitted through the Federal eRulemaking Portal at www.regulations.gov. The docket established for this request for comments can be found at www.regulations.gov, NTIA–2024–0004. Please do not include in your comments information of a confidential nature, such as sensitive personal information or proprietary information. All comments received are a part of the public record and will generally be posted to *Regulations.gov* without change. All personally identifiable information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Information obtained as a result of this notice may be used by the federal government for program planning on a non-attribution basis.

FOR FURTHER INFORMATION CONTACT:

Please direct questions regarding this Request for Comments to Emma Llansó, NTIA, 1401 Constitution Avenue NW, Washington, DC 20230, at ellanso@ntia.gov or 202–482–3821. Please direct

media inquiries to NTIA’s Office of Public Affairs, telephone: (202) 482–7002; email: press@ntia.gov.

SUPPLEMENTARY INFORMATION:**Overview**

The National Telecommunications and Information Administration (NTIA) is seeking input from the public on the potential writing of ethical guidelines for the use of “pervasive data” in research. “Pervasive data” refers to data about people gathered through online services.¹ Researchers have leveraged pervasive data to better understand human behavior, societal forces, public health, and the impact of the technology that surrounds us. These insights are essential for informing policy in the digital age, and researchers and organizations have called for ethical guidelines to help ensure this work is done responsibly.² Such guidelines, if warranted, would detail how independent third-party researchers³ can work with pervasive data while meeting ethical expectations of research and protecting individuals’ privacy and other rights. The goal of ethical guidelines would be to outline principles and best practices that researchers, research institutions, data intermediaries,⁴ and online service

¹ The term *pervasive data* is intended to mean data about people—user-contributed, observed, derived, or inferred—collected through online services regardless of the extent to which the data is publicly available, is aggregated, or could lead to the identification of an individual. Pervasive data may include text, images, videos, biometric information, information about a data subject’s behavior (purchases, financial standing, media consumption, search history, medical conditions, location, etc.), and other information that makes up a person’s digital footprint. *Online services* may include a wide range of information technologies throughout the technology stack/technical infrastructure, including but not limited to web-based monitoring tools, content delivery networks, blockchain technology, digital labor platforms, education technology, Internet of Things devices, connected cars, wearable devices, mobile sensors, data brokers, streaming services, search engines, online marketplaces, social media platforms, and AI systems. The term *pervasive data* is informed by research conducted under NSF Grant Award Number 1144934 (https://www.nsf.gov/awardsearch/showAward?AWD_ID=1144934).

² See e.g. Michael Zimmer, *Addressing Conceptual Gaps in Big Data Research Ethics: An Application of Contextual Integrity*, *Social Media + Society* 4, no. 2 (2018), <https://doi.org/10.1177/2056305118768300>; aline shakti franzke et al., *Internet Research: Ethical Guidelines 3.0*, *Association of Internet Researchers* (2020), <https://aoir.org/reports/ethics3.pdf>.

³ The ethics and privacy guidelines described for consideration in this Request for Comments focus on the flow of data from online service providers to independent researchers that operate outside of the online service provider and are often affiliated with an academic or non-profit institution.

⁴ The term *data intermediary* is intended to describe an independent entity that is operated specifically to facilitate data access and sharing under commercial or non-commercial agreements

providers can choose to follow when involved in research with pervasive data. Any such ethical guidelines may be a reference for research conducted solely within the United States (U.S.) or through international collaborations.

NTIA will rely on these comments, along with engagements with researchers, civil society, research institutions, industry, and other government bodies, to consider whether to draft and issue guidelines to assist researchers working with pervasive data. The ethical guidelines outlined for consideration in this Request for Comments would be non-binding and would not supersede any existing laws or regulations, or pre-empt future laws. For example, human subjects research conducted or supported by one of the U.S. government departments or agencies that have adopted the Federal Policy for the Protection of Human Subjects (‘Common Rule’)⁵ would need to adhere to any applicable regulatory requirements. Federal agencies and federal data are bound by additional laws and regulations, which these voluntary ethical guidelines would not supersede.⁶

Background

Research with pervasive data is essential in efforts to understand the impact of technology on society. For example, the Kids Online Health and Safety Task Force Report and the Surgeon General’s Youth Mental Health Advisory both emphasize that access to pervasive data, paired with privacy safeguards and ethical research guidelines, is essential to understanding technology’s impact on children.⁷

between researchers and online service providers or that evaluates and approves researcher requests for access to designated subsets of stored pervasive data. See Organisation for Economic Co-operation and Development, *Data Stewardship, Access, Sharing, and Control: A Going Digital III module synthesis report*, DSTI/CDEP(2022)6/FINAL (2023) at 37.

⁵ See Office for Human Research Protections (OHRP), *Federal Policy for the Protection of Human Subjects (‘Common Rule’)*, OHRP (June 23, 2009), <https://www.hhs.gov/ohrp/regulations-and-policy/regulations/common-rule/index.html>.

⁶ See, e.g., the Privacy Act of 1974, 5 U.S.C. 552a (1974); the Paperwork Reduction Act of 1980, 44 U.S.C. 3501–3521 (1980); the Federal Information Security Modernization Act of 2014, Public Law 113–283 (2014); the E-Government Act of 2002, 44 U.S.C. 101 (2002).

⁷ Kids Online Health and Safety Task Force, *Online Health and Safety for Children and Youth: Best Practices for Families and Guidance for Industry*, Substance Abuse and Mental Health Services Administration (July 19, 2024), <https://www.samhsa.gov/kids-online-health-safety-task-force/kohs-report-safe-internet-use>; Office of the Assistant Secretary for Health (OASH), *Surgeon General Issues New Advisory About Effects Social Media Use Has on Youth Mental Health*, OASH (May 23, 2023), <https://www.hhs.gov/about/news/>

Pervasive data is also crucial to enabling responsible research in other fast-moving technologies. For example, the National Artificial Intelligence (AI) Initiative Act of 2020, along with the CHIPS and Science Act of 2022, include landmark investments in AI research to advance the use of trustworthy AI.⁸ Such research often relies on pervasive data and should be conducted ethically.⁹

Research with pervasive data is widespread and in high demand. To better understand the impact of technology on society, researchers have developed methods for accessing pervasive data, including large-scale collection of publicly available information, entering into agreements with online service providers, and managing collections of user-contributed data.¹⁰ Policymakers in the U.S. and globally have called for providers of online services to make data available to researchers.¹¹ European regulators recently enacted the Digital Services Act, which mandates that Very Large Online Platforms share pervasive data with researchers to study systemic risks in the information environment.¹² However, the risks to the rights and welfare of individuals associated with

the use of pervasive data for research are nuanced and context-specific. This Request for Comments aims to explore these complexities and work toward more ethical practices for researchers working with pervasive data.

Discussion of research ethics has a long history, and the U.S. government has worked to shape well-recognized principles.¹³ In 1979, the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research released the Belmont Report, which outlined three principles: respect for persons, beneficence, and justice.¹⁴ These principles were the foundation of regulations implemented in 1981 by both the Department of Health and Human Services (HHS) and the Food and Drug Administration.¹⁵ Today, a version of the Common Rule, which was revised in 2017, has been adopted by 21 Federal departments and agencies.¹⁶ The regulations mandate that institutions engaged in nonexempt human subjects research supported or conducted by a Common Rule department or agency obtain institutional review board (IRB) approval before research can begin. With certain exemptions, IRBs review human subjects research according to specific criteria which are grounded in the Belmont Report's ethical principles, including a requirement for researchers to obtain informed consent from study participants unless the research is

eligible for a waiver of informed consent.¹⁷

The Common Rule sometimes applies to research conducted on pervasive data. However, as with other broad categories of research, the Common Rule does not apply to the full range of research using pervasive data and was not designed to address all societal risks associated with research using pervasive data.¹⁸ Specifically, the Common Rule applies to *human subjects research* which, in the context of online data, involves either obtaining information through an intervention or interaction with the living individual(s) about whom the research is conducted, or obtaining, using, studying, analyzing, or generating identifiable private information about the living individual(s).¹⁹ Therefore, the secondary use of only non-identifiable data in research, for example, would generally not be subject to the Common Rule's requirements, even for research that is federally supported or conducted.²⁰ Further, some research conducted with identifiable private information may meet the criteria of one or more categories of exemption from the Common Rule requirements, which

2023/05/23/surgeon-general-issues-new-advisory-about-effects-social-media-use-has-youth-mental-health.html.

⁸ William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116–283, § Division E (2021). <https://www.congress.gov/bill/116th-congress/house-bill/6395/text>; CHIPS and Science, Public Law 117–167 (2022). <https://www.congress.gov/bill/117th-congress/house-bill/4346/text>.

⁹ See e.g. National Institute of Science and Technology, *NIST Researchers Suggest Historical Precedent for Ethical AI Research*, NIST (February 15, 2024), <https://www.nist.gov/news-events/news/2024/02/nist-researchers-suggest-historical-precedent-ethical-ai-research>.

¹⁰ See e.g. Jakob Ohme, et al., *Digital Trace Data Collection for Social Media Effects Research: APIs, Data Donation, and (Screen) Tracking*, Communication Methods and Measures 18, no. 2, 124–41 (April 2, 2024), <https://doi.org/10.1080/19312458.2023.2181319>; Michael W. Wagner, *Independence by Permission*, Science 381, no. 6656, 388–91 (July 28, 2023), <https://doi.org/10.1126/science.adi2430>.

¹¹ See e.g. The White House, *U.S.–EU Joint Statement of the Trade and Technology Council*, The White House (April 5, 2024), <https://www.whitehouse.gov/briefing-room/statements-releases/2024/04/05/u-s-eu-joint-statement-of-the-trade-and-technology-council-3/>; UNESCO, *Guidelines for the Governance of Digital Platforms: Safeguarding Freedom of Expression and Access to Information through a Multi-Stakeholder Approach*, UNESCO (2023), <https://unesdoc.unesco.org/ark:/48223/p0000387339>.

¹² Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ L § Article 40 (2022), <http://data.europa.eu/eli/reg/2022/2065/oj/eng>.

¹³ In addition to ethical guidelines, laws regulating privacy are also relevant for researchers to consider. While the U.S. does not currently have an over-arching data protection law, sectoral laws such as the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Family Educational Rights and Privacy Act (FERPA), Children's Online Privacy Protection Act (COPPA), Electronic Communications Privacy Act (ECPA), Federal Trade Commission Act, Digital Millennium Copyright Act (DMCA) and other provisions in Title 17 of the United States Code, Title 9 of the United States Code, Title 18 of the United States Code, the 21st Century Cures Act, and other statutes may be relevant for researchers in certain contexts. Additionally, some online service providers may be under federal consent orders that affect how they can collect and share their users' data, including with researchers.

¹⁴ Office for Human Research Protections (OHRP), *The Belmont Report*, OHRP (January 28, 2010), <https://www.hhs.gov/ohrp/regulations-and-policy/belmont-report/index.html>. For more history on human subjects research, see Michael G. White, *Why Human Subjects Research Protection Is Important*, The Ochsner Journal 20, no. 1, 16–33 (2020), <https://doi.org/10.31486/toj.20.5012>.

¹⁵ Office for Human Research Protections (OHRP), *Federal Policy for the Protection of Human Subjects ('Common Rule')*, OHRP (June 23, 2009), <https://www.hhs.gov/ohrp/regulations-and-policy/regulations/common-rule/index.html>.

¹⁶ Office for Human Research Protections (OHRP), *Federal Policy for the Protection of Human Subjects ('Common Rule')*, OHRP (June 23, 2009), <https://www.hhs.gov/ohrp/regulations-and-policy/regulations/common-rule/index.html>.

¹⁷ Office for Human Research Protections (OHRP), *2018 Requirements (2018 Common Rule)*, OHRP (March 7, 2017), <https://www.hhs.gov/ohrp/regulations-and-policy/regulations/45-cfr-46/revise-common-rule-regulatory-text/index.html>.

¹⁸ See A. Michael Froomkin, *Big Data: Destroyer of Informed Consent*, 21 YALE J.L. & TECH. 27 (2019). See also, Edmund G. Howe III, *Falicia Elenberg, Ethical Challenges Posed by Big Data*, 17 *Innov Clin Neurosci.* 24–30 (2020). See also, Jessica Vitak et al., *Beyond the Belmont Principles: Ethical Challenges, Practices, and Beliefs in the Online Data Research Community*, In *Proceedings of the 19th ACM Conference on Computer-Supported Cooperative Work & Social Computing*, 941–53. CSCW '16, New York, NY, USA: Association for Computing Machinery (2016), <https://doi.org/10.1145/2818048.2820078>; Michael S. Bernstein, et al., *ESR: Ethics and Society Review of Artificial Intelligence Research*, arXiv/Stanford University (July 9, 2021), <https://doi.org/10.48550/arXiv.2106.11521>.

¹⁹ 45 CFR 46.102. Note that the Common Rule also includes definitions of both “private information” and “identifiable private information.” Specifically, “[p]rivate information includes information about behavior that occurs in a context in which an individual can reasonably expect that no observation or recording is taking place, and information that has been provided for specific purposes by an individual and that the individual can reasonably expect will not be made public (e.g., a medical record)” and “[i]dentifiable private information is private information for which the identity of the subject is or may readily be ascertained by the investigator or associated with the information.” Also, note that not all Common Rule signatories incorporate the Common Rule regulations into their own agency-specific regulations.

²⁰ Office for Human Research Protections (OHRP), *Human Subject Regulations Decision Charts: 2018 Requirements* (December 28, 2010), <https://www.hhs.gov/ohrp/regulations-and-policy/decision-charts-2018/index.html>.

would mean that IRB approval is not required.²¹

Recognizing the need for ethical guidelines beyond the Belmont Report and Common Rule, multiple institutions have tried to fill the gap. Starting in 2009, the Department of Homeland Security, which is a signatory to the Common Rule, engaged lawyers and computer scientists to draft a set of non-binding ethical guidelines for computer security and network measurement research. This led to the Menlo Report in 2012, which applied the Belmont Principles to network and security research and added an additional principle: respect for law and public interest.²² The Association of Internet Researchers (AoIR) has gone through several versions of ethical guidelines targeted at researchers and organizations involved in studying people in internet-related venues.²³ The American Statistical Association (ASA) has developed guidelines focused on “statistical practice”, which includes, among other things, designing data collection, processing data, and analyzing data.²⁴ The ASA guidelines also include the development and deployment of algorithms and AI models.

As technology has continued to advance, online services have developed the capacity to collect data on human behavior at massive scales.²⁵ Building on the government’s commitment to ethical research, NTIA is considering drafting ethical guidelines for research involving pervasive data, which requires considerations beyond

those enshrined in existing ethics regulations and practices.²⁶

Pervasive data can be drawn from global networks and may be analyzed by an international community of researchers. Therefore, it is increasingly important to use a global lens to address ethical issues in pervasive data. Advancements in research using pervasive data may benefit from international collaboration and agreed-upon norms for ethical research and the protection of privacy and other rights. For example, the U.S.-EU²⁷ Trade and Technology Council Working Group on Tech Platform Governance recently announced a shared commitment to advance data access for researchers and has begun discussing such principles.²⁸

Risks created by research vary throughout the lifecycle of a project, from research design to dissemination.²⁹ Users of commercial online services often do not understand or have control over how their data will be used.³⁰ Previous research has further found that researchers’ use of pervasive data for research is often not consistent with users’ expectations, even if the information involves public social

media posts.³¹ Risks to data subjects presented by research with pervasive data include reidentification of anonymous user accounts; release or inference of information that can be used to perpetuate a range of privacy and other individual-level harms, including fraud, impersonation, discrimination, reputational harms, and emotional distress; and decreased willingness to post and access information online and engage in the digital economy.³² Research using pervasive data also has the potential to generate societal and/or systemic risks beyond the individual-level risks to data subjects. These risks include the potential to undermine trust in the research ecosystem when users learn about unethical research,³³ further disadvantage historically disadvantaged groups,³⁴ cause negative impacts on the environment,³⁵ and create risks from the products of that research, such as machine learning models being used out of context.³⁶ While researchers across

³¹ See e.g. Casey Fiesler & Nicholas Proferes, *Participant Perceptions of Twitter Research Ethics*, *Social Media + Society* 4, no. 1 (2018), <https://doi.org/10.1177/2056305118763366>; Michael Zimmer, *But the Data Is Already Public: On the Ethics of Research in Facebook*, *Ethics and Information Technology* 12, no. 4, 313–25 (December 1, 2010), <https://doi.org/10.1007/s10676-010-9227-5>.

³² See Michael Zimmer, *Addressing Conceptual Gaps in Big Data Research Ethics: An Application of Contextual Integrity*, *Social Media + Society* 4, no. 2 (2018), <https://doi.org/10.1177/2056305118768300>; Daniel J. Solove & Danielle Keats, *Privacy Harms*, GW Law Faculty Publications & Other Works. 1534 (2021), https://scholarship.law.gwu.edu/faculty_publications/1534.

³³ See Mary L. Gray, *A Human Rights Framework for AI Research Worthy of Public Trust*, *Issues in Science and Technology*, May 21, 2024, <http://issues.org/ai-ethics-research-framework-human-rights-gray/>; Danah Boyd, *Untangling Research and Practice: What Facebook’s ‘Emotional Contagion’ Study Teaches Us*, *Research Ethics* 12, no. 1, 4–13 (2016), <https://doi.org/10.1177/1747016115583379>.

³⁴ See Jonathan Herington, et al., *Ethical Imperatives for Working With Diverse Populations in Digital Research*, *Journal of Medical Internet Research* 25, no. 1 (September 18, 2023), <https://doi.org/10.2196/47884>; Alex Thompson, et al., *Ethical Considerations and Challenges for Using Digital Ethnography to Research Vulnerable Populations*, *Journal of Business Research* 124, 676–83 (January 1, 2021), <https://doi.org/10.1016/j.jbusres.2020.02.025>.

³⁵ See Jude Coleman, *AI’s Climate Impact Goes beyond Its Emissions*, *Scientific American* (Dec 7, 2023), <https://www.scientificamerican.com/article/ai-climate-impact-goes-beyond-its-emissions/>; See also Irene V. Pasquetto, *What Is Research Data ‘Misuse’? And How Can It Be Prevented or Mitigated?*, *Journal of the Association for Information Science and Technology* (July 27, 2024), <https://doi.org/10.1002/asi.24944>.

³⁶ See Kristen K. Greene et al., *Avoiding Past Mistakes in Unethical Human Subjects Research: Moving From Artificial Intelligence Principles to Practice*, *Computer* 57, no. 2, 53–63 (February 2024), <https://doi.org/10.1109/MC.2023.3327653>; Anja Bechmann & Bendert Zevenbergen, *AI, and*

²¹ Office for Human Research Protections (OHRP), *Human Subject Regulations Decision Charts: 2018 Requirements* (December 28, 2010), <https://www.hhs.gov/ohrp/regulations-and-policy/decision-charts-2018/index.html>.

²² See Homeland Security, *Menlo Report: Ethical Principles Guiding Information and Communication Technology Research* (August 3, 2012). See also, Megan Finn and Katie Shilton, *Ethics Governance Development: The Case of the Menlo Report*, *Social Studies of Science* 53, no. 3, 315–40 (2023), <https://doi.org/10.1177/03063127231151708>.

²³ See Aline Shakti Franzke et al., *Internet Research: Ethical Guidelines 3.0*, Association of Internet Researchers (2020), <https://aoir.org/reports/ethics3.pdf>.

²⁴ See *Ethical Guidelines for Statistical Practice*, American Statistical Association (February 2022), <https://www.amstat.org/docs/default-source/amstat-documents/ethicalguidelines.pdf>.

²⁵ See, e.g., Patrick S. Park, et al., *The Strength of Long-Range Ties in Population-Scale Social Networks*, *Science* 362, no. 6421 (December 21, 2018), <https://doi.org/10.1126/science.aau9735>. See also, Claire E. Robertson, et al., *Negativity Drives Online News Consumption*, *Nature Human Behaviour* 7, no. 5, 812–22 (May 2023), <https://doi.org/10.1038/s41562-023-01538-4>. See also, Markus Schläpfer, et al., *The Universal Visitation Law of Human Mobility*, *Nature* 593, no. 7860, 522–27, (May 2021), <https://doi.org/10.1038/s41586-021-03480-9>.

²⁶ See e.g. The World Medical Association, *WMA Declaration of Taipei on Ethical Considerations Regarding Health Databases and Biobanks* (October, 2016), <https://www.wma.net/policies-post/wma-declaration-of-taipei-on-ethical-considerations-regarding-health-databases-and-biobanks/>. For example, The World Medical Association also codified the Declaration of Taipei in 2016, which includes ethical principles for research with health databases.

²⁷ European Union.

²⁸ See e.g. The White House, *U.S.-EU Joint Statement of the Trade and Technology Council*, The White House (May 31, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/31/u-s-eu-joint-statement-of-the-trade-and-technology-council-2/>; U.S.-EU Trade and Technology Council (TTC), *Joint Principles on Combating Gender Based Violence in the Digital Environment* √ *Shaping Europe’s Digital Future* (April 5, 2024), <https://digital-strategy.ec.europa.eu/en/library/us-eu-trade-and-technology-council-ttc-joint-principles-combatting-gender-based-violence-digital>.

²⁹ See Aline Shakti Franzke et al., *Internet Research: Ethical Guidelines 3.0*, Association of Internet Researchers (2020), <https://aoir.org/reports/ethics3.pdf>.

³⁰ See e.g. Omer Tene & Jules Polonetsky, *Big Data for All: Privacy and User Control in the Age of Analytics*, 11 NW. J. TECH. & INTELL. PROP. 239 (April 2013); Jonathan A. Obar & Anne Oeldorf-Hirsch, *The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services*, *Information, Communication & Society* 23, no. 1, 128–4 (January 2, 2020), <https://doi.org/10.1080/1369118X.2018.1486870>; Transparency and various forms of user control are at the heart of the Fair Information Practice Principles, which were first articulated in a 1973 Federal Government report from the Department of Health, Education, and Welfare Advisory Committee, “Records, Computers and the Rights of Citizens.” See *FPC.gov, Fair Information Practice Principles (FIPPs)* (1973), <https://www.fpc.gov/resources/fipps/>.

the country have taken voluntary measures to consider risks to data subjects in their research with pervasive data, the U.S. does not have a recognized set of shared guidelines.³⁷

This Request for Comments considers ethical issues and risks to privacy and other rights, and mitigation strategies throughout the lifecycle of a research project, from research design, data acquisition, and access, data processing, and analysis to dissemination.³⁸ The questions recognize that the research design phase allows researchers to reflect on the potential for harm to data subjects, society, and themselves; these considerations should be revisited throughout the remaining phases of research.³⁹

Definitions

For purposes of responding to this Request for Comments, please refer to the following definitions:

The term pervasive data is intended to mean data about people—user-contributed, observed, derived, or inferred—collected through online services regardless of the extent to which the data is publicly available, is aggregated, or could lead to the identification of an individual. Pervasive data may include text, images, videos, biometric information, information about a data subject's behavior (purchases, financial standing, media consumption, search history, medical conditions, location, etc.), and

other information that makes up a person's digital footprint.⁴⁰

Online services may include a wide range of information technologies throughout the technology stack/technical infrastructure, including but not limited to web-based monitoring tools, content delivery networks, blockchain technology, digital labor platforms, education technology, Internet of Things devices, connected cars, wearable devices, mobile sensors, data brokers, streaming services, search engines, online marketplaces, social media platforms, and AI systems.⁴¹

The term *data intermediary* is intended to describe an independent entity that is operated specifically to facilitate pervasive data access and sharing under commercial or non-commercial agreements between researchers and online service providers or that evaluates and approves researcher requests for access to designated subsets of stored pervasive data.

A *data subject*, for the purposes of this Request for Comments, is an individual whose personal information is contained in the pervasive data. The individual may be a digital device user who creates the information or who sets up and manages an account, or they could be an individual whose data is captured in the user's information (e.g., a child in a parent's photo, a visitor to a home that has smart devices, an electronically-monitored employee, or a passenger in a vehicle with tracking technology). Data subjects may or may not be "human subjects" as defined in the Common Rule.

Instructions for Commenters

Through this Request for Comments, we hope to gather information on the following questions and the broader topic outlined above. These questions are not exhaustive and commenters are invited to provide input on relevant questions not asked below. Commenters are not required to respond to all questions. When responding to one or more of the questions below, commenters are requested to include a question number with each part of their response. Commenters should include a page number on each page of their submissions. Commenters are welcome to provide specific actionable proposals, frameworks, rationales, and relevant facts.

⁴⁰ This project does not include biospecimens as pervasive data.

⁴¹ For the purpose of this project, online services do not include health plans, healthcare clearinghouses, or healthcare providers as defined by the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

Questions

1. What are the potential benefits of developing national-level ethical guidelines for researchers collecting, analyzing, and sharing pervasive data?

2. What are the potential drawbacks of developing national-level ethical guidelines for researchers collecting, analyzing, and sharing pervasive data?

3. To what extent does the definition of *pervasive data* in this Request for Comments capture the appropriate scope for national ethical guidelines?

a. Are there particular types of data or other digital artifacts⁴² that should be carefully considered or included/excluded in the definition?

b. Are there pre-existing similar definitions, similar to the one provided, that should be considered?

4. What are some existing barriers to accessing pervasive data?

a. What are examples of research questions, if any, that are challenging to answer because of the barriers to accessing pervasive data?⁴³ If possible, also explain why other methodological approaches and data types are insufficient for answering those questions.

b. If those barriers were removed, what would be the potential benefits and additional risks to society and individuals, if any?

5. What data held by online services would be most valuable to the public interest if researchers were able to access it?

6. Consent and autonomy are key principles in human subjects research ethics. However, users of online services may be required to divulge certain personal information and/or have no ability to freely make decisions about its use.⁴⁴ How should researchers working with pervasive data consider consent and autonomy?

a. What, if any, would be an appropriate consent model for research

⁴² Here, the term *digital artifact* is intended to include digital information that may not immediately be recognized as *data*, regardless of whether the information satisfies any particular definition of *data*. Examples might include AI models or systems, algorithm-to-human response patterns, or digital items exchanged in a marketplace.

⁴³ See e.g. U.S.-EU Trade and Technology Council, *Commission and White House Published Workshop Report on Researcher Access to Online Platform Data and Its Role for Research on Gender-Based Violence Online | Shaping Europe's Digital Future*, European Commission (May 6, 2024), <https://digital-strategy.ec.europa.eu/en/news/commission-and-white-house-published-workshop-report-researcher-access-online-platform-data-and-its>.

⁴⁴ See, e.g., Omer Tene & Jules Polonetsky, *Big Data for All: Privacy and User Control in the Age of Analytics*, 11 Nw. J. Tech. & Intell. Prop. 239 (2013), <https://scholarlycommons.law.northwestern.edu/njtip/vol11/iss5/1/>.

Machine Learning: internet Research Ethics Guidelines, IRE 3.0 Companion 6.1, Association of Internet Researchers, 33–49 (2020), <https://aoir.org/reports/ethics3.pdf>.

³⁷ See Jessica Vitak et al., *Beyond the Belmont Principles: Ethical Challenges, Practices, and Beliefs in the Online Data Research Community*, In Proceedings of the 19th ACM Conference on Computer-Supported Cooperative Work & Social Computing, 941–53. CSCW '16. New York, NY, USA: Association for Computing Machinery (2016), <https://doi.org/10.1145/2818048.2820078>; Katie Shilton & Sheridan Sayles, *We Aren't All Going to Be on the Same Page about Ethics: Ethical Practices and Challenges in Research on Digital and Social Media*, In Proceedings of the 2016 49th Hawaii International Conference on System Sciences (HICSS), 1909–18. HICSS '16. USA: IEEE Computer Society (2016), <https://doi.org/10.1109/HICSS.2016.242>. See also Madhulika Srikrishna et al., *Advancing Ethics Review Practices in AI Research*, *Nature Machine Intelligence* 4, no. 12, 1061–64 (December 2022), <https://doi.org/10.1038/s42256-022-00585-2>.

³⁸ See aline shakti franzke et al., *internet Research: Ethical Guidelines 3.0*, Association of internet Researchers (2020), <https://aoir.org/reports/ethics3.pdf>.

³⁹ See e.g. Katie Shilton, et al., *Excavating Awareness and Power in Data Science: A Manifesto for Trustworthy Pervasive Data Research*, *Big Data & Society* 8, no. 2 (2021), <https://doi.org/10.1177/20539517211040759>; Annette Markham, *Ethic as Method, Method as Ethic: A Case for Reflexivity in Qualitative ICT Research*, *Journal of Information Ethics* 15, no. 2, 37–54 (November 1, 2006), <https://doi.org/10.3172/JIE.15.2.37>.

with pervasive data? How and how often should consent occur?

b. Are there alternative models to traditional consent that either support autonomy or provide protections for data subjects in cases where autonomy is limited?

c. How, if at all, is user autonomy influenced by context, such as the need to use online services for school, work,⁴⁵ or socializing?

7. What ethical issues and risks to privacy and other rights, and mitigation strategies, should be considered during the research design phase?

a. Users' concerns about researcher data access vary based on contextual factors.⁴⁶ What contextual factors increase or alter the risks to data subjects in research using pervasive data?⁴⁷

b. What factors contribute to a user's expectations of privacy on an online service?⁴⁸

c. What power differences exist between researchers and data subjects, or between online service providers and data subjects, that could create unique

risks and potential for harm.⁴⁹ How should these differences be considered and mitigated during the research design phase?

d. What unique risks affect children and youth? How do these differ depending on their gender, age, developmental capabilities, and other factors?⁵⁰ How does this impact the way researchers should think about risks when using pervasive data that includes young data subjects, especially those who are not legally adults? What are best practices when working with pervasive data created by or containing information about children and youth? What is the appropriate role of parents/guardians in such research?

e. What other vulnerable communities or vulnerability risk factors warrant additional consideration when conducting research with pervasive data? Please explain.

f. How might researchers account for changes in data subject status over time (e.g., aging into an adult category; dying; transitioning gender; changing citizenship, employment, disability, or veteran status)? How should researchers consider privacy and other rights when data subjects change status?

g. When considering ethical issues and risks to privacy and other rights for data subjects, how should researchers consider differences in views across individuals, communities, ethnicities, nationalities, languages, cultures, socioeconomic status, employment status, and educational levels?

h. How can researchers best conduct research with pervasive data in a way that engages the community, users, and data subjects.⁵¹ What are the best

practices for such participatory research that uses pervasive data? What are the challenges and/or barriers to conducting participatory research? What important research questions cannot be answered using participatory mechanisms, and why?

i. What research conducted with pervasive data could pose societal-level risks beyond those to the researcher and data subject individually?⁵² How should researchers assess and mitigate societal-level risks in comparison with potential benefits during the design phase?

j. How should ethical guidelines address risks to researchers?⁵³ What risks to researchers are currently difficult for researchers to mitigate on their own?

k. How, if at all, should ethical guidelines address methodological rigor, including the strength of the underlying research design and the confidence with which conclusions can be drawn?

l. How do changes in the norms, features, policies, and use of online services impact the ability to have well-understood and accepted methods for the collection, study design, and analysis of pervasive data? How can researchers adapt to changes in online services? How can online service providers support researchers in ethical research with pervasive data?

8. What are the risks and mitigation measures related to pervasive data acquisition and access?

Platform Governance, In Proceedings of the 2018 CHI Conference on Human Factors in Computing Systems, 1–13. CHI '18. New York, NY, USA: Association for Computing Machinery (2018), <https://doi.org/10.1145/3173574.3173583>; Tom Denison & Larry Stillman, Academic and Ethical Challenges in Participatory Models of Community Research, *Information, Communication & Society* 15, no. 7, 1037–54 (2012), <https://doi.org/10.1080/1369118X.2012.656138>.

⁵² Societal-level risks may include risks to groups including historically marginalized or otherwise vulnerable communities, crowd workers (workers that label data and/or complete surveys), the environment, trust in research, national security, and others. See Anja Bechmann & Bendert Zevenbergen, *AI and Machine Learning: internet Research Ethics Guidelines, IRE 3.0 Companion 6.1*, Association of Internet Researchers, 33–49 (2020), <https://aoir.org/reports/ethics3.pdf>, at 46; Michael S. Bernstein, et al., *ESR: Ethics and Society Review of Artificial Intelligence Research*, arXiv/Stanford University (July 9, 2021), <https://doi.org/10.48550/arXiv.2106.11521>.

⁵³ Risks to researchers may include but are not limited to, legal risks, challenges associated with studying content that evokes strong emotional reactions, or personal and professional hazards from performing public research on controversial topics. See alina shakti franzke et al., *internet Research: Ethical Guidelines 3.0*, Association of Internet Researchers (2020), <https://aoir.org/reports/ethics3.pdf>, at 11; Aya Yadlin, *Understanding Researcher Risk and Safety in Qualitative Research Online*, *Digital Society* 3, no. 1, 4 (February 1, 2024), <https://doi.org/10.1007/s44206-024-00089-z>.

⁴⁵ See, e.g., Ifeoma Ajunwa, Kate Crawford & Jason Schultz, *Limitless Worker Surveillance*, 105 Calif. L. Rev. 735 (2017), <https://heinonline.org/HOL/LandingPage?handle=hein.journals/calr105&div=28&id=&page=>.

⁴⁶ See Michael Zimmer, *Addressing Conceptual Gaps in Big Data Research Ethics: An Application of Contextual Integrity*, *Social Media + Society* 4, no. 2 (2018), <https://doi.org/10.1177/2056305118768300>; Sarah Gilbert, *When Research Is the Context: Cross-Platform User Expectations for Social Media Data Reuse*, *Big Data & Society* 10, no. 1 (2023), <https://doi.org/10.1177/20539517231164108>; Kristen E. Martin, *Diminished or Just Different? A Factorial Vignette Study of Privacy as a Social Contract*, *Journal of Business Ethics* 111, no. 4, 519–39 (December 1, 2012), <https://doi.org/10.1007/s10551-012-1215-8>; Kirsten Martin & Katie Shilton, *Putting mobile application privacy in context: An empirical study of user privacy expectations for mobile devices*, *The Information Society*, 32:3, 200–216 (2016), <https://doi.org/10.1080/01972243.2016.1153012>.

⁴⁷ Considerations may include, for example, the type of online service (social media, marketplace, infrastructure), the type of data collected (comments, photos, geolocation), demographics of the data subjects as a group, the situation in which data is collected (e.g., in the workplace), online service features, values and norms on the online service, feasibility of reidentification or research topic, how research output might be used for other purposes, and the data quality and fitness for purpose. See, e.g., Russell T. Vought, Office of Management and Budget, *Memorandum re: Improving Implementation of the Information Quality Act* (April 24th, 2019), <https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-15.pdf>.

⁴⁸ Considerations may include, for example, high-profile accounts, audience settings, requirements that users log in to view content, encryption services, data sharing/linking provisions, and privacy policies. See also James M. Hudson & Amy Bruckman, "Go Away": Participant Objections to Being Studied and the Ethics of Chatroom Research. *The Information Society* 20, 2, 127–139 (April 2004), <https://doi.org/10.1080/01972240490423030>.

⁴⁹ See Matt Scherer, *Warning: Bossware May Be Hazardous to Your Health*, Center for Democracy & Technology (2021), <https://cdt.org/wp-content/uploads/2021/07/2021-07-29-Warning-Bossware-May-Be-Hazardous-To-Your-Health-Final.pdf>; Alexander Hertel-Fernandez, *Estimating the prevalence of automated management and surveillance technologies at work and their impact on workers' well-being*, Washington Center for Equitable Growth (n.d.), <https://equitablegrowth.org/research-paper/estimating-the-prevalence-of-automated-management-and-surveillance-technologies-at-work-and-their-impact-on-workers-well-being/>; Katie Shilton, et al., *Excavating Awareness and Power in Data Science: A Manifesto for Trustworthy Pervasive Data Research*, *Big Data & Society* 8, no. 2 (2021), <https://doi.org/10.1177/20539517211040759>; Anne Beaulieu & Adolfo Estalella, *Rethinking Research Ethics for Mediated Settings*, *Information, Communication & Society* 15, no. 1, 23–42 (2012), <https://doi.org/10.1080/1369118X.2010.535838>.

⁵⁰ See, e.g., Office of the Assistant Secretary for Health (OASH), *Surgeon General Issues New Advisory About Effects Social Media Use Has on Youth Mental Health*, OASH (May 23, 2023), <https://www.hhs.gov/about/news/2023/05/23/surgeon-general-issues-new-advisory-about-effects-social-media-use-has-youth-mental-health.html>.

⁵¹ See e.g. Nathan J. Matias & Merry Mou, *CivilServant: Community-Led Experiments in*

a. What are the risks to data subjects resulting from the methods used by researchers to access pervasive data? How do these risks vary based on the methods of access?⁵⁴

b. Pervasive data often includes data subjects from different places, which may involve geographical region, legal jurisdiction, or culture. What limitations are posed by research with pervasive data that only includes data subjects from one place? How can quality research and data integrity be maintained in those cases? What best practices are available to ensure that the treatment of pervasive data across places remains consistent with the privacy expectations where the data were created?

c. What are the current best practices for de-identifying, pseudonymizing, or aggregating pervasive data? What practices exist to prevent or reduce the chance of re-identification of de-identified data? Where do these techniques fall short? What research questions may require identifiable data, and why?⁵⁵

d. One common method for mitigating ethical issues and risks to privacy and other rights from sharing data is to provide controlled access.⁵⁶

i. What are the challenges and opportunities associated with provisioning pervasive data through controlled access?

ii. What criteria should be used to evaluate a request for controlled access to pervasive data?⁵⁷

iii. How can evaluation and approval procedures ensure access to pervasive data is non-discriminatory?

e. Under what conditions should data subjects be notified that their data is used for research? What are necessary and/or best practices for communicating with data subjects when their data is used for research? What barriers exist to notifying data subjects?⁵⁸

i. When should informed consent be obtained from users or data subjects? What should be the differences between informed consent obtained for a specific project versus for commercial or general secondary use (e.g., “broad consent”)? What are the barriers to obtaining informed consent from users and data subjects?

ii. What practices exist to support autonomy of data subjects in ways that may differ from standard concepts of informed consent?

iii. What are the best ways to communicate with users and data subjects when their data is used for research?

9. What are the risks and mitigation measures that arise when processing and analyzing pervasive data?⁵⁹

sharing.nih.gov/data-management-and-sharing-policy/protecting-participant-privacy-when-sharing-scientific-data/designating-scientific-data-for-controlled-access; The National Secure Data Service Demonstration, <https://ncses.nsf.gov/initiatives/national-secure-data-service-demo>; The Standard Application Process, <https://ncses.nsf.gov/initiatives/standard-application-process>.

⁵⁷ Considerations might include, for example, the researcher (e.g., affiliation), the research project (e.g., research design, data security), the type of data (e.g., identifiability, publicness, source, level of sensitivity, or information modality) or other factors.

⁵⁸ See National Institutes of Health, *Informed Consent for Research Using Digital Health Technologies*, 2024, https://osp.od.nih.gov/wp-content/uploads/2024/05/DigitalHealthResource_Final.pdf; Nathan J. Matais & Merry Mou, *CivilServant: Community-Led Experiments in Platform Governance*, In Proceedings of the 2018 CHI Conference on Human Factors in Computing Systems, 1–13. CHI ’18. New York, NY, USA: Association for Computing Machinery (2018), <https://doi.org/10.1145/3173574.3173583>; Casey Fiesler & Nicholas Proferes, *Participant’ Perceptions of Twitter Research Ethics*, *Social Media & Society* 4, no. 1 (2018), <https://doi.org/10.1177/2056305118763366>.

⁵⁹ Considerations may include assumptions made about the data, methodological flaws, misapplication of AI/ML systems, or statistical techniques used to analyze data. See e.g., Anja Bechmann & Bendert Zevenbergen, *AI and Machine Learning: internet Research Ethics Guidelines, IRE 3.0 Companion 6.1*, Association of internet Researchers, 33–49 (2020), <https://aoir.org/reports/ethics3.pdf>; See also Zeynep Tufekci, *Big Questions*

a. Researchers will sometimes combine pervasive data with other pervasive data or with non-pervasive data from other sources. How might this impact risks? What best practices exist to mitigate these risks?

10. What are the risks to privacy and other rights related to the dissemination and archiving of research outputs? What mitigation measures exist?

a. What steps should researchers take to protect data subjects or against societal-level harms prior to the dissemination of research outputs (publications, presentation slides, data visualization, datasets, AI/ML models, etc.)?⁶⁰

b. Under what circumstances is it appropriate for an online service provider or data intermediary to have access to or review third-party research papers before they are submitted for publication? Are there circumstances where pre-publication review is inappropriate?⁶¹

c. Reproducibility can help promote trust in research.⁶² What factors do/should researchers consider when deciding when/how to delete, store, share, or archive pervasive data?⁶³

for Social Media Big Data: Representativeness, Validity and Other Methodological Pitfalls, Proceedings of the International AAAI Conference on Web and Social Media 8, no. 1, 505–14 (May 16, 2014), <https://doi.org/10.1609/icwsm.v8i1.14517>.

⁶⁰ See e.g. Anja Bechmann & Bendert Zevenbergen, *AI and Machine Learning: internet Research Ethics Guidelines, IRE 3.0 Companion 6.1*, Association of internet Researchers, 33–49 (2020), <https://aoir.org/reports/ethics3.pdf> at 43; Irene V. Pasquetto, *What Is Research Data ‘Misuse’? And How Can It Be Prevented or Mitigated?*, *Journal of the Association for Information Science and Technology* (July 27, 2024), <https://doi.org/10.1002/asi.24944>.

⁶¹ See e.g. U.S.-EU Trade and Technology Council, *Status Report: Mechanisms for Researcher Access to Online Platform Data | Shaping Europe’s Digital Future*, Section 1.5.2 (April 5, 2024) <https://digital-strategy.ec.europa.eu/en/library/status-report-mechanisms-researcher-access-online-platform-data>.

⁶² See *Moving towards Reproducible Machine Learning*, *Nature Computational Science* 1, no. 10, 629–30 (October 2021), <https://doi.org/10.1038/s43588-021-00152-6>. See also Committee on Reproducibility and Replicability in Science, et al., *Reproducibility and Replicability in Science*, Washington, DC, National Academies Press (2019), <https://doi.org/10.17226/25303>.

⁶³ Such factors might include but are not limited to: Treatment of user-created data that either the user or the online service provider deleted after the research project; Storage of data that includes information about data subjects that are not users; Length of time to store data following the conclusion of a research project and when and how to delete that data; Level of access to stored data (e.g., is it available to the public or only researchers that have been granted access); Prior communication with data subjects, including whether data subjects received notice or gave informed consent; The types of data collected and the level of aggregation/deidentification performed; Restrictions or controls on how data can be

Continued

⁵⁴ See, e.g., Sandvig, C., Hamilton, K., Karahalios, K., & Langbort, C. (2014). Auditing algorithms: Research methods for detecting discrimination on internet platforms. *Data and discrimination: converting critical concerns into productive inquiry*, 22(2014), 4349–4357. Responses may address the following methods as well as any others not listed: Web scrapers/crawlers, Application Programming Interfaces (APIs), clean rooms/data enclaves/secure computer interfaces, data donations through data portability features built within an online service, data donations through data exports provided to the user by request to the online service (a mandate in some data protection laws), data donations through a passive sensing app or browser extensions, contract-based partnerships between researchers and online service providers, contracts or data purchases between researchers and data intermediaries, virtual data centers, research data centers such as FSRDCs and FFRDCs, or workplace observation.

⁵⁵ See Jacob Metcalf & Kate Crawford. “Where Are Human Subjects in Big Data Research? The Emerging Ethics Divide.” *Big Data & Society* 3, no. 1 (2016), <https://doi.org/10.1177/2053951716650211>. See also Networking and Information Technology Research and Development Subcommittee of the National Science and Technology Council, *National Strategy to Advance Preserving Data and Analytics*, White House (March 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/03/National-Strategy-to-Advance-Privacy-Preserving-Data-Sharing-and-Analytics.pdf>.

⁵⁶ See Christopher Morten et al., *Researcher Access to Social Media Data: Lessons from Clinical Trial Data Sharing*, 38 Berkeley Tech. L.J. 109 (2024), U of Michigan Public Law Research Paper No. 24–017 (April 1, 2024), <https://doi.org/10.2139/ssrn.4716353>. See also, Jeffrey Mervis, *Accessing U.S. Data for Research Just Got Easier*, *Science* (December 8, 2022), <https://doi.org/10.1126/science.adg2113>; National Institutes of Health, *Designating Scientific Data for Controlled Access | Data Sharing*, (Accessed August 31, 2024). <https://>

11. What existing ethical frameworks, such as those from professional organizations⁶⁴ or government agencies,⁶⁵ should be considered when drafting national-level ethical guidelines for research with pervasive data?

a. To what extent do existing frameworks apply to the collection and use of pervasive data?

b. What modifications of existing frameworks might be necessary to ensure that those frameworks are applicable to the needs of research with pervasive data?

12. What are the existing requirements and legal obligations that impact research with pervasive data?

a. What are the risks around research that uses pervasive data, if any, that currently fall beyond the usual considerations of IRBs operating under the Common Rule or FDA regulations?

b. What steps can be taken to ensure that potential new guidelines for research with pervasive data complement the existing regulatory framework for human subjects research?

c. How can research ethics guidelines be either integrated into existing workflows (such as IRB review processes) or given new workflows to ensure research is performed ethically and in a manner that protects individual privacy and other rights?⁶⁶

d. To what extent do state laws, federal laws, or other legal obligations⁶⁷ create uncertainties, barriers, or appropriate protections for:

i. Online service providers to voluntarily share pervasive data with researchers?

ii. Data intermediaries' ability to store and provide access to pervasive data?

iii. Researchers' ability to collect and analyze pervasive data?

e. How are researchers constrained by provisions in online service's terms of service, such as online services' general end-user agreements or the terms associated with APIs and other researcher access programs?⁶⁸

f. Pervasive data can include data subjects that reside outside of the U.S. and are therefore subject to different laws.⁶⁹ In what ways do international and foreign laws create uncertainties or barriers for:

i. Online service providers to voluntarily share pervasive data with researchers?

ii. Data intermediaries' ability to store and provision access to pervasive data?

iii. Researchers' ability to collect and analyze pervasive data?

13. What structured processes (questionnaires, rubrics, assessment frameworks) could be used to determine which techniques should be used to mitigate risks to data subjects and society in research that relies on pervasive data?⁷⁰

⁶⁸ See U.S.-EU Trade and Technology Council, *Status Report: Mechanisms for Researcher Access to Online Platform Data | Shaping Europe's Digital Future*, Section 1.5.2 (April 5, 2024) <https://digital-strategy.ec.europa.eu/en/library/status-report-mechanisms-researcher-access-online-platform-data> at Section 1.5. See also Casey Fiesler, et al., *No Robots, Spiders, or Scrapers: Legal and Ethical Regulation of Data Collection Methods in Social Media Terms of Service*, Proceedings of the International AAAI Conference on Web and Social Media 14, 187–96 (May 26, 2020), <https://doi.org/10.1609/icwsm.v14i1.7290>. See also Emil Chiauzzi, & Paul Wicks, *Digital Trespass: Ethical and Terms-of-Use Violations by Researchers Accessing Data From an Online Patient Community*, Journal of Medical Internet Research 21, no. 2 (February 21, 2019), <https://doi.org/10.2196/11985>.

⁶⁹ See Office for Human Research Protections (OHRP), *Attachment B—European Union's General Data Protection Regulations* (March 13, 2018), <https://www.hhs.gov/ohrp/sac/rp-committee/recommendations/attachment-b-implementation-of-the-european-unions-general-data-protection-regulation-and-its-impact-on-human-subjects-research/index.html>.

⁷⁰ See, for example, the following examples of frameworks, questionnaires, rubrics, and assessment tools to help researchers reason through ethical principles and select best practices: Michael S. Bernstein, et al., *ESR: Ethics and Society Review of Artificial Intelligence Research*, arXiv/Stanford University (July 9, 2021), <https://doi.org/10.48550/arXiv.2106.11521>; Katie Shilton et al., *PERVADE Decision Support Tool—PERVADE*, University of Maryland (April 10, 2024), <https://pervade.umd.edu/2024/04/pervade-decision-support-tool/>; European Digital Media Observatory, *EDMO Releases Report on Researcher Access to Platform Data*, 76 (May 31, 2022), <https://edmo.eu/2022/05/31/edmo-releases-report-on-researcher-access-to-platform-data/>; Annette N Markham et al., *Ethics as Methods: Doing Ethics in the Era of Big Data Research—Introduction*, Social Media + Society 4, no. 3 (2018), <https://doi.org/10.1177/2056305118784502>; Lorrie Cranor et al., *Conference Submission and Review Policies to Foster Responsible Computing Research*, Washington, DC Computing Research Association (2024) <https://cra.org/wp-content/uploads/2024/07/Report-Conference-Submission-and-Review-Policies.pdf>.

14. How should ethical guidelines take into account future technological advances around research with pervasive data?

Dated: December 5, 2024.

Stephanie Weiner,
Chief Counsel, National Telecommunications and Information Administration.

[FR Doc. 2024–29064 Filed 12–10–24; 8:45 am]

BILLING CODE 3510–60–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL25–14–000]

Idaho Power Company; Notice of Institution of Section 206 Proceeding and Refund Effective Date

On December 5, 2024, the Commission issued an order in Docket No. EL25–14–000, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e, instituting an investigation to determine whether Idaho Power Company's Rate Schedule is unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. *Idaho Power Company*, 189 FERC ¶ 61,172 (2024).

The refund effective date in Docket No. EL25–14–000, established pursuant to section 206(b) of the FPA, will be the date of publication of this notice in the **Federal Register**.

Any interested person desiring to be heard in Docket No. EL25–14–000 must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 CFR 385.214 (2023), within 21 days of the date of issuance of the order.

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>) using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. From FERC'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

cra.org/wp-content/uploads/2024/07/Report-Conference-Submission-and-Review-Policies.pdf.

reshared or used, including whether data can be used for commercial purposes.

⁶⁴ See, e.g., *Ethical Guidelines for Statistical Practice*, American Statistical Association (February 2022), <https://www.amstat.org/docs/default-source/amstat-documents/ethicalguidelines.pdf>. See also Aline Shakti Franzke, et al. *Internet Research: Ethical Guidelines 3.0* (2020), <https://aoir.org/reports/ethics3.pdf>.

⁶⁵ See, e.g., *Artificial Intelligence And Worker Well-being: Principles And Best Practices For Developers And Employers*, Department of Labor (n.d.), <https://www.dol.gov/general/AI-Principles; Ethics Principles for Access to and Use of Veteran Data>, Department of Veterans Affairs (n.d.), <https://digital.va.gov/ethics-principles-for-access-to-and-use-of-veteran-data/>; NIST Privacy Framework (2020), <https://doi.org/10.6028/NIST.CSWP.01162020>.

⁶⁶ See e.g. Jessica Pater, et al., *No Humans Here: Ethical Speculation on Public Data, Unintended Consequences, and the Limits of Institutional Review*, Proc. ACM Hum.-Comput. Interact. 6, no. GROUP 38, 1–13 (January 14, 2022), <https://doi.org/10.1145/3492857>.

⁶⁷ In addition to the laws referenced in the Background, laws such as the Confidential Information Protection and Statistical Efficiency Act and Title 13 of the U.S. Code also set requirements for interactions with data.

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 FERC'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, protests and interventions in lieu of paper using the "eFile" link at <https://www.ferc.gov>. In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Debbie-Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Debbie-Anne A. Reese, Acting 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.

Dated: December 5, 2024.

Carlos D. Clay,

Acting Deputy Secretary.

[FR Doc. 2024-29095 Filed 12-10-24; 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: RP25-268-000.

Applicants: Crux1, LLC, HEDV Gala, LLC.

Description: Joint Petition for Limited Waiver of Capacity Release Regulations, et al. of CRUX1, LLC, et al.

Filed Date: 12/5/24.

Accession Number: 20241205-5058.

Comment Date: 5 p.m. ET 12/17/24.

Docket Numbers: RP25-269-000.

Applicants: LA Storage, LLC.

Description: Tariff Amendment: LA Storage Tariff Cancellation Filing to be effective 1/1/2025.

Filed Date: 12/5/24.

Accession Number: 20241205-5082.

Comment Date: 5 p.m. ET 12/17/24.

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.

The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercgensearch.asp>) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

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: December 5, 2024.

Carlos D. Clay,

Acting Deputy Secretary.

[FR Doc. 2024-29096 Filed 12-10-24; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 4113-067]

Oswego Hydro Partners, LP; Notice of Application Accepted for Filing and Soliciting Motions To Intervene and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* 4113-067.

c. *Date Filed:* February 27, 2024.

d. *Applicant:* Oswego Hydro Partners, LP.

e. *Name of Project:* Phoenix Hydroelectric Project (project).

f. *Location:* On the Oswego, Oneida, and Seneca Rivers in Onondaga and Oswego counties, New York.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)-825(r).

h. *Applicant Contact:* Jody Smet, Vice President Regulatory Affairs, Eagle Creek Renewable Energy, LLC, 7315 Wisconsin Avenue, Suite 1100W, Bethesda, MD 20814; telephone at (240) 482-2700; email at Jody.smet@eaglecreekre.com.

i. *FERC Contact:* Joshua Dub, Project Coordinator, Great Lakes Branch, Division of Hydropower Licensing; telephone at (202) 502-8138; email at Joshua.Dub@ferc.gov.

j. *Deadline for filing motions to intervene and protests:* February 3, 2025.

The Commission strongly encourages electronic filing. Please file motions to intervene and protests using the Commission's eFiling system at <https://ferconline.ferc.gov/FEROnline.aspx>. For assistance, please contact FERC Online Support at FEROnlineSupport@ferc.gov, (866) 208-3676 (toll free), or (202) 502-8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Debbie-Anne A. Reese, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Debbie-Anne A. Reese, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852. All filings must clearly identify the project name and docket number on the first page: Phoenix Hydroelectric Project (P-4113-067).

The Commission's Rules of Practice and Procedure require all intervenors

filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted, but is not ready for environmental analysis at this time.

l. *Project Description:* The project consists of a 981-foot-long concrete dam, known as the Phoenix Dam, that includes: (1) an approximately 90-foot-long, 55-foot-wide powerhouse that is integral with the dam and includes: (a) north and south intake openings with a trashrack with 1-inch clear bar spacing; and (b) two 1.59-megawatt (MW) vertical Kaplan turbine-generator units, for a total installed capacity of 3.18 MW; (2) a 25-foot-long section that includes a 10-foot-long debris sluice gate and a 7-foot-long sluice gate; (3) a 163-foot-long ogee spillway with 1-foot-high flashboards that have a crest elevation of 362.42 feet North American Vertical Datum of 1988 (NAVD 88); (4) an approximately 206-foot-long section with four 46.5-foot-long Tainter gates; (5) a 390-foot-long ogee spillway with 1-foot-high flashboards that have a crest elevation of 362.42 feet NAVD 88; and (6) a 107-foot-long section with two 41.5-foot-long Tainter gates.

The 107-foot-long Tainter gate section of Phoenix Dam abuts Lock Island, which is a non-project feature that spans approximately 150 feet of the Oswego River. In addition, a non-project lock, known as the Phoenix Lock, spans approximately 45 feet of the Oswego River between Lock Island and the east shoreline of the Oswego River. Together, the Phoenix Dam, Lock Island, and Phoenix Lock create an impoundment that has a surface area of approximately 1,400 acres at 362.42 feet NAVD 88.

From the impoundment, water flows through the trashrack to a forebay, and then through the powerhouse. Water is discharged from the turbines to an approximately 120-foot-long tailrace that discharges to the Oswego River.

The project includes a trap and transport facility for the upstream passage of American eel, including an eel ramp and eel collection box located approximately 160 feet downstream of the project dam on the west shoreline of the Oswego River. The project also includes a downstream fishway that consists of the 7-foot-long sluice gate and a 4.8-foot-deep concrete plunge pool. Additionally, the project includes an aluminum walkway that provides

access to the 206-foot-long Tainter gate section of the dam.

The project generators are connected to the regional electric grid by a 4.16/34.5-kilovolt (kV) step-up transformer and a 230-foot-long, 34.5-kV underground transmission line. The minimum and maximum hydraulic capacities of the powerhouse are 500 and 4,580 cubic feet per second (cfs), respectively. The average annual energy production of the project was 10,518 megawatt-hours from 2016 through 2023.

The current license requires Oswego Hydro to operate the project in a run-of-river mode and maintain a maximum impoundment surface elevation of 362.42 feet NAVD88. Oswego Hydro currently maintains the surface elevation of the impoundment between 361.92 feet and 362.42 feet NAVD 88. The current license also requires Oswego Hydro to: (1) release a year-round minimum flow of 300 cfs or inflow, whichever is less, to the Oswego River downstream of the project; and (2) when inflow is less than 1,900 cfs from June 1 through October 31, monitor water quality and, if average tailwater dissolved oxygen drops below 5 milligrams per liter, provide mitigative flow releases for the protection of downstream water quality. Oswego Hydro provides upstream eel passage from June through October, using the trap and transport facility, and provides downstream fish passage year-round using the downstream fishway.

Oswego Hydro proposes to continue operating the project in a run-of-river mode and maintaining the surface elevation of the impoundment at 361.92 to 362.42 feet NAVD 88. Oswego Hydro proposes to continue releasing a year-round minimum flow of 300 cfs or inflow, whichever is less, to the Oswego River downstream of the project, but does not propose to continue water quality monitoring and mitigative flow releases when inflow is less than 1,900 cfs from June 1 through October 31. In addition, Oswego Hydro proposes to continue operating and maintaining the trap and transport facility and the downstream fishway for eel and fish passage. Oswego Hydro proposes to develop a fish passage operation and maintenance plan, implement a Bat and Bald Eagle Protection Plan that it filed in the application, and maintain an existing interpretative display and fencing for the protection of historic properties.

m. A copy of the application can be viewed on the Commission's website at <https://www.ferc.gov> using the "eLibrary" link. Enter the docket number excluding the last three digits in

the docket number field to access the document. For assistance, contact FERC Online Support. A copy is also available for inspection and reproduction at the Phoenix Public Library, 34 Elm Street, Phoenix, New York.

You may also register online at <https://ferconline.ferc.gov/FERCOnline.aspx> to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. 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.

o. Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or motions to intervene must be received on or before the specified deadline date for the particular application.

All filings must (1) bear in all capital letters the title "PROTEST" or "MOTION TO INTERVENE;" (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and email address of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application.

Dated: December 5, 2024.

Carlos D. Clay,

Acting Deputy Secretary.

[FR Doc. 2024-29093 Filed 12-10-24; 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 electric rate filings:

Docket Numbers: ER23–2212–005.
Applicants: New York Independent System Operator, Inc., Consolidated Edison Company of New York, Inc.
Description: Compliance filing: New York Independent System Operator, Inc. submits tariff filing per 35: Con Edison Compliance: Rate Schedule 19 Formula Rate Template to be effective 8/22/2023.
Filed Date: 12/5/24.
Accession Number: 20241205–5077.
Comment Date: 5 p.m. ET 12/26/24.
Docket Numbers: ER23–2448–000.
Applicants: Tunica Windpower LLC.
Description: Supplement to 07/31/2024 Notice of Change in Status of Tunica Windpower LLC.
Filed Date: 12/3/24.
Accession Number: 20241203–5271.
Comment Date: 5 p.m. ET 12/24/24.
Docket Numbers: ER24–2039–001.
Applicants: Deseret Generation & Transmission Co-operative, Inc.
Description: Compliance filing: OATT Order No. 2023 Second Compliance to be effective 5/17/2024.
Filed Date: 12/5/24.
Accession Number: 20241205–5032.
Comment Date: 5 p.m. ET 12/26/24.
Docket Numbers: ER25–85–000.
Applicants: Westside Canal 2A, LLC.
Description: Supplement to October 11, 2024, Westside Canal 2A, LLC tariff filing.
Filed Date: 12/2/24.
Accession Number: 20241202–5301.
Comment Date: 5 p.m. ET 12/12/24.
Docket Numbers: ER25–645–000.
Applicants: PJM Interconnection, L.L.C.
Description: 205(d) Rate Filing: Original CSA Service Agreement No. 7423; Project Identifier #Q505 to be effective 11/4/2024.
Filed Date: 12/4/24.
Accession Number: 20241204–5121.
Comment Date: 5 p.m. ET 12/26/24.
Docket Numbers: ER25–647–000.
Applicants: Southwestern Public Service Company.
Description: Petition for Limited Waiver of Southwestern Public Service Company.
Filed Date: 12/4/24.
Accession Number: 20241204–5124.
Comment Date: 5 p.m. ET 12/26/24.
Docket Numbers: ER25–651–000.
Applicants: PJM Interconnection, L.L.C.

Description: 205(d) Rate Filing: Original GIA, Service Agreement No. 7419; AF2–032 to be effective 11/4/2024.
Filed Date: 12/4/24.
Accession Number: 20241204–5223.
Comment Date: 5 p.m. ET 12/26/24.
Docket Numbers: ER25–652–000.
Applicants: American Electric Power Service Corporation.
Description: 205(d) Rate Filing: AEPSC submits a revision to Attachment 1 of the ILDSA—SA No. 1252 to be effective 3/1/2025.
Filed Date: 12/5/24.
Accession Number: 20241205–5025.
Comment Date: 5 p.m. ET 12/26/24.
Docket Numbers: ER25–653–000.
Applicants: Deseret Generation & Transmission Co-operative, Inc.
Description: Initial rate filing: WestConnect PPA Concurrence to be effective 12/6/2024.
Filed Date: 12/5/24.
Accession Number: 20241205–5031.
Comment Date: 5 p.m. ET 12/26/24.
Docket Numbers: ER25–654–000.
Applicants: PJM Interconnection, L.L.C.
Description: 205(d) Rate Filing: Amendment to WMPA SA No. 6915; Queue No. AF2–039/AF2–088 to be effective 2/4/2024.
Filed Date: 12/5/24.
Accession Number: 20241205–5043.
Comment Date: 5 p.m. ET 12/26/24.
Docket Numbers: ER25–655–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: 205(d) Rate Filing: 2024–12–05 SA 4406 Cleco Power-Cleco Power GIA (Coughlin 6) to be effective 11/26/2024.
Filed Date: 12/5/24.
Accession Number: 20241205–5049.
Comment Date: 5 p.m. ET 12/26/24.
Docket Numbers: ER25–656–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: 205(d) Rate Filing: 2024–12–05 SA 4407 Cleco Power-Cleco Power GIA (Coughlin 7) to be effective 11/26/2024.
Filed Date: 12/5/24.
Accession Number: 20241205–5053.
Comment Date: 5 p.m. ET 12/26/24.
Docket Numbers: ER25–658–000.
Applicants: PJM Interconnection, L.L.C.
Description: 205(d) Rate Filing: Amendment to ISA, Service Agreement No. 3483; W3–032A to be effective 2/4/2025.
Filed Date: 12/5/24.
Accession Number: 20241205–5059.
Comment Date: 5 p.m. ET 12/26/24.
Docket Numbers: ER25–659–000.

Applicants: Otter Tail Power Company.
Description: 205(d) Rate Filing: 2024–12–05 SA 2690 OTP–MDU–NorthWestern Energy 2nd Rev TIA (Big Stone) to be effective 12/6/2024.
Filed Date: 12/5/24.
Accession Number: 20241205–5066.
Comment Date: 5 p.m. ET 12/26/24.
Docket Numbers: ER25–660–000.
Applicants: San Diego Gas & Electric.
Description: 205(d) Rate Filing: Service Agreement No. 70 to be effective 12/6/2024.
Filed Date: 12/5/24.
Accession Number: 20241205–5107.
Comment Date: 5 p.m. ET 12/26/24.
Docket Numbers: ER25–661–000.
Applicants: Southwest Power Pool, Inc.
Description: 205(d) Rate Filing: Revisions to Clarify RUC System-Wide Make Whole Payment Distribution Volume to be effective 2/4/2025.
Filed Date: 12/5/24.
Accession Number: 20241205–5109.
Comment Date: 5 p.m. ET 12/26/24.
Docket Numbers: ER25–662–000.
Applicants: PacifiCorp.
Description: 205(d) Rate Filing: BPA Non-Conforming PTP SA 656, Rev 5 (Lost Creek) to be effective 12/1/2024.
Filed Date: 12/5/24.
Accession Number: 20241205–5152.
Comment Date: 5 p.m. ET 12/26/24.
Docket Numbers: ER25–663–000.
Applicants: California Independent System Operator Corporation.
Description: 205(d) Rate Filing: 2024–12–05 EDAM Implementation Agmt—CAISO and BANC & Request for Notice Waiver to be effective 12/6/2024.
Filed Date: 12/5/24.
Accession Number: 20241205–5159.
Comment Date: 5 p.m. ET 12/26/24.
Docket Numbers: ER25–664–000.
Applicants: Tri-State Generation and Transmission Association, Inc.
Description: 205(d) Rate Filing: Amendment to Rate Schedule FERC No. 40 to be effective 2/4/2025.
Filed Date: 12/5/24.
Accession Number: 20241205–5160.
Comment Date: 5 p.m. ET 12/26/24.
Take notice that the Commission received the following electric securities filings:
Docket Numbers: ES25–17–000.
Applicants: Trans-Allegheny Interstate Line Company.
Description: Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of Trans-Allegheny Interstate Line Company.
Filed Date: 12/4/24.
Accession Number: 20241204–5281.

Comment Date: 5 p.m. ET 12/26/24.

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.

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: December 5, 2024.

Carlos D. Clay,

Acting Deputy Secretary.

[FR Doc. 2024-29092 Filed 12-10-24; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2290-130]

Southern California Edison Company; Notice of Application Tendered for Filing With the Commission and Establishing Procedural Schedule for Licensing and Deadline for Submission of Final Amendments

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* 2290-130.

c. *Date Filed:* November 22, 2024.

d. *Applicant:* Southern California Edison Company (SCE).

e. *Name of Project:* Kern River No. 3 Hydroelectric Project (KR3 Project).

f. *Location:* On the North Fork Kern River and on Salmon Creek and Corral Creek near the town of Kernville in Kern and Tulare Counties, California.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)-825(r).

h. *Applicant Contact:* Stephanie Fincher-DeMillo, Project Manager, Southern California Edison Company, 54170 Mtn Spruce Road, Big Creek, California 93605; (262) 302-0945; stephanie.fincher@sce.com.

i. *FERC Contact:* Quinn Emmering, Project Coordinator; (202) 502-6382 or quinn.emmering@ferc.gov.

j. The application is not ready for environmental analysis at this time.

k. *Project Description:* The KR3 Project is operated as a run-of-river facility to generate power and has no water storage. Project facilities are primarily located on federal land in the Sequoia National Forest and consist of: (1) the project's main diversion, Fairview Dam, located on the North Fork Kern River (NFKR) at river mile 18.6, which is a 26-foot-high mass concrete overflow gravity structure with a 206-foot-long, 6.5-foot-wide overflow crest at 3,632 feet above mean sea level that also serves as the spillway with a capacity of about 15,000 cubic feet per second (cfs) with 8 feet of head; (2) two non-operational fish ladders located adjacent to the west abutment of the dam; (3) two 19-foot by 8-foot fish-release slide gates each with a capacity of 300 cfs located near the east abutment of the dam passing minimum instream flow releases to the 16-mile-long NFKR bypassed reach; (4) an 85-foot-long, 19-foot-wide rectangular reinforced concrete intake structure and trash rack with 2-inch spacing on the east abutment of the dam diverting water from the NFKR; (5) a 61-foot-long, 5-foot-high mass concrete diversion structure on Salmon Creek located about 0.4 miles upstream of its confluence with the NFKR, which includes two drain gates directing water to the creek and a third gate conveying water to a diversion pipe; (6) a 226-foot-long, 26-inch-diameter steel pipe delivering water to the project's conveyance system; (7) a 43-foot-long, 8-foot-high mass concrete diversion structure on Corral Creek located about 1.1 miles upstream of its confluence with the NFKR, which includes a 17-foot-wide spillway notch on top; an 8-inch slide gate to pass natural flows downstream when not diverting; and a pipe with interchangeable fixed-orifice plates to deliver water for minimum instream

flows and to the diversion pipe; (8) a 904-foot-long, 14-inch- and 11-inch-diameter steel pipe delivering water to the project's conveyance system; (9) two flowline intake gates conveying water to an approximately 13-mile-long, 620-cfs capacity water conveyance system located along the eastern hillslope above the NFKR that is comprised of: (a) a 449-foot-long sandbox to trap sediment before water is directed to the flowline; (b) a buried flowline consisting of 24, 8-foot-high, 8.5- to 9.5-foot-wide concrete-lined tunnel segments totaling 60,270 feet long; (c) 4,600 feet of 8.5-foot-high, 8.25-foot-wide, above-ground concrete flumes between each tunnel segment; (d) the Cannell Creek siphon and spillway consisting of a 1,146-foot-long, steel pipe and a 515-foot-long spillway conveying excess water in the flowline to Cannell Creek during unplanned outages or paused generation; (e) a 1,100-foot-long, 9.5-foot-diameter concrete pressure flume pipe; (f) two 24-inch slide gates between the flume and forebay controlling flow to the penstocks; (g) a 61-foot-long, 20-foot-wide, 30-foot-high concrete box forebay with a 2,700-foot-long spillway to the NFKR; and (h) two 2,500-foot-long steel penstocks extending from the forebay to the powerhouse; (10) an 130-foot-long, 88-foot-wide concrete powerhouse containing two Francis reaction-type turbines and two generator units with installed capacities of 20.5 and 19.7 megawatts; (7) a 90-foot-long, 20-foot-wide concrete wing wall attached to the powerhouse serving as a tailrace that discharges all diverted water to the NFKR; (11) two communication lines totaling 2.5 miles long; (12) 33 project roads totaling about 18.4 miles; (13) an approximately 3.4-acre recreation facility downstream of the powerhouse with parking and a boat launch; and (14) appurtenant facilities. The estimated average annual generation (1997-2023) is 118,497 megawatt-hours.

SCE proposes to continue operating the KR3 Project in run-of-river mode with minor adjustments to the FERC project boundary and operation and maintenance activities in response to implementing proposed environmental measures. No new project facilities are proposed.

l. In addition to publishing this notice in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this notice, as well as other documents in the proceeding (e.g., license application) via the internet through the Commission's Home Page (<http://www.ferc.gov>), using the "eLibrary" link. Enter the docket number, excluding the last three digits

in the docket number field to access the document (P–2290). For assistance, contact FERC at FERCOnlineSupport@ferc.gov, (866) 208–3676 (toll free), or (202) 502–8659 (TTY). You may also register online at <https://ferconline.ferc.gov/FEROnline.aspx> to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

m. 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.

n. *Procedural Schedule*: The application will be processed according to the following preliminary schedule. Revisions to the schedule will be made as appropriate.

Deficiency Letter (if necessary)

December 2024

Additional Information Request (if necessary) January 2025

Notice of Acceptance April 2025

Issue Notice of Ready for Environmental Analysis April 2025

o. Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

Dated: December 5, 2024.

Carlos D. Clay,

Acting Deputy Secretary.

[FR Doc. 2024–29098 Filed 12–10–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 4113–067]

Oswego Hydro Partners, LP; Notice of Revised Procedural Schedule

This notice revises the Federal Energy Regulatory Commission’s (Commission) schedule for processing the relicense application for the Phoenix Hydroelectric Project No. 4113, which was filed by Oswego Hydro Partners, LP (Oswego Hydro) on February 27, 2024. On July 8, 2024, Commission staff issued Scoping Document 1 (SD1),

which included an initial processing schedule with an issuance date of September 2024, for a public notice indicating that the application is ready for environmental analysis.

On August 7, 2024, Oswego Hydro notified the Commission that it is actively engaged in settlement negotiations on potential protection, mitigation, and enhancement measures at the project. On September 6, 2024, Oswego Hydro filed a letter stating that settlement discussions with the New York State Department of Environmental Conservation and the U.S. Fish and Wildlife Service have been productive and the parties are making progress towards formalizing terms and conditions that would resolve operational and environmental issues raised by the parties. Oswego Hydro anticipated filing a Settlement Agreement with the Commission by the end of 2024. On December 2, 2024, Oswego Hydro filed an update on the settlement negotiations, stating that fish passage discussions have been productive and that it now expects to file a Settlement Agreement in the first quarter of 2025.

To provide additional time for the parties to conduct settlement negotiations, the application will be processed according to the following revised schedule.

Milestone	Target date
Notice of Ready for Environmental Analysis.	May 2025.
Comments, Recommendations, and Agency Terms and Conditions/Prescriptions.	June 2025.

If a schedule change becomes necessary, an additional notice will be provided so that interested parties and government agencies are kept informed of the project’s progress.

Dated: December 5, 2024.

Carlos D. Clay,

Acting Deputy Secretary.

[FR Doc. 2024–29097 Filed 12–10–24; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2020–0262; FRL–12436–01–OMS]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Reporting and Recordkeeping for Asbestos Abatement Worker Protection (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), Reporting and Recordkeeping for Asbestos Worker Protection, (EPA ICR Number 1246.15, OMB Control Number 2070–0072) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through January 31, 2025. Public comments were previously requested via the **Federal Register** on April 23, 2024 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

DATES: Comments may be submitted on or before January 10, 2025.

ADDRESSES: Submit your comments, referencing Docket ID number EPA–HQ–OPPT–2020–0262, to EPA online using www.regulations.gov (our preferred method), or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. EPA’s policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

FOR FURTHER INFORMATION CONTACT: Katherine Sleasman, Office of Program Support (7602M), Office of Chemical Safety and Pollution Prevention,

Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 566-1204; email address:

Sleasman.katherine@epa.gov.

SUPPLEMENTARY INFORMATION: This is a proposed extension of the ICR, which is currently approved through January 31, 2025. 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.

Public comments were previously requested via the **Federal Register** on April 23, 2024, during a 60-day comment period (89 FR 30358). This notice allows for an additional 30 days for public comments. Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at www.regulations.gov or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202-566-1744. For additional information about EPA's public docket, visit <http://www.epa.gov/dockets>.

Abstract: This ICR covers reporting and recordkeeping requirements associated with EPA's workplace standards for the protection of state and local government employees who work with asbestos and who are not covered by a state plan approved by the Occupational Safety and Health Administration. Currently, some 23 states and state equivalent territories have reporting and recordkeeping requirements under the Toxic Substances Control Act, Section 8, documenting worker protection actions for state and local government employees involved in asbestos work. EPA's asbestos work protection regulations incorporate, by reference, the OSHA Construction Industry Standard for Asbestos, and the General Industry Standard for Asbestos. EPA does not collect any information under this collection. All information subject to this collection request is to be gathered and maintained by the employer.

Form number(s): None.

Respondents/affected entities: Public Administration, Educational Services. North American Industrial Classification System (NAICS) codes identified in question 12 of the ICR.

Respondent's obligation to respond: Mandatory. (15 U.S.C 2605, 2607(a)).

Estimated number of respondents: 34,138 (total).

Frequency of response: On occasion.

Total estimated burden: 358,049 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: \$21,175,968 (per year), which includes \$0 annualized capital or operation & maintenance costs.

Changes in the estimates: There is a decrease of 14,920 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This change, which is discussed in more detail in the ICR, reflects a decrease in the number of states subject to the rule. This change is an adjustment.

Courtney Kerwin,

Director, Information Engagement Division.

[FR Doc. 2024-29065 Filed 12-10-24; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2024-0423; FRL-12291-01-OAR]

Information Collection Request Number 2265.04; Proposed Information Collection Request; Comment Request; Information Collection Activities Associated With the SmartWay Transport Partnership

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is planning to submit an information collection request (ICR), "Information Collection Activities Associated with the SmartWay Transport Partnership" (EPA ICR No. 2265.04, OMB Control No. 2060-0663) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a proposed extension of the ICR, which is currently approved through March 25, 2025. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Comments must be submitted on or before February 10, 2025.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA-HQ-OAR-2024-0423 online using www.regulations.gov (our preferred method), by email to smartway_transport@epa.gov, or by mail to: EPA Docket Center, Environmental

Protection Agency, Mail Code 28221 T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Erik Herzog, U.S. Environmental Protection Agency, 2000 Traverwood Drive, S-72, Ann Arbor, MI 48105; telephone number: 734-214-4487; Fax: 734-214-4906; email address: herzog.erik@epa.gov.

SUPPLEMENTARY INFORMATION:

Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at www.regulations.gov or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202-566-1744. For additional information about EPA's public docket, visit <https://www.epa.gov/dockets>.

Pursuant to section 3506(c)(2)(A) of the PRA, EPA is soliciting comments and information to enable it to: (i) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, EPA will issue another **Federal Register** document to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

Abstract: The EPA's Office of Air and Radiation (OAR) developed the SmartWay Transport Partnership ("SmartWay") under directives outlined

in Subtitle D of the Energy Policy Act of 2005 which calls on EPA to assess the energy and air quality impacts of activities within the freight industry. These activities include long-duration truck idling, the development and promotion of strategies for reducing idling, fuel consumption, and negative air quality effects. SmartWay's objectives also are consistent with the Clean Air Act, the Federal Technology Transfer Act and other laws that authorize and support research, training and air pollutant control activities.

SmartWay is open to organizations that own, operate, or contract with fleet operations, including truck, rail, barge, air and multi-modal carriers, logistics companies, and shippers. Organizations that do not operate fleets, but that are working to strengthen the freight industry, such as industry trade associations, state and local transportation agencies and environmental groups, also may join as SmartWay affiliates. All organizations that join SmartWay are asked to provide EPA with information as part of their SmartWay registration to annually benchmark their transportation-related operations and improve the environmental performance of their freight activities.

A company joins SmartWay when it completes and submits a SmartWay Annual Reporting tool to EPA. The company submits an updated reporting tool annually thereafter. Truck carriers with fewer than 20 trucks may submit their annual updates through the On-Line Truck Tool Short Form, rather than the full On-Line Truck Tool version. The data outputs from the submitted tool are used by partners and SmartWay in several ways. First, the data provides confirmation that SmartWay partners are meeting established objectives in their Partnership Agreement. The reporting tool outputs enable EPA to provide partners with environmental performance information to assist them in incorporating freight efficiency in their goods movement decisions. Additionally, the data allows EPA to empower SmartWay partners, as appropriate, by providing them with environmental strategies and technology information that improve their efficiency. This information also improves EPA's knowledge and understanding of the environmental and energy impacts associated with goods movement, and the effectiveness of both proven and emerging strategies to lessen those impacts.

In addition to requesting annual freight transportation-related data, EPA may ask its SmartWay partners for other kinds of information which could

include opinions and test data on the effectiveness of new and emerging technology applications, sales volumes associated with SmartWay-recommended vehicle equipment and technologies, the reach and value of partnering with EPA through the SmartWay Partnership, and awareness of the SmartWay brand. In some instances, EPA might query other freight industry representatives (not just SmartWay partners), including trade and professional associations, nonprofit environmental groups, energy and community organizations, and universities, and a small sampling of the general public.

Form Numbers: None.

Respondents/affected entities: Entities potentially affected by this action include private and public organizations that join the SmartWay Transport Partnership; freight industry representatives who engage in activities related to the SmartWay Partnership; and representative samplings of consumers in the general public. These entities may be affected by EPA efforts to assess the effectiveness and value of the SmartWay program, awareness of the SmartWay brand, and ideas for developing and improving SmartWay.

Respondent's obligation to respond: Voluntary.

Estimated number of respondents: 4,770.

Frequency of response: The information collections described in the ICR must be completed in order for an organization to register as or continue its status as a SmartWay partner, to become a SmartWay affiliate, to use the SmartWay logo on an EPA-designated tractor or trailer, or to be considered for a SmartWay Excellence Award.

Total estimated burden: The annual burden for this collection of information that all respondent partners and affiliates incur is estimated to average 8,879 hours with a projected annual aggregate cost of \$732,210. The annual burden for this collection of information that federal agency respondents incur is estimated to average 4,578 hours with a projected annual aggregate cost of \$122,602.

This ICR estimates that approximately 5,844 respondent partners will incur burden associated with SmartWay in the first year, with a growth of 330 partners per year projected into the future. The estimated average burden time per respondent is 1.52 hours annually. This is an average across all Smart Way partners, regardless of whether they are affiliates, shippers, carriers or logistics companies. The average also includes 150 consumer and industry respondents, who spend far less time,

providing the SmartWay program with basic information on their awareness of the program. Among respondent partners the burden hours are typically higher for larger companies with complex fleets, than for smaller companies.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Total estimated cost: The total annual cost to all respondent partners is \$732,210. The total annual cost to federal agency respondents is \$122,602.

Changes in estimates: There is a decrease of 3,678 hours and \$129,672 in the total estimated respondent partner burden compared with the ICR currently approved by OMB. This decrease reflects the following adjustments and program changes:

(1) Implementation of a new On-Line Truck Tools for the majority of partners.

(2) The reduction of the number of annual Affiliate Applications.

There is also a decrease of 110 hours and \$48,228 in the total estimated agency burden currently approved by OMB. This decrease is due to the following:

(1) Implementation of a new On-Line Truck Tools for the majority of partners.

(2) The reduction of the number of annual Affiliate Applications.

Karl Simon,

Director, Transportation and Climate Division, Office of Transportation and Air Quality.

[FR Doc. 2024-29020 Filed 12-10-24; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2020-0627; FRL-12453-01-OMS]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; NSPS for Petroleum Refineries (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), NSPS for Petroleum Refineries (EPA ICR Number 1054.15, OMB Control Number 2060-0022) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through December 31, 2024. Public comments were previously requested via the **Federal Register** on May 18, 2023 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

DATES: Comments may be submitted on or before January 9, 2025.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA-HQ-OAR-2020-0627, to EPA online using <https://www.regulations.gov/> (our preferred method), by email to a-and-r-docket@epa.gov, or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

The EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

FOR FURTHER INFORMATION CONTACT: Muntasir Ali, Sector Policies and Program Division (D243-05), Office of Air Quality Planning and Standards,

U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541-0833; email address: ali.muntasir@epa.gov.

SUPPLEMENTARY INFORMATION: This is a proposed extension of the ICR, which is currently approved through December 31, 2024. 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.

Public comments were previously requested via the **Federal Register** on May 18, 2023 during a 60-day comment period (88 FR 31748). This notice allows for an additional 30 days for public comments. Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at www.regulations.gov or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202-566-1744. For additional information about EPA's public docket, visit <http://www.epa.gov/dockets>.

Abstract: The New Source Performance Standards (NSPS) for the regulations published at 40 CFR part 60, subpart J were proposed on June 11, 1973; promulgated on March 8, 1974; and amended on both September 12, 2012, and December 1, 2015. These regulations apply to affected facilities at petroleum refineries that were constructed, modified or reconstructed on or before May 14, 2007. The affected sources are: (1) fluid catalytic cracking unit (FCCU) catalyst regenerator or fuel gas combustion device (FGCD) other than a flare that commenced construction, reconstruction or modification after June 11, 1973 and on/ or before May 14, 2007; (2) FGCD that is also a flare that commenced construction, reconstruction or modification after June 11, 1973 and on/ or before June 24, 2008; or (3) any Claus sulfur recovery plant with a design capacity of more than 20 long tons per day sulfur feed which commenced construction, reconstruction or modification after October 4, 1976 and on/ or before May 14, 2007. These regulations also apply to flares which commenced construction, modification, or reconstruction on/ or before June 24, 2008. At the time of this ICR renewal, all refinery flares are subject to the NSPS Subpart Ja requirements. This information is being collected to assure compliance with 40 CFR part 60, subpart J.

In general, all NSPS standards require initial notifications, performance tests, and periodic reports by the owners/operators of the affected facilities. They are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility or any period during which the monitoring system is inoperative. These notifications, reports, and records are essential in determining compliance, and are required of all affected facilities subject to NSPS.

Form Numbers: None.

Respondents/affected entities: Petroleum refineries.

Respondent's obligation to respond: Mandatory (40 CFR part 60, subpart J).

Estimated number of respondents: 130 (total).

Frequency of response: Semiannually.

Total estimated burden: 13,800 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: \$2,830,000 (per year), includes \$1,090,000 annualized capital or operation & maintenance costs.

Changes in the Estimates: There is no change in burden from the most recently approved ICR as currently identified in the OMB Inventory of Approved Burdens. This is due to two considerations. First, the regulations have not changed over the past three years and are not anticipated to change over the next three years. Second, the growth rate for this industry is very low or non-existent, so there is no significant change in the overall burden. There is an increase in capital and operation & maintenance costs due to an adjustment to increase from 2005 to 2022 \$ using the CEPCI Equipment Cost Index. Capital and operation & maintenance costs were previously adjusted from 2005 to 2019 \$.

Courtney Kerwin,

Director, Information Engagement Division.

[FR Doc. 2024-29069 Filed 12-10-24; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2023-0114; FRL-12454-01-OMS]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; NSPS for Electric Utility Steam Generating Units (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency has submitted an information collection request (ICR), NSPS for Electric Utility Steam Generating Units (EPA ICR Number 1053.14, OMB Control Number 2060-0023) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through December 31, 2024. Public comments were previously requested via the **Federal Register** on May 18, 2023 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

DATES: Additional comments may be submitted on or before January 9, 2025.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA-HQ-OAR-2023-0114, to EPA online using <https://www.regulations.gov/> (our preferred method), by email to a-and-r-docket@epa.gov, or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

FOR FURTHER INFORMATION CONTACT:

Muntasir Ali, Sector Policies and Program Division (D243-05), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina, 27711; telephone number: (919) 541-0833; email address: ali.muntasir@epa.gov.

SUPPLEMENTARY INFORMATION: This is a proposed extension of the ICR, which is currently approved through December 31, 2024. 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.

Public comments were previously requested via the **Federal Register** (88 FR 31748) on May 18, 2023 during a 60-day comment period (88 FR 31748). This notice allows for an additional 30 days for public comments. Supporting documents that explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at <https://www.regulations.gov> or in person at the EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202-566-1744. For additional information about EPA's public docket, visit <http://www.epa.gov/dockets>.

Abstract: The New Source Performance Standards (NSPS) for NSPS for Electric Utility Steam Generating Units (40 CFR part 60 subpart Da) were proposed on September 18, 1978, promulgated on June 11, 1979, and amended on November 19, 2014 and April 6, 2016. These regulations apply to new and existing electric utility steam generating units capable of combusting more than 73 megawatts (MW) heat input of fossil fuel. New facilities include those that commenced construction, modification, or reconstruction after the date of proposal. This information is being collected to assure compliance with 40 CFR part 60, subpart Da.

In general, all NSPS standards require initial notifications, performance tests, and periodic reports by the owners/operators of the affected facilities. They are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. These notifications, reports, and records are essential in determining compliance, and are required of all affected facilities subject to NSPS.

Form numbers: None.

Respondents/affected entities:

Owners and operators of electric steam generating units.

Respondent's obligation to respond: Mandatory (40 CFR part 60, subpart Da).

Estimated number of respondents: 732 (total).

Frequency of response: Initially, semiannually, and quarterly.

Total estimated burden: 171,000 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: \$37,100,000 (per year), includes \$15,600,000 annualized capital or operation & maintenance costs.

Changes in the Estimates: There is no change in burden from the most recently approved ICR as currently identified in the OMB Inventory of Approved Burdens. This is due to two considerations. First, the regulations have not changed over the past three years and are not anticipated to change over the next three years. Second, the growth rate for this industry is very low or non-existent, so there is no significant change in the overall burden. There is an increase in operation & maintenance costs due to an adjustment to increase from 2008 to 2022 \$ using the CEPCI Equipment Cost Index.

Courtney Kerwin,

Director, Information Engagement Division.

[FR Doc. 2024-29067 Filed 12-10-24; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPP-2024-0007; FRL-12450-01-OCSPP]

Pesticide Emergency Exemptions; Agency Decisions and State and Federal Agency Crisis Declarations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has granted emergency exemptions under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) for use of pesticides as listed in this notice. The exemptions were granted during the period April 1, 2024, to September 30, 2024, to control unforeseen pest outbreaks.

FOR FURTHER INFORMATION CONTACT:

Charles Smith, Director, 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: RDFRNotices@epa.gov.

SUPPLEMENTARY INFORMATION:**I. General Information***A. Does this action apply to me?*

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

- Crop production (NAICS code 111).

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

If you have any questions regarding the applicability of this action to a particular entity, consult the person listed after **FOR FURTHER INFORMATION CONTACT**.

B. How can I get copies of this document and other related information?

The docket for this action, identified by docket identification (ID) number EPA-HQ-OPP-2024-0007, 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>.

II. Background

EPA has granted or denied emergency exemptions to the following State and Federal agencies. The emergency exemptions may take the following form: specific, quarantine, public health, or crisis.

Under FIFRA section 18 (7 U.S.C. 136p), EPA can authorize the use of a pesticide when emergency conditions exist. Authorizations (commonly called emergency exemptions) are granted to State and Federal agencies and are of four types:

1. A “specific exemption” authorizes use of a pesticide against specific pests on a limited acreage in a particular State. Most emergency exemptions are specific exemptions.
2. “Quarantine” and “public health” exemptions are emergency exemptions issued for quarantine or public health purposes. These are rarely requested.
3. A “crisis exemption” is initiated by a State or Federal agency (and is confirmed by EPA) when there is insufficient time to request and obtain EPA permission for use of a pesticide in an emergency.

EPA may deny an emergency exemption: If the State or Federal agency cannot demonstrate that an emergency exists, if the use poses unacceptable risks to the environment, or if EPA cannot reach a conclusion that

the proposed pesticide use is likely to result in “a reasonable certainty of no harm” to human health, including exposure of residues of the pesticide to infants and children.

If the emergency use of the pesticide on a food or feed commodity would result in pesticide chemical residues, EPA establishes a time-limited tolerance meeting the “reasonable certainty of no harm standard” of the Federal Food, Drug, and Cosmetic Act (FFDCA).

In this document: EPA identifies the State or Federal agency granted the exemption, the type of exemption, the pesticide authorized and the pests, the crop or use for which authorized, number of acres (if applicable), and the duration of the exemption. EPA also gives the **Federal Register** citation for the time-limited tolerance, if any.

III. Emergency Exemptions

A. U.S. States and Territories

American Samoa

Environmental Protection Agency

Public health exemption: EPA authorized the use of 95,000 units of the unregistered product, Guardian, a hanging polyester mesh emanator that passively releases TRANSFLUTHRIN in communities to protect residents from mosquitoes that may transmit the dengue virus. This authorization was effective July 9, 2024, to July 9, 2025.

Arkansas

Department of Agriculture

Crisis Exemption: EPA concurred upon a crisis exemption declared by the Arkansas Department of Agriculture for the use of methoxyfenozide on rice to control fall armyworms. The authorization was effective July 11, 2024.

Specific Exemption: EPA authorized the use of methoxyfenozide on a maximum of 250,000 acres of rice to control fall armyworms. Permanent tolerances in connection with a previous action are established in 40 CFR 180.544 to support this emergency use. The authorization was effective September 4, 2024, to September 30, 2024.

California

Department of Pesticide Regulation

Crisis Exemption: EPA concurred upon a crisis exemption declared by the California Department of Pesticide Regulation for the use of afidopyropen on field-grown strawberries to control lygus bugs. The authorization was effective May 20, 2024.

Specific Exemption: EPA authorized the use of afidopyropen on a maximum

of 17,000 acres of field-grown strawberries to control lygus bugs. A time-limited tolerance supports this emergency use and is established in 40 CFR 180.700(b). The authorization was effective June 13, 2024, to October 31, 2024.

Colorado

Department of Agriculture

Specific Exemption: On September 12, 2024, EPA denied a specific exemption request for use of the unregistered product MAGNET, containing the unregistered active ingredients alpha-pinene, anisyl alcohol, butyl salicylate, cineole (eucalyptol), and phenylacetaldehyde as well as the registered active ingredient d-limonene on up to 1,400 acres of sweet corn as an insect attractant to manage corn earworm. Because an unregistered pesticide was requested, a Notice of Receipt, with opportunity for public comment (required by 40 CFR 166.24), published in the **Federal Register** on June 7, 2024 (89 FR 48610) (FRL-11998-01-OCSPP). The public comment period closed on June 24, 2024. EPA received two comments, one negative comment was submitted anonymously concerning potential risk and one from a federal government stakeholder supported allowing the use.

Florida

Department of Agriculture and Consumer Services

Specific Exemption: EPA authorized the use of clothianidin on a maximum of 75,000 acres of immature (3 to 5 years old) citrus trees to control the Asian citrus psyllid, the vector of huanglongbing (HLB, or citrus greening) disease. A time-limited tolerance in connection with this action supports this emergency use and is established in 40 CFR 180.586(b). Because the applicant proposed a use that has been requested in 5 or more previous years, a Notice of Receipt, with opportunity for public comment in accordance with the requirements at 40 CFR 166.24(a)(7)(i), published in the **Federal Register** on December 29, 2023 (88 FR 80717) FRL-11634-01-OCSPP). The public comment period closed on January 16, 2024. Two public comments were received: one from a nongovernmental organization that included substantive supporting material objected to the use and the other from a federal government stakeholder supported the use. EPA posted a document addressing the comments in response to the NOR to the docket, as well as EPA’s evaluations associated with the use, which may be accessed at <https://www.regulations.gov>

www.regulations.gov/docket/EPA-HQ-OPP-2023-0597. The authorization was effective April 16, 2024, to April 16, 2025

Hawaii

Department of Agriculture

Crisis Exemption: EPA concurred upon a crisis exemption declared by the Hawaii Department of Agriculture for the use of cypermethrin on the crowns of ornamental palm trees to control coconut rhinoceros beetles. This authorization was effective November 13, 2023.

Specific Exemption: EPA authorized the use of the unregistered product, DQB Males (*Wolbachia pipientis* DQB strain (wAlbB) contained in live adult male *Culex quinquefasciatus* mosquitoes) on a maximum of 20,000 acres of State, Federal, and private lands to control mosquitoes (*Cx.*

quinquefasciatus). Because the applicant proposed a use of a new chemical, a Notice of Receipt, with opportunity for public comment in accordance with the requirements at 40 CFR 166.24(a)(1), published in the **Federal Register** on February 8, 2024 (89 FR 8675) (FRL-11721-01-OCSPP). The public comment period closed on February 23, 2024. Eighty-seven public comments were received. EPA posted a document addressing the comments in response to the NOR to the docket, as well as EPA's evaluations associated with the use, which may be accessed at <https://www.regulations.gov/docket/EPA-HQ-OPP-2024-0035>. The authorization was effective April 25, 2024, to April 25, 2025.

Quarantine Exemption: EPA authorized the use of cypermethrin on a maximum of 10,000 acres of ornamental palm trees, applied on the crowns via unmanned aerial vehicles, to control coconut rhinoceros beetles. The authorization was effective April 22, 2024, to April 22, 2027.

Louisiana

Department of Agriculture and Forestry

Crisis Exemption: EPA concurred upon a crisis exemption declared by the Louisiana Department of Agriculture and Forestry for the use of methoxyfenozide on rice to control fall armyworms. The authorization was effective July 16, 2024.

Specific Exemption: EPA authorized the use of methoxyfenozide on a maximum of 40,000 acres of rice to control fall armyworms. Permanent tolerances in connection with a previous action are established in 40 CFR 180.544 to support this emergency use. The authorization was effective

September 4, 2024, to September 30, 2024.

Michigan

Department of Agriculture and Rural Development

Specific Exemption: EPA authorized the use of acifluorfen on a maximum of 48,000 acres of sugar beets for postemergence control of invasive *Amaranthus* (pigweed) spp., water hemp, and Palmer amaranth. Time-limited tolerances in connection with a previous action support this emergency use and are established in 40 CFR 180.383(b). The authorization was effective May 1, 2024, to July 31, 2024.

Minnesota

Department of Agriculture

Specific Exemption: EPA authorized the use of acifluorfen on a maximum of 65,000 acres of sugar beets for postemergence control of glyphosate-resistant water hemp. Time-limited tolerances in connection with a previous action support this emergency use and are established in 40 CFR 180.383(b). The authorization was effective May 20, 2024, to July 31, 2024.

Mississippi

Department of Agriculture and Commerce

Crisis Exemption: EPA concurred upon a crisis exemption declared by the Mississippi Department of Agriculture and Commerce for the use of methoxyfenozide on rice to control fall armyworms. The authorization was effective July 11, 2024.

Specific Exemption: EPA authorized the use of methoxyfenozide on a maximum of 60,000 acres of rice to control fall armyworms. Permanent tolerances in connection with a previous action are established in 40 CFR 180.544 to support this emergency use. The authorization was effective September 4, 2024, to September 30, 2024.

Missouri

Department of Agriculture

Crisis Exemption: EPA concurred upon a crisis exemption declared by the Missouri Department of Agriculture for the use of methoxyfenozide on rice to control fall armyworms. The authorization was effective July 18, 2024.

Specific Exemption: EPA authorized the use of methoxyfenozide on a maximum of 60,000 acres of rice to control fall armyworms. Permanent tolerances in connection with a previous action are established in 40

CFR 180.544 to support this emergency use. The authorization was effective September 4, 2024, to September 30, 2024.

North Dakota

Department of Agriculture

Specific Exemption: EPA authorized the use of acifluorfen on a maximum of 20,000 acres of sugar beets for postemergence control of glyphosate resistant water hemp. Time-limited tolerances in connection with a previous action support this emergency use and are established in 40 CFR 180.383(b). The authorization was effective May 27, 2024, to July 31, 2024.

Puerto Rico

Department of Agriculture

Public Health Exemption: EPA authorized the use of 750,000 units of the unregistered product, Guardian, a hanging polyester mesh emanator that passively releases TRANSFLUTHRIN in communities to protect residents from mosquitoes that may transmit the dengue virus. This authorization was effective June 20, 2024, to June 20, 2025.

B. Federal Departments and Agencies

United States Department of Agriculture

Animal and Plant Health Inspection Service

Quarantine Exemptions: EPA authorized the use of acetic acid (vinegar) on hard nonporous surfaces to control African swine fever virus. The authorization was effective June 10, 2024, to June 10, 2027.

EPA authorized the use of sodium hypochlorite on porous and nonporous, nonfood/feed contact surfaces to control foot-and mouth disease virus (FMDv), African swine fever virus (ASFv), and classical swine fever virus (CSFv). The authorization was effective September 17, 2024, to September 17, 2027.

EPA authorized the use of sodium hydroxide on hard, nonporous, nonfood/feed contact surfaces to control prions. The authorization was effective September 25, 2024, to September 25, 2027.

EPA authorized the use of sodium hypochlorite on hard, nonporous, nonfood/feed contact surfaces to control prions. The authorization was effective September 25, 2024, to September 25, 2027.

C. Annual Report of Crisis Exemptions Declared and Revoked

Seven crisis exemptions were declared, and none were revoked between November 6, 2023, to July 18, 2024.

Authority: 7 U.S.C. 136 *et seq.*

Dated: December 5, 2024.

Charles Smith,

*Director, Registration Division, Office of
Pesticide Programs.*

[FR Doc. 2024-29019 Filed 12-10-24; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OCFO-2024-0107; FRL-12487-
01-OMS]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; General Performance Reporting for Assistance Programs

AGENCY: Environmental Protection
Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), General Performance Reporting for Assistance Programs (EPA ICR Number 2802.01, OMB Control Number 2090-NEW) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a request for approval of a new collection. Public comments were previously requested via the **Federal Register** on March 7, 2024 during a 60-day comment period; and on September 19, 2024 during a 30-day comment period. This notice allows for an additional 30 days for public comments.

DATES: Comments may be submitted on or before January 9, 2025.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA-HQ-OCFO-2024-0107, to EPA online using www.regulations.gov (our preferred method), by email to Docket_OMS@epa.gov, or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT:

Aarti Iyer, Office of the Chief Financial Officer, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; email address: iyer.aarti@epa.gov; phone: 202-564-0214.

SUPPLEMENTARY INFORMATION: This is a request for approval of a new collection. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it

displays a currently valid OMB control number.

Public comments were previously requested via the **Federal Register** on March 7, 2024 during a 60-day comment period, and on September 21, 2024 during a 30-day comment period. This notice allows for an additional 30 days for public comments. Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at www.regulations.gov or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202-566-1744. For additional information about EPA's public docket, visit <http://www.epa.gov/dockets>.

Abstract: The U.S. Environmental Protection Agency (EPA) awards billions of dollars in funding for grants and other assistance agreements, with recipients ranging from small non-profit organizations to large state governments. With this Information Collection Request (ICR), EPA seeks authorization to collect information to track progress by the Agency's assistance programs. Collection of this information from award recipients enables EPA to assess and manage its assistance programs, which in turn ensures responsible stewardship of public funds; rigorous evidence-based learning and improvement; and transparent accountability to the American public. The information requested under this ICR will be collected via performance report forms, including work plans, interim reports, and final reports.

Form numbers: None.

Respondents/affected entities: Recipients of financial assistance awards from EPA.

Respondent's obligation to respond: Mandatory for grant recipients as per reporting requirements included in EPA regulations 2 CFR parts 200 and 1500.

Estimated number of respondents: 2,662 (per year).

Frequency of response: Varies.

Total estimated burden: 87,088 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: \$7,071,495.82 (per year), there are no annualized capital or operation & maintenance costs.

Changes in the estimates: This is a new collection, and so does not involve

any program changes or burden adjustments.

Courtney Kerwin,

Director, Information Engagement Division.

[FR Doc. 2024-29068 Filed 12-10-24; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-12127-01-OAR]

Official Release of the MOVES5 Motor Vehicle Emissions Model for SIPs and Transportation Conformity

AGENCY: Environmental Protection
Agency (EPA).

ACTION: Notice of availability.

SUMMARY: The Environmental Protection Agency (EPA) is announcing the availability of the latest major release of the MOtor Vehicle Emission Simulator (MOVES) model, MOVES5, for official purposes outside of California. MOVES5 is the latest version of EPA's state-of-the-science modeling tool for estimating emissions from cars, trucks, buses, and motorcycles based on the latest data and regulations. MOVES5 is available for use in state implementation plans (SIPs) and transportation conformity analyses outside of California. This notice starts a two-year grace period before MOVES5 will need to be used as the latest EPA emissions model for transportation conformity determinations outside of California, both in new regional emissions analyses and in new hot-spot analyses.

DATES: EPA's announcement of the MOVES5 emissions model for SIPs and transportation conformity determinations in states other than California is effective December 11, 2024. This announcement starts a two-year transportation conformity grace period that ends on *December 11, 2026*. After this date, MOVES5 will need to be used as the latest EPA emissions model for new transportation conformity analyses outside of California in both regional emissions analyses and in hot-spot analysis.

FOR FURTHER INFORMATION CONTACT: For technical model questions regarding the official release or use of MOVES5, please email EPA at mobile@epa.gov. For questions about SIPs, contact Kaitlyn Leffert at Leffert.Kaitlyn@epa.gov. For transportation conformity questions, contact Aaron Letterly at Letterly.Aaron@epa.gov.

SUPPLEMENTARY INFORMATION:

The contents of this notice are as follows:

I. General Information

- II. What is MOVES5?
 III. SIPs and MOVES5
 IV. Transportation Conformity and MOVES5

I. General Information

A. Does this action apply to me?

Entities potentially impacted by the approval of MOVES5 are those that adopt, approve, or fund transportation plans, transportation improvement programs (TIPs), or transportation projects as defined in 40 CFR 93.101 and those that develop and submit SIPs to EPA. Regulated categories and entities potentially affected by today's action include:

Category	Examples of regulated entities
Local government	Local air quality and transportation agencies, including metropolitan planning organizations (MPOs).
State government ..	State air quality and transportation agencies.
Federal government.	Department of Transportation (Federal Highway Administration (FHWA) and Federal Transit Administration (FTA)).

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by the release of MOVES. Other entities not listed in the table could also be affected. To determine whether your organization is affected by this action, you should carefully examine the transportation conformity applicability requirements in 40 CFR 93.102. If you have questions regarding the applicability of this action to a particular entity, consult the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. How can I get copies of MOVES5 and other related information?

The official version of the MOVES5 model and supporting documentation are available on EPA's MOVES website: <https://www.epa.gov/moves>. Individuals who want to receive EPA announcements related to the MOVES5 model can subscribe to the EPA–MOBILENEWS email listserv, which can be done at EPA's website at: <https://www.epa.gov/moves/forms/epa-mobileneews-listserv>.

Available guidance on how to apply MOVES5 for SIPs and transportation conformity purposes can be found on EPA's transportation conformity website, [https://www.epa.gov/state-and-local-transportation/policy-and-](https://www.epa.gov/state-and-local-transportation/policy-and-technical-guidance-state-and-local-transportation)

[technical-guidance-state-and-local-transportation](https://www.epa.gov/state-and-local-transportation/policy-and-technical-guidance-state-and-local-transportation),¹ including the “MOVES5 Policy Guidance: Use of MOVES for State Implementation Plan Development, Transportation Conformity, General Conformity, and Other Purposes.” (EPA–420–B–24–038, November 2024).

EPA will continue to update these websites as other MOVES support materials and guidance are developed or updated.

II. What is MOVES5?

MOVES5 is EPA's latest official motor vehicle emissions model for state and local agencies to estimate volatile organic compounds (VOCs), nitrogen oxides (NO_x), particulate matter (PM_{2.5} and PM₁₀), carbon monoxide (CO), and other pollutants and precursors from cars, trucks, buses, and motorcycles for SIP purposes and transportation conformity determinations outside of California.² The model is based on analyses of millions of emission test results and considerable advances in the Agency's understanding of vehicle emissions. MOVES5 is a major revision to the MOVES series of models. This model is the fifth major MOVES release.³

MOVES5 includes new regulations, features, and significant new data, as detailed in the MOVES5 technical reports. Notably, MOVES5 incorporates several important updates, including:

- Accounting for EPA's Light- and Medium-Duty Multi-Pollutant Rule with higher projected electric vehicle (EV) fractions and more stringent standards for carbon dioxide (CO₂), PM, non-methane organic gases (NMOG) and NO_x.⁴
- Accounting for EPA's Heavy-Duty Greenhouse Gas Emissions-Phase 3 Rule with higher projected EV fractions and updated energy consumption estimates for heavy-duty EVs.⁵
- Incorporating new data on light-duty (LD) and heavy-duty (HD) brake wear emissions.

¹ Interested parties can find these documents under the “Emission Models and Conformity” and “Project-Level Conformity” topics on this website.

² MOVES can also model emissions in the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Nonattainment and maintenance areas located in California use the latest approved version of the Emission FAcTtor (EMFAC) model.

³ For more information, see EPA's MOVES Versions in Limited Current Use website at <https://www.epa.gov/moves/moves-versions-limited-current-use>.

⁴ See EPA's final rule, “Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles,” published in the **Federal Register** on April 18, 2024 (89 FR 27842).

⁵ See EPA's final rule, “Greenhouse Gas Emissions Standards for Heavy-Duty Vehicles—Phase 3,” published in the **Federal Register** on April 22, 2024 (89 FR 29440).

- Expanding detailed calculations to vehicles up to 40 years old, instead of 30.

- Updating onroad and nonroad fuel properties for calendar year 2021 and later.

- Updated historical and forecast default vehicle miles travelled (VMT), vehicle populations, age distributions, and fuel distributions.

For additional information on the updates included in MOVES5, please refer to the “Overview of EPA's Motor Vehicle Emissions Simulator (MOVES5),” found at EPA's MOVES website. Specific information about MOVES5 inputs and algorithms can be found on EPA's websites for MOVES Onroad Technical Reports and MOVES Nonroad Technical Reports.⁶

Like its predecessors, MOVES5 can estimate vehicle exhaust and evaporative emissions as well as brake wear and tire wear emissions for criteria pollutants and precursors. Also, like previous versions, MOVES5 does not estimate emissions of re-entrained road dust. To estimate emissions from re-entrained road dust, practitioners should continue to use the latest approved methodologies.⁷

The structure of MOVES5 is fundamentally the same as MOVES4, although there are some minor differences, e.g., in the user interface. However, inputs developed by model users for previous versions of MOVES will need to be updated to work with MOVES5. Model run time may differ depending on the type of run and user inputs and computer configuration. As for emissions, EPA performed a comparison of onroad emissions from MOVES5 to emissions from MOVES4 using default information in MOVES5 at the national level, and for three sample urban counties with different local travel patterns and ambient conditions. In general, compared to MOVES4, MOVES5 emissions of NO_x, PM_{2.5}, VOC, and CO tend to be higher in the 2020s and 2030s. In the longer term, emissions of these pollutants in MOVES5 are lower due to the emissions reductions of new EPA regulations. Note that results will vary based on the pollutant selected and that area's local inputs.

III. SIPs and MOVES5

EPA has articulated its policy regarding the use of MOVES5 in SIP development in its “MOVES5 Policy

⁶ For more information, see EPA's MOVES website: <https://www.epa.gov/moves>.

⁷ See EPA's notice of availability, “Official Release of the January 2011 AP–42 Method for Estimating Re-Entrained Road Dust from Paved Roads,” published in the **Federal Register** on February 4, 2011 (76 FR 6328).

Guidance: Use of MOVES for State Implementation Plan Development, Transportation Conformity, General Conformity, and Other Purposes” (EPA–420–B–24–038, November 2024).

Today’s notice highlights certain aspects of the guidance, but state and local governments should refer to the guidance for more detailed information on how and when to use MOVES5 in reasonable further progress SIPs, attainment demonstrations, maintenance plans, inventory updates, and other SIP submissions.

MOVES5 should be used in ozone, CO, PM, and nitrogen dioxide (NO₂) SIP development as expeditiously as possible, as there is no grace period for the use of MOVES5 in SIPs. The Clean Air Act requires that SIP inventories and control measures be based on the most current information and applicable models that are available when a SIP is developed.⁸ States other than California should use the latest version of MOVES that is available at the time that a SIP is developed, which is now MOVES5. Using MOVES5 for SIPs that will be submitted in the future ensures that they are based on the most accurate estimates of emissions possible.

However, EPA recognizes the time and level of effort involved in SIP development, so in cases where state and local agencies have already completed significant work on a SIP with MOVES4 (e.g., attainment modeling has already been completed with MOVES4), they may continue to rely on this earlier version. In addition, due to the fact that EPA is releasing multiple versions of MOVES in a short timeframe, MOVES3 may have already been used in SIP development. In areas where state and local agencies have already completed significant work on a SIP with MOVES3, MOVES3 may continue to be used in SIP development. EPA believes this would be only a limited number of cases. States should consult with their EPA Regional Office if they have questions about how MOVES5 affects SIPs under development in specific nonattainment or maintenance areas. Early consultation can facilitate EPA’s adequacy finding for SIP motor vehicle emissions budgets for transportation conformity purposes or for the SIP approval process.

⁸ See Clean Air Act section 172(c)(3). Also see the discussion of emissions inventory requirements in the “Fine Particulate Matter National Ambient Air Quality Standards: State Implementation Plan Requirements” rule (81 FR 58029, August 24, 2016) and in the “Implementation of the 2015 National Ambient Air Quality Standards for Ozone: Nonattainment Area State Implementation Plan Requirements” rule (83 FR 63022, December 6, 2018).

The Clean Air Act does not require states to revise submitted SIPs or SIPs that have already been approved simply because a new motor vehicle emissions model is now available.⁹ States can choose to update these SIPs with MOVES5, for example, if it is determined that it is appropriate to update motor vehicle emissions budgets (“budgets”) with the model for future conformity determinations. However, as stated above, states should use MOVES5 where SIP development is in its initial stages or has not progressed far enough along that switching from a previous model version would create a significant adverse impact on state resources.

Incorporating MOVES5 into the SIP now could assist areas in mitigating possible transportation conformity difficulties in the future after the MOVES5 conformity grace period ends. New regional emissions analyses using EPA’s emissions model that are started after the grace period is over must be based on MOVES5 (40 CFR 93.111), so having MOVES5-based SIP budgets in place at that time could provide more consistency with transportation conformity determinations. For complete explanations of how MOVES5 is to be implemented for SIP purposes, refer to the “MOVES5 Policy Guidance: Use of MOVES for State Implementation Plan Development, Transportation Conformity, General Conformity, and Other Purposes.” (EPA–420–B–24–038).

IV. Transportation Conformity and MOVES5

Transportation conformity is required under CAA section 176(c) (42 U.S.C. 7506(c)) to ensure that federally funded or approved highway and transit activities are consistent with (“conform to”) the purpose of the SIP. Conformity to the purpose of the SIP means that transportation activities will not cause or contribute to new air quality violations, worsen existing violations, or delay timely attainment of the relevant national ambient air quality standards (NAAQS) or any interim milestones. EPA’s transportation conformity rule (40 CFR parts 51 and 93) establishes the criteria and procedures for determining whether metropolitan transportation plans, TIPs, and federally supported highway and transit projects conform to the SIP. Transportation conformity applies to designated nonattainment and maintenance areas¹⁰ for

⁹ *Sierra Club v. EPA*, 356 F.3d. 296, 308 (D.C. Cir. 2004) (“To require states to revise completed plans every time a new model is announced would lead to significant costs and potentially endless delays in the approval processes.”)

¹⁰ “Maintenance areas” are those areas that were initially designated nonattainment for a criteria

transportation-related criteria pollutants: ozone, PM_{2.5}, PM₁₀, CO, and NO₂.

In this notice, EPA is announcing the availability of MOVES5 for use in transportation conformity determinations outside of California. EPA is also establishing a two-year grace period before MOVES5 will need to be used in regional emissions analyses for transportation conformity determinations of transportation plans and transportation improvement programs (TIPs)¹¹ and in hot-spot analyses for project-level transportation conformity determinations which use EPA’s emissions model. The MOVES5 grace period for regional emissions and hot-spot analyses applies to the use of MOVES5 and any future minor revisions that occur during the grace period.

This MOVES5 grace period is separate and distinct from the two-year grace period established with the release of the previous version of the model, MOVES4. The two-year grace period established by EPA’s September 2023 MOVES4 Notice of Availability in the **Federal Register** is unchanged by the release of MOVES5 and continues to be in effect until September 12, 2025.¹² For more information, see the MOVES4 Notice of Availability in the **Federal Register** and the “MOVES5 Policy Guidance: Use of MOVES for State Implementation Plan Development, Transportation Conformity, General Conformity, and Other Purposes” (EPA–420–B–24–038, November 2024).

The remainder of this section describes how the transportation conformity grace period was determined and summarizes how it will be implemented, including those circumstances when the MOVES5 grace period could be shorter than two years for regional emissions analyses. However, for complete explanations of how MOVES5 is to be implemented for transportation conformity, including details about using MOVES5 during the grace period, refer to the “MOVES5 Policy Guidance: Use of MOVES for

pollutant and subsequently redesignated to attainment after 1990. Maintenance areas have SIPs developed under CAA section 175A. (40 CFR 93.101).

¹¹ The grace period also applies in the case that a regional emissions analysis is done for a project not from a conforming transportation plan and TIP (i.e., a project in an isolated rural area). See the transportation conformity rule at 40 CFR 93.101 for the definition of an isolated rural area and 40 CFR 93.109(g) for how conformity is done in an isolated rural area.

¹² See EPA’s Notice of Availability, “Official Release of the MOVES4 Motor Vehicle Emissions Model for SIPs and Transportation Conformity,” published in the **Federal Register** on September 12, 2023 (88 FR 62567).

State Implementation Plan Development, Transportation Conformity, General Conformity, and Other Purposes.” (EPA-420-B-24-038).

A. Why is EPA establishing a two-year conformity grace period?

Section 176(c)(1) of the Clean Air Act states that “. . . [t]he determination of conformity shall be based on the most recent estimates of emissions, and such estimates shall be determined from the most recent population, employment, travel, and congestion estimates . . .”. Additionally, the transportation conformity rule (40 CFR 93.111) requires conformity determinations to be based on “the latest emission estimation model available,” and further states that this requirement is satisfied if the most current version of EPA’s motor vehicle emissions model is used in the conformity analysis. When EPA announces a new emissions model, such as MOVES5, we establish a grace period before the model needs to be used for transportation conformity purposes (40 CFR 93.111(b)). In consultation with DOT, EPA must consider the degree of change in the emissions model and the effects of the new model on the transportation planning process (40 CFR 93.111(b)(2)). The transportation conformity rule provides that EPA will establish a grace period for new emissions models of between three and 24 months (40 CFR 93.111(b)(1)).

EPA articulated its intentions for establishing the length of a conformity grace period in the preamble to the 1993 transportation conformity rule (November 24, 1993; 58 FR 62211):

“EPA and DOT [the Department of Transportation] will consider extending the grace period if the effects of the new emissions model are so significant that previous SIP demonstrations of what emission levels are consistent with attainment would be substantially affected. In such cases, States should have an opportunity to revise their SIPs before MPOs must use the model’s new emissions factors.”

In consultation with DOT, EPA considered the degree of change in MOVES5 and the effects of the new model on the transportation planning process (40 CFR 93.111(b)(2)). EPA considered the time it will take state and local transportation and air quality agencies to conduct and provide technical support for analyses. State and local agencies will need to become familiar with the MOVES5 emissions model and will need to convert existing data for use in MOVES5. Since 1993, the fundamental purpose of section 93.111(b) of the transportation conformity rule has been to provide a

sufficient amount of time for MPOs and other state and local agencies to learn and employ new emissions models. The transition to a new emissions model for conformity involves more than learning to use the new model and preparing input data and model output. After model start-up is complete, state and local agencies also need to consider how the model affects regional emissions analysis results and whether SIP and/or transportation plan/TIP changes are necessary to assure future conformity determinations.

The two-year conformity grace period also provides sufficient time for state and local agencies to learn and apply new technical guidance and training that reflect MOVES5. EPA provides guidance on how to run the latest MOVES version for SIP and transportation conformity purposes with the release of the model¹³ and is working to update other guidance documents and training materials as quickly as possible. Generally, existing guidance and training applies to MOVES5 as noted on EPA’s website, and EPA will notify MOVES5 users when updates to these materials are available. Training materials will continue to address different levels of state and local expertise.

In addition, many agencies will be implementing the transition to MOVES5 for PM and CO hot-spot analyses for applicable projects in those nonattainment and maintenance areas, with each analysis potentially involving multiple state and local agencies. States with CO hot-spot protocols that were previously approved into the SIP (40 CFR 93.123(a)(1)) that are based on a previous version of MOVES will need time to revise them. Finally, EPA considered the general time and monetary resource constraints in which state and local agencies currently operate. Upon considerations of all these factors, EPA is establishing a two-year grace period, which begins today and ends on *December 11, 2026*, before MOVES5 needs to be used for new transportation conformity analyses outside of California.

B. Circumstances When the MOVES5 Grace Period Will Be Shorter Than Two Years

The MOVES5 grace period for regional emissions analyses will be shorter than two years for a given

pollutant if an area revises its SIP and motor vehicle emissions budgets with MOVES5 and such budgets have been found adequate or approved into the SIP prior to the end of the two-year grace period. In this case, the new regional emissions analysis must use MOVES5 if the conformity determination is based on a MOVES5-based budget (40 CFR 93.111).

Areas that are designated nonattainment or maintenance for more than one pollutant may rely on both MOVES5 and MOVES4 to determine conformity for different pollutants during the MOVES5 grace period. For example, if an area revises a previously submitted (but not approved) PM₁₀ SIP with MOVES5 and EPA finds these revised MOVES5 budgets adequate for conformity, such budgets would apply for conformity on the effective date of the **Federal Register** notice announcing EPA’s adequacy finding. In this example, if the area is nonattainment for PM₁₀ and ozone, the MOVES5 grace period would end for PM₁₀ regional emissions analyses once EPA found the new MOVES5-based SIP budgets adequate. However, MOVES4 could continue to be used for ozone-related regional emissions analyses begun before the end of the MOVES5 grace period.¹⁴ Refer to the MOVES5 Policy Guidance for additional details.

In addition, the length of the MOVES5 grace period for hot-spot analyses would not be affected by an early submission of MOVES5-based budgets. In the above example, the two-year grace period for PM₁₀ hot-spot analyses would continue to apply even if the grace period is shortened for regional PM₁₀ conformity analyses. EPA Regional Offices should be consulted for questions regarding such situations in multi-pollutant areas.

In addition, in most cases, if the state revises previously approved budgets based on an earlier EPA emissions model, the revised MOVES5 budgets could not be used for conformity purposes until EPA approves them, *i.e.*, approves the SIP revision. In general, submitted SIPs cannot supersede approved budgets until the submitted SIP is approved. See 40 CFR 93.118(e)(1).

However, 40 CFR 93.118(e)(1) allows an approved budget to be replaced by an adequate budget if EPA’s approval of the initial budgets specifies that the budgets

¹³ Refer to EPA’s “MOVES5 Technical Guidance: Using MOVES to Prepare Emission Inventories for State Implementation Plans and Transportation Conformity,” EPA-420-B-24-043, November 2024, available on EPA’s website at: <https://www.epa.gov/state-and-local-transportation/policy-and-technical-guidance-state-and-local-transportation>.

¹⁴ In this example, such an area would use MOVES5 to develop a regional emissions analysis for PM₁₀ for comparison to the revised MOVES5-based budgets (*e.g.*, PM₁₀ budgets). The regional emissions analysis for ozone could be based on MOVES4 for the VOC and NO_x budgets in the ozone SIP for the remainder of the conformity grace period.

being approved may be replaced in the future by new adequate budgets. This flexibility has been used in limited situations in the past. In such cases, the MOVES5-based budgets would be used for conformity purposes once they have been found adequate, if requested by the state in its SIP submission and specified in EPA's SIP approval. States should consult with their EPA Regional Office to determine if this flexibility applies to their situation.

C. Use of MOVES5 for Regional Emissions Analyses During the Grace Period

During the conformity grace period, areas should use interagency consultation to examine how MOVES5 will impact their future transportation plan and TIP conformity determinations, including regional emissions analyses. Isolated rural areas should also consider how future regional emissions analyses will be affected when the MOVES5 grace period ends. Areas should carefully consider whether the SIP and budgets should be revised with MOVES5 or if transportation plans and TIPs should be revised before the end of the conformity grace period, since doing so may be necessary to ensure conformity in the future.

Finally, the transportation conformity rule provides flexibility for completing conformity determinations based on regional emissions analyses that use MOVES4 that are started before the end of the grace period. Regional emissions analyses that are started during the MOVES5 grace period can use either MOVES5 or MOVES4. The interagency consultation process should be used if it is unclear if a MOVES4-based analysis was begun before the end of the grace period. If there are questions about which model should be used in a conformity determination, the EPA Regional Office can be consulted.

When the grace period ends on December 11, 2026, MOVES5 will become the only EPA motor vehicle emissions model for regional emissions analyses for transportation conformity in states other than California. In general, this means that all new transportation plan and TIP conformity determinations started after the end of the grace period must be based on MOVES5, even if the SIP is based on MOVES4 or an older version of the MOVES model.

D. Use of MOVES5 for Project-Level Hot-Spot Analyses During the Conformity Grace Period

The MOVES5 grace period also applies to the use of MOVES5 for CO,

PM₁₀ and PM_{2.5} hot-spot analyses. Sections 93.116 and 93.123 of the transportation conformity regulation contain the requirements for when a hot-spot analysis is required for project-level conformity determinations.¹⁵ The transportation conformity rule provides flexibility for analyses that are started before the end of the grace period. A conformity determination for a transportation project may be based on a previous model if the analysis was begun before or during the grace period, and if the final environmental document for the project is issued no more than three years after the issuance of the draft environmental document (40 CFR 93.111(c)). Interagency consultation should be used if it is unclear if a previous analysis was begun before the end of the grace period. For CO, PM₁₀ and PM_{2.5} hot-spot analyses that start during the MOVES5 grace period, project sponsors can choose to use MOVES5 or MOVES4. Any new CO, PM₁₀ or PM_{2.5} hot-spot analyses for conformity purposes begun after the end of the MOVES5 grace period must be based on MOVES5.

Interagency consultation must be used to evaluate and choose model(s) and associated methods and assumptions to be used in hot-spot analyses and regional emissions analyses (40 CFR 93.105(c)(1)(i)). This includes which MOVES version to use for a hot-spot analysis. EPA encourages project sponsors to use the consultation process to determine which option may be most appropriate for a given situation. For questions about how the MOVES grace periods apply in a project-level conformity determination, contact your EPA Regional Office.

EPA has guidance on how to conduct quantitative PM_{2.5} and PM₁₀ hot-spot modeling for transportation conformity purposes, and on how to use MOVES for a CO hot-spot analysis. See EPA's "Project-level Conformity" website, <https://www.epa.gov/state-and-local-transportation/project-level-conformity-and-hot-spot-analyses>, for the latest information and guidance documents on how to conduct CO, PM₁₀ and PM_{2.5} hot-spot modeling for transportation conformity purposes.

¹⁵ In CO nonattainment and maintenance areas, a hot-spot analysis is required for all non-exempt projects, with quantitative hot-spot analyses being required for larger, congested intersections and other projects (40 CFR 93.123(a)(1)). In addition, in PM_{2.5} and PM₁₀ nonattainment and maintenance areas, the transportation conformity regulation requires that a quantitative hot-spot analysis be completed for certain projects (see 40 CFR 93.123(b)(1)).

E. FHWA's CO Categorical Hot-Spot Finding

FHWA released the most recent CO categorical hot-spot finding for intersection projects on January 31, 2023, that was based on MOVES3.¹⁶ Until September 12, 2025, a project sponsor outside of California may continue to rely on the categorical finding for applicable projects that are determined through interagency consultation to be covered by the finding's parameters. However, any new CO hot-spot analyses for conformity purposes begun after September 12, 2025, would not be able to rely on the MOVES3-based January 2023 CO categorical hot-spot finding.

F. CO Hot-spot Protocols that Were Previously Approved into the SIP

Section 93.123(a)(1) of the transportation conformity regulation allows areas to develop alternate procedures for determining localized CO hot-spot analyses, when developed through interagency consultation and approved by the EPA Regional Administrator. Some states have chosen in the past to develop such procedures based on previous EPA emissions models.

During the MOVES5 grace period, areas with previously approved CO hot-spot protocols based on MOVES4 may continue to rely on these protocols. Once the MOVES5 two-year grace period ends, new CO hot-spot analyses for conformity purposes will need to be based on MOVES5 and thus may no longer rely on CO hot-spot protocols based on MOVES4 or earlier versions.

William Charmley,

*Director, Assessment and Standards Division,
Office of Transportation and Air Quality.*

[FR Doc. 2024-29073 Filed 12-10-24; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL COMMUNICATIONS COMMISSION

[FR ID 267397]

Open Commission Meeting Wednesday, December 11, 2024

December 04, 2024.

The Federal Communications Commission will hold an Open Meeting on the subjects listed below on Wednesday, December 11, 2024, which is scheduled to commence at 10:30 a.m. in the Commission Meeting Room of the

¹⁶ See <https://www.epa.gov/state-and-local-transportation/project-level-conformity-and-hot-spot-analyses#cohotspot>.

Federal Communications Commission,
45 L Street NE, Washington, DC.

While attendance at the Open Meeting is available to the public, the FCC headquarters building is not open access

and all guests must check in with and be screened by FCC security at the main entrance on L Street. Attendees at the Open Meeting will not be required to have an appointment but must

otherwise comply with protocols outlined at: www.fcc.gov/visit. Open Meetings are streamed live at: www.fcc.gov/live and on the FCC's YouTube channel.

Item No.	Bureau	Subject
1	Office of Engineering and Technology	<i>Title:</i> Unlicensed Use of the 6 GHz Band (ET Docket No. 18–295); Expanding Flexible Use in Mid-Band Spectrum Between 3.7 and 24 GHz (GN Docket No. 17–183). <i>Summary:</i> The Commission will consider a Third Report and Order that would expand unlicensed use of the 6 GHz band by very low power devices in two additional sub-bands, making a contiguous 1200 megahertz of spectrum available for use by these devices.
2	Media	<i>Title:</i> Broadcast Rule Update (MB Docket No. 24–626). <i>Summary:</i> The Commission will consider a Notice of Proposed Rulemaking that would amend its rules for radio and television stations to reflect current application processing requirements, clarify and harmonize provisions, and remove references to outdated procedures and legacy filing systems.
3	Wireline Competition	<i>Title:</i> Connect America Fund (WC Docket No. 10–90); The Uniendo a Puerto Rico Fund and the Connect USVI Fund (WC Docket No. 18–143); Rural Digital Opportunity Fund (WC Docket No. 19–126); Letters of Credit for Recipients of High-Cost Competitive Bidding Support (WC Docket No. 24–144); Connect America Fund Phase II Auction (AU Docket No. 17–182); Rural Digital Opportunity Fund Auction (AU Docket No. 20–34); Establishing a 5G Fund for Rural America (GN Docket No. 20–32). <i>Summary:</i> The Commission will consider a Report and Order that would adopt targeted modifications to the requirements for Letters of Credit that recipients of Universal Service Fund (USF) high-cost support awarded through a competitive process must obtain.
4	Enforcement	<i>Title:</i> Enforcement Order on Reconsideration (EB Docket No. 23–64). <i>Summary:</i> The Commission will consider an Order on Reconsideration of its March 19, 2024, Memorandum Opinion and Order in the UPM Technology, Inc. v. Unigestion Holding, S.A., d/b/a Digicel Haiti, complaint proceeding.
5	Enforcement	<i>Title:</i> Enforcement Bureau Action. <i>Summary:</i> The Commission will consider an enforcement action.
6	Enforcement	<i>Title:</i> Enforcement Bureau Action. <i>Summary:</i> The Commission will consider an enforcement action.
7	Enforcement	<i>Title:</i> Enforcement Bureau Action. <i>Summary:</i> The Commission will consider an enforcement action.

* * * * *

The meeting will be webcast at: www.fcc.gov/live. Open captioning will be provided as well as a text only version on the FCC website. Other reasonable accommodations for people with disabilities are available upon request. In your request, include a description of the accommodation you will need and a way we can contact you if we need more information. Last minute requests will be accepted but may be impossible to fill. Send an email to: fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202–418–0530.

Press Access—Members of the news media are welcome to attend the meeting and will be provided reserved seating on a first-come, first-served basis. Following the meeting, the Chairwoman may hold a news conference in which she will take questions from credentialed members of the press in attendance. Also, senior policy and legal staff will be made available to the press in attendance for questions related to the items on the meeting agenda. Commissioners may

also choose to hold press conferences. Press may also direct questions to the Office of Media Relations (OMR): MediaRelations@fcc.gov. Questions about credentialing should be directed to OMR.

Additional information concerning this meeting may be obtained from the Office of Media Relations, (202) 418–0500. Audio/Video coverage of the meeting will be broadcast live with open captioning over the internet from the FCC Live web page at www.fcc.gov/live.

Federal Communications Commission

Marlene Dortch,

Secretary.

[FR Doc. 2024–29053 Filed 12–10–24; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0819; FR ID 266290]

Information Collection Being Submitted for Review and Approval to Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Pursuant to the Small Business Paperwork Relief Act of 2002, the FCC seeks specific comment on how it might “further reduce the information collection burden for small business concerns with fewer than 25 employees.” The Commission 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 and recommendations for the proposed information collection should be submitted on or before January 10, 2025.

ADDRESSES: Comments should be sent 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. Your comment must be submitted into www.reginfo.gov per the above instructions for it to be considered. In addition to submitting in www.reginfo.gov also send a copy of your comment on the proposed information collection to Nicole Ongele, FCC, via email to PRA@fcc.gov and to Nicole.Ongele@fcc.gov. Include in the comments the OMB control number as shown in the **SUPPLEMENTARY INFORMATION** below.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection, contact Nicole Ongele at (202) 418–2991. To view a copy of this information collection request (ICR) submitted to OMB: (1) go to the web page <http://www.reginfo.gov/public/do/PRAMain>, (2) look for the section of the web page called “Currently Under Review,” (3) click on the downward-pointing arrow in the “Select Agency” box below the “Currently Under Review” heading, (4) select “Federal Communications Commission” from the list of agencies presented in the “Select Agency” box, (5) click the “Submit” button to the right of the “Select Agency” box, (6) when the list of FCC ICRs currently under review appears, look for the Title of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION: As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the FCC invited the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: (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 burden estimates; (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 the respondents, including the use of automated collection techniques or other forms of information technology. Pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the FCC seeks specific comment on how it might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

OMB Control Number: 3060–0819.

Title: Bridging the Digital Divide for Low-Income Consumers, Lifeline and Link Up Reform and Modernization, Telecommunications Carriers Eligible for Universal Service Support.

Form No.: FCC Forms 481, 497, 555, 5629, 5630, and 5631.

Type of Review: Revision of a currently approved collection.

Respondents: Individuals or households, businesses or other for-profit institutions, and not-for-profit institutions.

Number of Respondents and Responses: 25,111,368 respondents; 26,878,712 responses.

Estimated Time per Response: 0.0167–125 hours.

Frequency of Response: Annual, biennial, monthly, daily and on occasion reporting requirements, recordkeeping requirement and third-party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits and Voluntary. Statutory authority is contained in Sections 1, 4(i), 5, 201, 205, 214, 219, 220, 254, 303(r), and 403 of the Communications Act of 1934, as amended, and section 706 of the Communications Act of 1996, as amended; 47 U.S.C. 151, 154(i), 155, 201, 205, 214, 219, 220, 254, 303(r), 403, and 1302.

Total Annual Burden: 6,534,599 hours.

Total Annual Cost: \$937,500.

Needs and Uses: On November 15, 2023, the Commission adopted the *Supporting Survivors of Domestic and Sexual Violence et al.*, WC Docket Nos. 22–238, 11–42, 21–450, Report and Order, FCC 23–96 (2023) (*Safe Connections Act Order*). The *Safe Connections Act Order*, among other things, adopted rules to address the emergency communications portions of the *Safe Connections Act*. The *Order* also required that surveys be developed and sent to stakeholder groups working directly with survivors in order to conduct a program evaluation,

including examining the impact and effectiveness of the support offered to survivors. The Commission is requesting the Office of Management and Budget (OMB) approval for this revised information collection to implement the new requirements captured in the *Safe Connections Act Survey* in the *Safe Connections Act Order*, FCC 23–96. The revision requires that surveys be developed and sent to stakeholder groups working directly with survivors in order to conduct a program evaluation, including examining the impact and effectiveness of the support offered to survivors.

The Commission first adopted rules for the Lifeline program in 1997. On May 8, 1997, the Commission adopted rules establishing, among other things, that eligible telecommunications carriers (ETCs) offering Lifeline and Link Up to qualifying low-income customers would receive reimbursement from the federal Universal Service Fund (USF or Fund) for low-income support.

On April 2, 2004, in its Report and Order and Further Notice of Proposed Rulemaking (*Lifeline Order*), the Commission directed ETCs to certify their Lifeline/Link Up subscribers’ eligibility for the program and to verify a portion of their subscribers’ eligibility on an annual basis. States that operated their own Lifeline/Link Up programs were allowed to develop their own certification procedures (referred to as non-federal default states). The *Lifeline Order* also required ETCs to submit to the Universal Service Administrative Company (USAC or Administrator) proof that they certified that their Lifeline subscribers are eligible for Lifeline, and proof that they verified a portion of their subscribers’ continued eligibility for Lifeline.

On September 23, 2011, the Commission issued an *Inquiry into Disbursement Process for the Universal Service Fund Low Income Program* seeking comment on a proposal for disbursing USF low-income support to ETCs based upon claims for reimbursement of actual support payments made, instead of projected claims for support. On February 6, 2012, the Commission issued its Report and Order and Further Notice of Proposed Rulemaking (*2012 Lifeline Order*). In the *2012 Lifeline Order*, the Commission adopted the proposal to file the FCC Form 497 monthly and changed the low-income disbursement process from payments based on projected subscriber counts to payments based on actual subscriber counts. After the *2012 Lifeline Order*, ETCs were required to recertify the eligibility of their entire subscriber base annually. Starting in

2013, ETCs could elect to have USAC conduct the annual recertification process on their behalf.

On June 22, 2015, the Commission released a Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order (2015 Lifeline Order). The Commission adopted several rules in the 2015 Lifeline Order to: strengthen the document retention requirements; ensure that only ETCs directly serving low-income customers receive reimbursement under the Lifeline program; and require ETCs to use a uniform snapshot date to request reimbursement from USAC for the provision of Lifeline support.

On April 27, 2016, the Commission adopted the *Lifeline and Link Up Reform and Modernization et al.*, WC Docket Nos. 11–42, 09–197, 10–90, Third Report and Order, Further Report and Order, and Order on Reconsideration, FCC 16–38 (2016) (2016 Lifeline Order). The 2016 Lifeline Order changes included requiring ETCs to certify compliance with the new minimum service requirements, moving to rolling annual subscriber recertification, streamlining the first-year ETC audit requirements, and eliminating the temporary address requirements.

The Commission's decision to transition to a centralized National Verifier was outlined in detail in the 2016 Lifeline Order. The National Verifier was established to make eligibility determinations and perform a variety of other functions necessary to enroll subscribers into the Lifeline program. The National Verifier verifies Lifeline subscriber eligibility, checks for duplicate Lifeline subscribers, conducts recertification of subscribers, and calculates support payments to ETCs. ETCs maintain ultimate responsibility for the accuracy of information submitted to the National Verifier and complying with the Lifeline program's rules. The National Verifier was launched over a period of several years from late 2017 through December 2020, serving all states, territories, and the District of Columbia.

On October 30, 2019, the Commission adopted the *Bridging the Digital Divide for Low-Income Consumers*, WC Docket Nos. 17–287, 11–42, 09–197, Fifth Report and Order, Memorandum Opinion and Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 19–111 (2019) (2019 Lifeline Order). The 2019 Lifeline Order restored the states' lawful role in designating eligible telecommunications carriers and

eliminated the Lifeline Broadband Provider designation category and its associated designation procedures. The Order also implemented a number of administrative changes to improve the integrity of the Lifeline eligibility verification, enrollment, and recertification processes.

On October 20, 2023, the Commission adopted the *Connect America Fund et al.*, WC Docket No. 10–90 et al. WT Docket No. 10–208, Notice of Proposed Rulemaking and Report and Order, FCC 23–87 (Oct. 20, 2023) (*Administrative Order*). In the *Administrative Order*, the Commission modified, in relevant part, section 205 of the Commission's rules, to require an ETC that intends to relinquish its ETC designation to provide: (1) advance notice to the state commission and to the Commission of such intention to relinquish, and (2) notice to the Commission of the state authority's decision to permit or deny such relinquishment, within 10 days of its decision. These filings must be submitted regardless of whether the ETC is currently receiving federal support.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2024–29001 Filed 12–10–24; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1223; FR ID 266484]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the 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 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 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 Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before February 10, 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 Nicole Ongele, FCC, via email PRA@fcc.gov and to nicole.ongele@fcc.gov.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Nicole Ongele, (202) 418–2991.

SUPPLEMENTARY INFORMATION: OMB Control Number: 3060–1223.

Title: Payment Instructions from the Eligible Entity Seeking Reimbursement from the TV Broadcaster Relocation Fund.

Form Number: FCC Form 1876.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit, Not-for-profit institutions and State, Local or Tribal Government.

Number of Respondents and Responses: 15 respondents; 15 responses.

Estimated Time per Response: 5 hours.

Frequency of Response: One-time reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection is contained in Middle Class Tax Relief and Job Creation Act of 2012, Public Law 112–96 (Spectrum Act) section 6403(a)(1) and Repack Airwaves Yielding Better Access for Users of Modern Services Act of 2018, Public Law 115–141, Div. P, (RAY BAUM'S Act) section 1452.

Total Annual Burden: 75 hours.

Total Annual Cost: No Cost.

Needs and Uses: The Commission is requesting Office of Management and Budget (OMB) approval for a three-year extension of this information collection.

The Spectrum Act requires the Commission to reimburse broadcast

television licensees for costs “reasonably incurred” in relocating to new channels assigned in the repacking process and Multichannel Video Programming Distributors (MVPDs) for costs reasonably incurred in order to continue to carry the signals of stations relocating to new channels as a result of the repacking process or a winning reverse auction bid.¹

The Commission decided through notice-and-comment rulemaking that it will issue all eligible broadcasters and MVPDs an initial allocation of funds based on estimated costs, which will be available for draw down (from individual accounts in the U.S. Treasury) as the entities incur expenses, followed by a subsequent allocation to the extent necessary. The reason for allowing eligible entities to draw down funds as they incur expenses is to reduce the chance that entities will be unable to finance necessary relocation changes.²

The information collection for which we are requesting approval is necessary for eligible entities to instruct the Commission on how to pay the amounts the entities draw down, and for the entities to make certifications that reduce the risk of waste, fraud, abuse and improper payments.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2024–29000 Filed 12–10–24; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments, relevant information, or documents regarding the agreements to the Secretary by email at Secretary@fmc.gov, or by mail, Federal Maritime Commission, 800 North Capitol Street, Washington, DC 20573. Comments will be most helpful to the Commission if received within 12 days of the date this notice appears in the **Federal Register**, and the Commission requests that comments be submitted within 7 days on agreements that request expedited review. Copies of agreements are

available through the Commission’s website (www.fmc.gov) or by contacting the Office of Agreements at (202) 523–5793 or tradeanalysis@fmc.gov.

Agreement No.: 011707–021.

Agreement Name: Gulf/South America Discussion Agreement.

Parties: BBC Chartering Carriers GmbH & Co. KG and BBC Chartering Logistics GmbH & Co. KG (acting as a single party); and Intermarine Carriers LLC.

Filing Party: Wayne Rohde; Cozen O’Connor.

Synopsis: The amendment deletes Industrial Maritime Carrier, L.L.C. as a party to the Agreement.

Proposed Effective Date: 12/3/2024.

Location: <https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/684>.

Agreement No.: 201437.

Agreement Name: ONE/WHL Slot Exchange Agreement.

Parties: Ocean Network Express Pte. Ltd; and Wan Hai Lines Ltd. and Wan Hai Lines (Singapore) PTE Ltd. (acting as a single party).

Filing Party: Rebecca Fenneman; Jeffrey/Fenneman Law and Strategy PLLC.

Synopsis: The Agreement authorizes the Parties to exchange slots in the trade between Vietnam, China, Korea, and Taiwan, on the one hand, and the U.S. West Coast on the other hand.

Proposed Effective Date: 12/4/2024.

Location: <https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/86583>.

Dated: December 6, 2024.

Alanna Beck,

Federal Register Alternate Liaison Officer.

[FR Doc. 2024–29109 Filed 12–10–24; 8:45 am]

BILLING CODE 6730–02–P

FEDERAL MARITIME COMMISSION

Notice of Requests for Additional Information

The Commission gives notice that it has formally requested that the parties to the below listed agreement provide additional information pursuant to 46 U.S.C. 40304(d). This action suspends the statutory effective date until 45 days after the Commission receives all the additional information and documents requested. Interested parties may submit written comments, including relevant information and documents, regarding the agreement to the Secretary by email at Secretary@fmc.gov, or by mail, Federal Maritime Commission, 800 North Capitol Street NW, Washington, DC 20573. Comments may be filed up to fifteen (15) days after publication of this notice appears in the **Federal Register**.

Agreement No.: 201435.

Title: Premier Alliance Agreement.

Parties: HMM Co., Ltd.; Ocean

Network Express Pte. Ltd.; and Yang Ming Joint Service Agreement, FMC Agreement No. 201392. Current parties to the Yang Ming Joint Service Agreement are: Yang Ming Marine Transport Corp. and Yang Ming (Singapore) Pte. Ltd.

By Order of the Federal Maritime Commission.

Dated: December 6, 2024.

Jennifer Everling,

Assistant Secretary.

[FR Doc. 2024–29127 Filed 12–10–24; 8:45 am]

BILLING CODE 6730–02–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)—CE25–031, Rigorously Evaluating Primary Prevention Strategies for Intimate Partner Violence and Sexual Violence.

Dates: April 29–30, 2025.

Times: 10 a.m.–5 p.m., EDT.

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.

¹ Middle Class Tax Relief and Job Creation Act of 2012, *Public Law 112–96* (Spectrum Act) § 6403(b)(4)(A)(i), (ii).

² Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, GN Docket No. 12–268, Report and Order, 29 FCC Rcd 6567 (2014) (“Incentive Auction R&O”) at 609.

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. 2024–29004 Filed 12–10–24; 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)—CE25–026, Rigorously Evaluating Programs and Policies to Prevent Child Sexual Abuse and Problematic Sexual Behavior among Youth.

Dates: April 29–30, 2025.

Times: 10 a.m.–5 p.m., EDT.

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. 2024–29008 Filed 12–10–24; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—TS25–036, Identify and Evaluate Potential Risk Factors for ALS; Amended Notice of Closed Meeting

AGENCY: Centers for Disease Control and Prevention, Department of Health and Human Services.

ACTION: Notice.

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.

SUPPLEMENTARY INFORMATION: Notice is hereby given of a change in the meeting of the Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—TS25–036, Identify and Evaluate Potential Risk Factors for ALS; February 25–26, 2025, 10 a.m.–5 p.m., EST, web conference, in the original **Federal Register** notice. The meeting notice was published in the **Federal Register** on December 2, 2024, 89 FR 95215.

This meeting notice is being amended to change the meeting dates from a two-day meeting to a one-day meeting. The notice should read as follows:

Name of Committee: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—TS25–036, Identify and Evaluate Potential Risk Factors for ALS.

Date: February 25, 2025.

Time: 10 a.m.–5 p.m., EST.

The meeting is closed to the public.

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. 2024–29009 Filed 12–10–24; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS–10515 and CMS–10780]

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 February 10, 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-10515 Payment Collections Operations Contingency Plan
CMS-10780 Requirements Related to Surprise Billing: Qualifying Payment Amount, Notice and Consent, Disclosure on Patient Protections Against Balance Billing, and State Law Opt-in

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:* Payment Collections Operations Contingency Plan; *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, the “Affordable Care Act” (ACA)], provides for consumers to receive subsidies based on income to purchase affordable health care on the Exchanges. The U.S. Department of Health and Human Services (HHS) uses a manual process to obtain enrollment and payment data from issuers in States transitioning from Federally-facilitated Exchanges (FFE) and State-based Exchanges on the Federal platform (SBE-FPs) to State-based Exchanges (SBEs) to facilitate the payment of subsidies to issuers on behalf of eligible enrollees. This document describes the data collection requirements related to this manual process, known as the Enrollment and Payment Data template. This extension reduces burden compared to the currently approved collection based on recent program experience. *Form Number:* CMS-10515 (OMB Control Number: 0938-1217); *Frequency:* Annually; *Affected Public:* Private Sector, Business or other for-profit and not-for-profit institutions; *Number of Respondents:* 25; *Number of Responses:* 150; *Total Annual Hours:* 1,500. (For policy questions regarding this collection, contact Jacquelyn Rudich at 301-492-5211.)

2. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Requirements Related to Surprise Billing: Qualifying Payment Amount, Notice and Consent, Disclosure on Patient Protections Against Balance Billing, and State Law Opt-in; *Use:* On December 27, 2020, the Consolidated Appropriations Act, 2021 (Pub. L. 116–260), which included the No Surprises Act, was signed into law. The No Surprises Act provides federal protections against surprise billing and limits out-of-network cost sharing under many of the circumstances in which surprise medical bills arise most frequently. The July 13, 2021 interim

final rules “Requirements Related to Surprise Billing; Part I” (86 FR 36872, July 2021 interim final rules) issued by the Department of Health and Human Services, the Department of Labor, the Department of the Treasury, and the Office of Personnel Management, implement provisions of the No Surprises Act that apply to group health plans, health insurance issuers offering group or individual health insurance coverage, and carriers in the Federal Employees Health Benefits (FEHB) Program that provide protections against balance billing and out-of-network cost sharing with respect to emergency services, non-emergency services furnished by nonparticipating providers related to patient visits to certain types of participating health care facilities, and services furnished by nonparticipating providers of air ambulance services. The July 2021 interim final rules prohibit nonparticipating providers, emergency facilities, and providers of air ambulance services from balance billing participants, beneficiaries, and enrollees in certain situations unless they satisfy certain notice and consent requirements.

The No Surprises Act and the July 2021 interim final rules require group health plans and issuers of health insurance coverage to provide information about qualifying payment amounts (QPAs) to nonparticipating providers and facilities and to provide disclosures on patient protections against balance billing to participants, beneficiaries and enrollees. Self-insured plans opting in to a specified state law are required to provide a disclosure to participants. Certain nonparticipating providers and nonparticipating emergency facilities may provide participants, beneficiaries, and enrollees with notice and obtain their consent to waive balance billing protections, provided certain requirements are met. In addition, certain providers and facilities are required to provide disclosures on patient protections against balance billing to participants, beneficiaries and enrollees. The No Surprises Act requires the Secretary of HHS to audit no more than 25 group health plans and health insurance issuers offering group or individual health insurance coverage annually, and permits additional audits based on complaints, to ensure that such plans and coverage are in compliance with the requirement of applying a QPA and that the QPA applied satisfies the definition under the No Surprises Act with respect to the year involved. *Form Number:* CMS-10780 (OMB control number:

0938–1401); *Frequency*: On Occasion; *Affected Public*: Individuals, State, Local, or Tribal Governments, Private Sector; *Number of Respondents*: 2,477,197; *Total Annual Responses*: 85,148,199; *Total Annual Hours*: 6,006,654. (For policy questions regarding this collection, contact Russell Tipps at 667–290–9640.)

William N. Parham III,

Director, Division of Information Collections and Regulatory Impacts, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2024–29002 Filed 12–10–24; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–3460–FN]

Medicare and Medicaid Programs: Approval of Application by the DNV Healthcare USA, Inc. for Continued CMS-Approval of Its Critical Access Hospital Accreditation Program

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

ACTION: Notice.

SUMMARY: This notice acknowledges the approval of an application by the DNV Healthcare USA, Inc., for continued recognition as a national accrediting organization for Critical Access Hospitals that wish to participate in the Medicare or Medicaid programs.

FOR FURTHER INFORMATION CONTACT: Caecilia Andrews, (410) 786–2190.

SUPPLEMENTARY INFORMATION:

I. Background

Under the Medicare program, eligible beneficiaries may receive covered services in a critical access hospital (CAH), provided that the facility meets certain requirements. Sections 1820(c)(2)(B), 1820(e), and 1861(mm)(1) of the Social Security Act (the Act) establish distinct criteria for facilities seeking designation as a CAH. Regulations concerning provider agreements are at 42 CFR part 489 and those pertaining to activities relating to the survey and certification of facilities are at 42 CFR part 488. Our regulations at 42 CFR part 485, subpart F specify the conditions of participation (CoPs) that a CAH must meet to participate in the Medicare program, the scope of covered services, and the conditions for Medicare payment for CAHs. The regulations at § 485.647 specify that a CAH's psychiatric or rehabilitation

distinct part unit (DPU), if any, must meet the hospital requirements specified in subparts A, B, C, and D of part 482 in order for the CAH DPU to participate in the Medicare program.

Prior to becoming a CAH, to enter into an agreement, a CAH must first be certified by a state survey agency as a hospital complying with the conditions of participation at 42 CFR part 482. It then can convert to a CAH by complying with the conditions or requirements at part 485, subpart F. Thereafter, the CAH is subject to regular surveys by a state survey agency to determine whether it continues to meet these requirements. However, there is an alternative to surveys by state agencies. Certification by a nationally recognized accreditation program can substitute for ongoing state review.

Section 1865(a)(1) of the Act provides that, if a provider entity demonstrates through accreditation by a Centers for Medicare & Medicaid Services (CMS) approved national accrediting organization (AO) that all applicable Medicare requirements are met or exceeded, we will deem those provider entities as having met such requirements. Accreditation by an AO is voluntary and is not required for Medicare participation.

If an AO is recognized by the Secretary of the Department of Health and Human Services (the Secretary) as having standards for accreditation that meet or exceed Medicare requirements, any provider entity accredited by the national accrediting body's approved program would be deemed to meet the Medicare requirements. A national AO applying for approval of its accreditation program under 42 CFR part 488, subpart A, must provide CMS with reasonable assurance that the AO requires the accredited provider entities to meet requirements that are at least as stringent as the Medicare requirements.

Our regulations concerning the approval of AOs are at §§ 488.4 and 488.5. The regulations at § 488.5(e)(2)(i) require an AO to reapply for continued approval of its accreditation program every 6 years or sooner, as determined by CMS. This notice is to announce our continued approval of the DNV Healthcare USA, Inc.'s (DNV's) CAH accreditation program for a period of 4 years.

II. Application Approval Process

Section 1865(a)(3)(A) of the Act provides a statutory timetable to ensure that our review of applications for CMS approval of an accreditation program is conducted in a timely manner. The Act provides us 210 days after the date of receipt of a complete application, with

any documentation necessary to make the determination, to complete our survey activities and application process. Within 60 days after receiving a complete application, we must publish a notice in the **Federal Register** that identifies the national accrediting body making the request, describes the request, and provides no less than a 30-day public comment period. At the end of the 210-day period, we must publish a notice in the **Federal Register** approving or denying the application.

III. Provisions of the Proposed Notice

On June 13, 2024, we published a proposed notice in the **Federal Register** (89 FR 50332), announcing DNV's request for continued approval of its Medicare critical hospital accreditation program. In the proposed notice, we detailed our evaluation criteria. Under section 1865(a)(2) of the Act and in our regulations at § 488.5, we conducted a review of DNV's Medicare CAH accreditation application in accordance with the criteria specified by our regulations, which include, but are not limited to the following:

- An administrative review of DNV's: (1) corporate policies; (2) financial and human resources available to accomplish the proposed surveys; (3) procedures for training, monitoring, and evaluation of its surveyors; (4) ability to investigate and respond appropriately to complaints against accredited facilities; and (5) survey review and decision-making process for accreditation.

- A comparison of DNV's accreditation to our current Medicare CAH conditions of participation (CoPs).
- A documentation review of DNV's survey process to:

- ++ Determine the composition of the survey team, surveyor qualifications, and DNV's ability to provide continuing surveyor training.

- ++ Compare DNV's processes to those of state survey agencies, including survey frequency, and the ability to investigate and respond appropriately to complaints against accredited facilities.

- ++ Evaluate DNV's procedures for monitoring CAHs out of compliance with DNV's program requirements. The monitoring procedures are used only when DNV identifies noncompliance. If noncompliance is identified through validation reviews, the state survey agency monitors corrections as specified at § 488.7(d).

- ++ Assess DNV's ability to report deficiencies to the surveyed facilities and respond to the facility's plan of correction in a timely manner.

- ++ Establish DNV's ability to provide CMS with electronic data and reports necessary for effective validation and

assessment of the organization's survey process.

++ Determine the adequacy of staff and other resources.

++ Confirm DNV's ability to provide adequate funding for performing required surveys.

++ Confirm DNV's policies with respect to whether surveys are unannounced.

++ Obtain DNV's agreement to provide CMS with a copy of the most current accreditation survey together with any other information related to the survey as we may require, including corrective action plans.

IV. Analysis of and Responses to Public Comments on the Proposed Notice

In accordance with section 1865(a)(3)(A) of the Act, the June 13, 2024 proposed notice also solicited public comments regarding whether DNV's requirements met or exceeded the Medicare CoPs for CAHs. We did not receive any comments.

V. Provisions of the Final Notice

A. Differences Between DNV's Standards and Requirements for Accreditation and Medicare Conditions and Survey Requirements

We compared DNV's CAH requirements and survey process with the Medicare CoPs and survey process as outlined in the State Operations Manual (SOM). Our review and evaluation of DNV's CAH application were conducted as described in section III. of this notice and has yielded the following areas where, as of the date of this notice, DNV's has completed revising its standards and certification processes in order to:

- Meet the standard's requirements of all of the following regulations:

++ Section 485.614, to incorporate language ensuring promotion and protection of each patient's rights.

++ Section 485.614(b)(4), to incorporate language ensuring the patient's family member or representative of their choice and their own physician are notified promptly of their admission to the hospital.

++ Section 485.614(d)(2), to incorporate language that the patient has the right to access their medical records, including current medical records, upon an oral or written request, in the form and format requested by the individual, if it is readily producible in such form and format.

++ Section 485.618(d)(1)(ii)(A), to add the definition of a CAH that is located in an area designated as a frontier area.

++ Section 485.625(d), to specify that the CAH must review and update its

emergency preparedness training program at least every two years.

++ Section 485.625(d)(1), to include language that training must include: prompt reporting and extinguishing of fires; protection and, where necessary, evacuation, of patients, personnel, and guests; fire prevention; and cooperation with firefighting and disaster authorities, to all new and existing staff, individuals providing services under arrangement, and volunteers, consistent with their expected roles.

++ Section 485.625(d)(1)(iv), to specify that staff must be able to demonstrate knowledge of their role during an emergency.

++ Section 485.627(b), to include the requirement for addresses within the disclosure.

++ Section 485.631(a)(3), to clarify that staff is sufficient to provide the services essential to the operation of the CAH.

++ Section 485.638(b)(2), to provide additional language that there must be written policies and procedures that govern the use and removal of records from the CAH and the conditions for the release of information.

++ Section 485.639(c), to revise the language from "directing" to "administering" anesthesia.

++ Section 485.639(c)(2), to clarify the requirement surrounding a Certified Registered Nurse Anesthetist supervision requirements under the operating practitioner when administering anesthesia.

++ Section 485.640, to include that the CAH's infection prevention and control and antibiotic stewardship program is an active facility-wide program.

++ Section 485.645(d)(5), to encompass the notation of comprehensive assessment of a resident's needs, strengths, goals, life history and preferences.

++ Section 485.645(d)(8), to state "assisted nutrition and hydration."

In addition to the standards review, we also reviewed DNV's comparable survey processes, which were conducted as described in section III. of this notice, and yielded the following areas where, as of the date of this notice, DNV has completed revising its survey processes, in order to demonstrate that it uses survey processes that are comparable to state survey agency processes by:

- Revising DNV's complaint policy to reflect that any withdrawals from accreditation and deemed status, whether voluntary or involuntary, must be reported within three business days.

- Revising DNV's internal policies to ensure all surveyors are qualified.

- Providing training and education to surveyors to ensure records are reviewed and reported consistently on DNV's survey report.

- Developing a process to verify levels of deficiency citations for the physical environment and Life Safety Codes citations to ensure facilities are appropriately cited based on the potential for harm.

- Ensuring citations are closely aligned or cross-walked from DNV's standard to the Medicare condition(s).

- Developing process or policy to ensure swing beds are reviewed, when applicable, and providing education to surveyors to adequately annotate swing bed reviews in DNV's surveyor notes.

- Providing additional education to surveyors related to observations of care and patient interviews.

- Providing additional clarifications on the survey process for medical record reviews comparable to those in the SOM, Appendix W.

B. Term of Approval

Based on our review and observations described in section III. and section V. of this notice, we approve DNV as a national AO for CAHs that request participation in the Medicare program. The decision announced in this final notice is effective December 23, 2024 through December 23, 2028 (4 years).

VI. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping, or third-party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Administrator of the Centers for Medicare & Medicaid Services (CMS), Chiquita Brooks-LaSure, having reviewed and approved this document, authorizes Vanessa Garcia, who is the Federal Register Liaison, to electronically sign this document for purposes of publication in the **Federal Register**.

Vanessa Garcia,

Federal Register Liaison, Centers for Medicare & Medicaid Services.

[FR Doc. 2024-29075 Filed 12-10-24; 8:45 am]

BILLING CODE 4120-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Unaccompanied Children Office of the Ombuds (UCOO) Statement of Organization, Functions, and Delegations of Authority

AGENCY: Administration for Children and Families, Department of Health and Human Services (HHS).

ACTION: Notice of reorganization; Establishment of the Unaccompanied Children Office of the Ombuds (UCOO).

SUMMARY: The Administration for Children and Families (ACF) has reorganized to establish the Unaccompanied Children Office of the Ombuds (UCOO) within the Immediate Office of the Assistant Secretary, to be headed by a Director (“Ombuds”), who reports directly to the HHS Assistant Secretary for Children and Families.

FOR FURTHER INFORMATION CONTACT: Leah Chavla, Senior Advisor, Administration for Children and Families, 330 C Street SW, Washington, DC 20201, (202) 838–3307.

SUPPLEMENTARY INFORMATION: This notice amends Part K of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (HHS), Administration for Children and Families (ACF), as follows: Chapter KA, Immediate Office of the Assistant Secretary as last amended by 88 FR 17229–17233 dated March 22, 2023.

I. Amend Chapter K, Administration for Children and Families, Chapter KA, Office of the Assistant Secretary for Children and Families, Subchapter KA.10 Organization, by Adding

Unaccompanied Children Office of the Ombuds (KAO)

II. Amend Chapter KA, Office of the Assistant Secretary for Children and Families, by Establishing Chapter KAO, Unaccompanied Children Office of the Ombuds

KAO.00 Mission. The Mission of the Unaccompanied Children Office of the Ombuds (UCOO) is to be an independent, impartial office with authority to receive reports, including confidential and informal reports, of concerns regarding the care and custody of unaccompanied children; to investigate such reports; to work collaboratively with the Office of Refugee Resettlement (ORR) to potentially resolve such reports; issue

its own reports concerning UCOO’s efforts; and make recommendations to ORR regarding UC program policies and procedures related to protecting unaccompanied children in the care and custody of ORR.

KAO.10 Organization. The UCOO is headed by a Director (“Ombuds”), who reports directly to the ACF Assistant Secretary, and consists of:

Immediate Office of the Ombuds for Unaccompanied Children (KAO1)
Division of Case Management (KAO2)
Division of Operations (KAO3)

KAO.20 Functions. The UCOO may engage in activities including, but not limited to: (1) Receiving reports from unaccompanied children, potential sponsors, other stakeholders in a child’s case, and the public regarding ORR’s adherence to its regulations and standards; (2) Investigating implementation of or adherence to Federal law and ORR regulations, in response to reports it receives, and meeting with interested parties to receive input on ORR’s compliance with Federal law and ORR policy; (3) Requesting and receiving information or documents, such as the Ombuds deems relevant, from ORR and ORR care provider facilities, to determine implementation of and adherence to Federal law and ORR policy; (4) Preparing formal reports and recommendations on findings to publish or present, including an annual report describing activities conducted in the prior year; (5) Conducting investigations, interviews, and site visits at care provider facilities as necessary to aid in the preparation of reports and recommendations; (6) Visiting ORR care providers in which unaccompanied children are or will be housed; (7) Reviewing individual circumstances, including, but not limited to, concerns about unaccompanied children’s access to services, ability to communicate with service providers, parents/legal guardians of children in ORR custody, sponsors, and matters related to transfers within or discharge from ORR care; (8) Making efforts to resolve complaints or concerns raised by interested parties as it relates to ORR’s implementation or adherence to Federal law or ORR policy; (9) Hiring and retaining others, including, but not limited to, independent experts, specialists, assistants, interpreters, and translators to assist the Ombuds in the performance of their duties; (10) Making non-binding recommendations to ORR regarding its policies and procedures, specific to protecting unaccompanied children in the care of ORR; (11) Providing general educational

information about pertinent laws, regulations, and policies, ORR child advocates, and legal services as appropriate; and (12) Advising and updating the Director of ORR, Assistant Secretary, and the Secretary, as appropriate, on the status of ORR’s implementation and adherence with Federal law or ORR policy.

The Ombuds shall manage the files, records, and other information of the program, regardless of format, and such files must be maintained in a manner that preserves the confidentiality of the records except in instances of imminent harm or judicial action and is prohibited from using or sharing information for any immigration enforcement related purpose.

III. Continuation of Policy

Except as inconsistent with this reorganization, all statements of policy and interpretations with respect to organizational components affected by this notice within ACF, heretofore issued and in effect on this date of this reorganization are continued in full force and effect.

IV. Delegation of Authority

All delegations and re-delegations of authority made to officials and employees of affected organizational components will continue in them, or their successors, pending further re-delegations, provided they are consistent with this reorganization.

V. Funds, Personnel, and Equipment

Transfer of organizations and functions affected by this reorganization shall be accompanied in each instance by direct and support funds, positions, personnel, records, equipment, supplies, and other resources.

This reorganization will be effective upon date of signature.

Xavier Becerra,

Secretary, Health and Human Services.

[FR Doc. 2024–29188 Filed 12–9–24; 11:15 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

12th Amendment to Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID–19

ACTION: Notice of amendment.

SUMMARY: The Secretary issues this amendment pursuant to section 319F–3 of the Public Health Service Act to

extend the duration of the Declaration to December 31, 2029, and to republish the Declaration in full.

DATES: This amendment is effective as of January 1, 2025.

FOR FURTHER INFORMATION CONTACT: L. Paige Ezernack, Administration for Strategic Preparedness and Response, U.S. Department of Health and Human Services, 400 7th St. SW, Washington, DC 20024; 202–260–0365, paige.ezernack@hhs.gov.

SUPPLEMENTARY INFORMATION: The Public Readiness and Emergency Preparedness (PREP) Act authorizes the Secretary of Health and Human Services (the Secretary) to issue a Declaration to provide liability immunity to certain individuals and entities (Covered Persons) against any claim of loss caused by, arising out of, relating to, or resulting from the manufacture, distribution, administration, or use of medical countermeasures (Covered Countermeasures), except for claims involving “willful misconduct” as defined in the PREP Act. Under the PREP Act, a Declaration may be amended as circumstances warrant.

The PREP Act was enacted on December 30, 2005, as Public Law 109–148, Division C, section 2. It amended the Public Health Service (PHS) Act, adding section 319F–3, which addresses liability immunity, and section 319F–4, which creates a compensation program. These sections are codified at 42 U.S.C. 247d–6d and 42 U.S.C. 247d–6e, respectively. Section 319F–3 of the PHS Act has been amended by the Pandemic and All-Hazards Preparedness Reauthorization Act (PAHPRA), Public Law 113–5, enacted on March 13, 2013, and the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Public Law 116–136, enacted on March 27, 2020, to expand Covered Countermeasures under the PREP Act.

On January 31, 2020, the former Secretary, Alex M. Azar II, declared a public health emergency (PHE) pursuant to section 319 of the PHS Act, 42 U.S.C. 247d, effective January 27, 2020, for the entire United States to aid in the response of the nation’s health care community to the COVID–19 outbreak. Pursuant to section 319 of the PHS Act, the declaration was renewed effective April 26, 2020, July 25, 2020, October 23, 2020, January 21, 2021, April 21, 2021, July 20, 2021, October 15, 2021, January 14, 2022, April 12, 2022, July 15, 2022, October 13, 2022, January 11, 2023, and February 11, 2023. The PHE declared under section 319 of the PHS Act ended on May 11, 2023. Nonetheless, as stated in section I of this amended PREP Act Declaration, I have

determined there is a credible risk that COVID–19 may in the future constitute such an emergency and am thus amending this Declaration to prepare for and mitigate that risk.

On March 10, 2020, former Secretary Azar issued a Declaration under the PREP Act for medical countermeasures against COVID–19 (85 FR 15198, Mar. 17, 2020) (the Declaration). On April 10, 2020, the former Secretary amended the Declaration under the PREP Act to extend liability immunity to covered countermeasures authorized under the CARES Act (85 FR 21012, Apr. 15, 2020). On June 4, 2020, the former Secretary amended the Declaration to clarify that Covered Countermeasures under the Declaration include qualified countermeasures that limit the harm COVID–19 might otherwise cause (85 FR 35100, June 8, 2020). On August 19, 2020, the former Secretary amended the Declaration to add additional categories of Qualified Persons and amend the category of disease, health condition, or threat for which he recommended the administration or use of the Covered Countermeasures. (85 FR 52136, Aug. 24, 2020).

On December 3, 2020, the former Secretary amended the Declaration to incorporate Advisory Opinions of the General Counsel interpreting the PREP Act and the Secretary’s Declaration and authorizations issued by the Department’s Office of the Assistant Secretary for Health as an Authority Having Jurisdiction to respond; added an additional category of qualified persons under section V of the Declaration, *i.e.*, healthcare personnel using telehealth to order or administer Covered Countermeasures for patients in a state other than the state where the healthcare personnel are permitted to practice; made explicit that the Declaration covers all qualified pandemic and epidemic products as defined under the PREP Act; added a third method of distribution to provide liability protections for, among other things, private distribution channels; made explicit that there can be situations where not administering a covered countermeasure to a particular individual can fall within the PREP Act and the Declaration’s liability protections; made explicit that there are substantive Federal legal and policy issues and interests in having a unified whole-of-nation response to the COVID–19 pandemic among Federal, state, local, and private-sector entities; revised the effective time period of the Declaration; and republished the Declaration in full (85 FR 79190, Dec. 9, 2020).

On February 2, 2021, the Acting Secretary Norris Cochran amended the Declaration to add additional categories of Qualified Persons authorized to prescribe, dispense, and administer COVID–19 vaccines that are Covered Countermeasures under the Declaration (86 FR 7872, Feb. 2, 2021). On February 16, 2021, the Acting Secretary amended the Declaration to add additional categories of Qualified Persons authorized to prescribe, dispense, and administer COVID–19 vaccines that are covered countermeasures under the Declaration (86 FR 9516, Feb. 16, 2021) and on February 22, 2021, the Department filed a notice of correction to the February 2 and February 16 notices correcting effective dates stated in the Declaration, and correcting the description of qualified persons added by the February 16, 2021, amendment (86 FR 10588, Feb. 22, 2021). On March 11, 2021, the Acting Secretary amended the Declaration to add additional Qualified Persons authorized to prescribe, dispense, and administer Covered Countermeasures under the Declaration (86 FR 14462, Mar. 16, 2021).

On August 4, 2021, I amended the Declaration to clarify categories of Qualified Persons and to expand the scope of authority for certain Qualified Persons to administer seasonal influenza vaccines to adults (86 FR 41977, Aug. 4, 2021). On September 14, 2021, I amended the Declaration to expand the scope of authority for certain Qualified Persons to administer COVID–19 therapeutics subcutaneously, intramuscularly, or orally (86 FR 51160, Sept. 14, 2021), and on September 30, 2021, the Department filed a notice of correction to the September 14 notice clarifying the terms “ACIP recommendations” and “ACIP’s standard immunization schedules” (86 FR 54696, Oct. 4, 2021). On January 7, 2022, I amended the Declaration to expand the scope of authority for licensed pharmacists to order and administer and qualified pharmacy interns to administer seasonal influenza vaccines (87 FR 982, January 7, 2022).

On May 9, 2023, I amended the Declaration to update the determination of a PHE to state that COVID–19 continues to present a credible risk of a future PHE after the end of the PHE declared pursuant to section 319 of the PHS Act; to add a new limitation on distribution to provide coverage under the PREP Act Declaration through December 31, 2024, for manufacturing, distribution, administration and use of Covered Countermeasures while they are authorized for emergency use (EUA) by the U.S. Food and Drug

Administration (FDA) pursuant to section 564 of the Federal Food, Drug & Cosmetic (FD&C) Act, regardless of any Federal agreement related to manufacturing, distribution, administration or use of the countermeasures, and regardless of any Federal, regional, state, or local emergency Declaration; to add a new limitation on distribution to provide coverage under this PREP Act Declaration through December 31, 2024, for manufacturing, distribution, administration and use of Covered Countermeasures that are COVID-19 vaccines licensed by FDA, and any FDA-approved or cleared in vitro diagnostic product or other device used to treat, diagnose, cure, prevent, or mitigate COVID-19, or the transmission of SARS-CoV-2 or a virus mutating therefrom regardless of any Federal agreement related to manufacturing, distribution, administration or use of the vaccines, and regardless of any Federal, regional, state, or local emergency Declaration; to clarify that the category of disease, health condition or health threat includes the burden on healthcare providers caused by coterminous seasonal influenza infections and COVID-19 infections; to extend the time period of PREP Act coverage through December 31, 2024, to Qualified Persons who are licensed pharmacists to order and administer, and pharmacy interns and qualified pharmacy technicians to administer, Covered Countermeasures that are COVID-19 vaccines, seasonal influenza vaccines, and COVID-19 tests regardless of any Federal agreement related to manufacturing, distribution, administration or use of these Covered Countermeasures and regardless of any Federal, regional, state, or local emergency Declaration or other limitations on distribution stated in section VII of the Declaration; to clarify the time period of coverage for other qualified persons authorized under section V of the Declaration; and to extend the duration of the Declaration to December 2024 (88 FR 30769, May 12, 2023).

I am now amending section XII of the Declaration to extend the time period of PREP Act coverage through December 31, 2029. COVID-19 continues to present a credible risk of a future public health emergency. COVID-19 continues to cause significant serious illness, morbidity, and mortality during outbreaks. The risk of domestic cases is high due to ongoing outbreaks that continue domestically and internationally in the year since the PHE for COVID-19 ended. Development of

and stockpiling vaccines, therapeutics, devices, and diagnostics for COVID-19 continues to be needed for U.S. preparedness against the credible threat of a public health emergency due to outbreaks of COVID-19. Continued coverage under the PREP Act, as provided in this Declaration, is intended to prepare for and mitigate the credible risk presented by COVID-19. This includes extending the time period for PREP Act coverage for licensed pharmacists, pharmacy interns, and qualified technicians, which allows for continued access by the recipient Population to Covered Countermeasures that are COVID-19 vaccines, seasonal influenza vaccines and COVID-19 tests. As stated in prior amendments to this Declaration, licensed pharmacists, pharmacy interns and qualified pharmacy technicians are well positioned to provide continued access to Covered Countermeasures, particularly in certain areas or for certain populations that have too few primary-care providers or that are otherwise medically underserved. As of 2022, nearly 90 percent of Americans lived within five miles of a community pharmacy. During the COVID-19 pandemic, the majority of Americans have received their COVID-19 vaccines and tests from a pharmacy. In addition, continued access by the Population to seasonal influenza vaccines mitigates risks that seasonal influenza infections, in conjunction with COVID-19 infections, could overwhelm healthcare providers.

As qualified persons, these licensed pharmacists, pharmacy interns, and qualified pharmacy technicians will be afforded liability protections in accordance with the PREP Act and the terms of this amended Declaration. To the extent that any State law would otherwise prohibit these healthcare professionals who are a “qualified person” from prescribing, dispensing, or administering Covered Countermeasures that are COVID-19 vaccines, seasonal influenza vaccines or COVID-19 tests, such law is preempted.

Other conforming changes and technical corrections are made throughout the Declaration for consistency and clarity.

Declaration, as Amended, for Public Readiness and Emergency Preparedness Act Coverage for Medical Countermeasures Against COVID-19

To the extent any term previously in the Declaration, including its amendments, is inconsistent with any provision of this Republished Declaration, the terms of this Republished Declaration are controlling.

This Declaration must be construed in accordance with the Advisory Opinions of the Office of the General Counsel (Advisory Opinions). I incorporate those Advisory Opinions as part of this Declaration. Declaration is a “requirement” under the PREP Act.

I. Determination of Public Health Emergency

42 U.S.C. 247d–6d(b)(1)

I have determined that the spread of SARS-CoV-2 or a virus mutating therefrom and the resulting disease COVID-19 constitutes a credible risk of a future public health emergency. I have also determined that use of any respiratory protective device approved by the National Institute for Occupational Safety and Health (NIOSH) under 42 CFR part 84, or any successor regulations, was a priority for use during the public health emergency that former Secretary Azar declared on January 31, 2020, under section 319 of the PHS Act for the entire United States to aid in the response of the nation’s healthcare community to the COVID-19 outbreak, and that ended on May 11, 2023.

II. Factors Considered

42 U.S.C. 247d–6d(b)(6)

I have considered the desirability of encouraging the design, development, clinical testing, or investigation, manufacture, labeling, distribution, formulation, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, and use of the Covered Countermeasures.

III. Recommended Activities

42 U.S.C. 247d–6d(b)(1)

I recommend, under the conditions stated in this Declaration, the manufacture, testing, development, distribution, administration, and use of the Covered Countermeasures.

IV. Liability Protections

42 U.S.C. 247d–6d(a), 247d–6d(b)(1)

Liability protections as prescribed in the PREP Act and conditions stated in this Declaration are in effect for the Recommended Activities described in Section III.

V. Covered Persons

42 U.S.C. 247d–6d(i)(2), (3), (4), (6), (8)(A) and (B)

Covered Persons who are afforded liability immunity under this Declaration are “manufacturers,” “distributors,” “program planners,” “qualified persons,” and their officials,

agents, and employees, as those terms are defined in the PREP Act, and the United States.

“Order” as used herein and in guidance issued by the Office of the Assistant Secretary for Health means a provider medication order, which includes prescribing of vaccines, or a laboratory order, which includes prescribing laboratory orders, if required.

“Qualified person” includes (A) a licensed health professional or other individual who is authorized to prescribe, administer, or dispense such countermeasures under the law of the State in which the countermeasure was prescribed, administered, or dispensed; or (B) “a person within a category of persons so identified in a Declaration by the Secretary” under subsection (b) of the PREP Act. 42 U.S.C. 247d–6d(i)(8)

In addition, I have determined that the following additional persons are qualified persons:

(a) Any person authorized in accordance with the public health and medical emergency response of the Authority Having Jurisdiction, as described in Section VII below, to prescribe, administer, deliver, distribute, or dispense the Covered Countermeasures, and their officials, agents, employees, contractors, and volunteers, following a Declaration of an Emergency, as that term is defined in Section VII of this Declaration;

(b) Any person authorized to prescribe, administer, or dispense the Covered Countermeasures or who is otherwise authorized to perform an activity under an Emergency Use Authorization in accordance with Section 564 of the FD&C Act.

(c) Any person authorized to prescribe, administer, or dispense Covered Countermeasures in accordance with section 564A of the FD&C Act.

(d) A State-licensed pharmacist who orders and administers, and pharmacy interns and qualified pharmacy technicians who administer (if the pharmacy intern or technician acts under the supervision of such pharmacist and the pharmacy intern or technician is licensed or registered by his or her State board of pharmacy), (1) vaccines that the Centers for Disease Control and Prevention (CDC)/Advisory Committee on Immunization Practices (ACIP) recommend to persons ages three through 18 according to CDC’s/ACIP’s standard immunization schedule; or (2) seasonal influenza vaccine administered by qualified pharmacy technicians and interns that the CDC/ACIP recommends to persons aged 19 and older according to CDC’s/ACIP’s standard immunization schedule; or (3) FDA-authorized or

FDA-licensed COVID–19 vaccines to persons ages three or older. Such State-licensed pharmacists and the State-licensed or registered interns or technicians under their supervision are qualified persons only if the following requirements are met:

i. The vaccine must be authorized, approved, or licensed by the FDA;

ii. In the case of a COVID–19 vaccine, the vaccination must be ordered and administered according to CDC’s/ACIP’s COVID–19 vaccine recommendation(s);

iii. In the case of a childhood vaccine, the vaccination must be ordered and administered according to CDC’s/ACIP’s standard immunization schedule;

iv. In the case of seasonal influenza vaccine administered by qualified pharmacy technicians and interns, the vaccination must be ordered and administered according to CDC’s/ACIP’s standard immunization schedule;

v. In the case of pharmacy technicians, the supervising pharmacist must be readily and immediately available to the immunizing qualified pharmacy technician;

vi. The licensed pharmacist must have completed the immunization training that the licensing State requires for pharmacists to order and administer vaccines. If the State does not specify training requirements for the licensed pharmacist to order and administer vaccines, the licensed pharmacist must complete a vaccination training program of at least 20 hours that is approved by the Accreditation Council for Pharmacy Education (ACPE) to order and administer vaccines. Such a training program must include hands on injection technique, clinical evaluation of indications and contraindications of vaccines, and the recognition and treatment of emergency reactions to vaccines;

vii. The licensed or registered pharmacy intern and qualified pharmacy technician must complete a practical training program that is approved by the ACPE. This training program must include hands-on injection technique, clinical evaluation of indications and contraindications of vaccines, and the recognition and treatment of emergency reactions to vaccines;

viii. The licensed pharmacist, licensed or registered pharmacy intern, and qualified pharmacy technician must have a current certificate in basic cardiopulmonary resuscitation;

ix. The licensed pharmacist must complete a minimum of two hours of ACPE-approved, immunization-related continuing pharmacy education during each State licensing period;

x. The licensed pharmacist must comply with recordkeeping and reporting requirements of the jurisdiction in which he or she administers vaccines, including informing the patient’s primary care provider when available, submitting the required immunization information to the State or local immunization information system (vaccine registry), complying with requirements with respect to reporting adverse events, and complying with requirements whereby the person administering a vaccine must review the vaccine registry or other vaccination records prior to administering a vaccine;

xi. The licensed pharmacist must inform his or her childhood-vaccination patients and the adult caregiver accompanying the child of the importance of a well-child visit with a pediatrician or other licensed primary care provider and refer patients as appropriate; and

xii. The licensed pharmacist, the licensed or registered pharmacy intern and the qualified pharmacy technician must comply with any applicable requirements (or conditions of use) as set forth in the CDC COVID–19 vaccination provider agreement and any other federal requirements that apply to the administration of COVID–19 vaccine(s).

(e) Healthcare personnel using telehealth to order or administer Covered Countermeasures for patients in a state other than the state where the healthcare personnel are licensed or otherwise permitted to practice. When ordering and administering Covered Countermeasures by means of telehealth to patients in a state where the healthcare personnel are not already permitted to practice, the healthcare personnel must comply with all requirements for ordering and administering Covered Countermeasures to patients by means of telehealth in the state where the healthcare personnel are permitted to practice. Any state law that prohibits or effectively prohibits such a qualified person from ordering and administering Covered Countermeasures by means of telehealth is preempted. Nothing in this Declaration shall preempt state laws that permit additional persons to deliver telehealth services.

(f) Any healthcare professional or other individual who holds an active license or certification permitting the person to prescribe, dispense, or administer vaccines under the law of any State as of the effective date of this amendment, or a pharmacist or pharmacy intern as authorized under the section V(d) of this Declaration, who

prescribes, dispenses, or administers COVID-19 vaccines that are Covered Countermeasures under section VI of this Declaration in any jurisdiction where the PREP Act applies, other than the State in which the license or certification is held, in association with a COVID-19 vaccination effort by a federal, state, local, tribal, or territorial authority or by an institution in the State in which the COVID-19 vaccine Covered Countermeasure is administered, so long as the license or certification of the healthcare professional has not been suspended or restricted by any licensing authority, surrendered while under suspension, discipline or investigation by a licensing authority or surrendered following an arrest, and the individual is not on the List of Excluded Individuals/Entities maintained by the Office of Inspector General, subject to Documentation of completion of the COVID-19 (CDC) Vaccine Training Modules and, for healthcare providers who are not currently practicing, documentation of an observation period by a currently practicing healthcare professional experienced in administering intramuscular injections, and for whom administering intramuscular injections is in their ordinary scope of practice, who confirms competency of the healthcare provider in preparation and administration of the COVID-19 vaccine(s) to be administered.

(g) Any member of a uniformed service (including members of the National Guard in a Title 32 duty status) (hereafter in this paragraph “service member”) or federal government, employee, contractor, or volunteer who prescribes, administers, delivers, distributes or dispenses a Covered Countermeasure. Such federal government service members, employees, contractors, or volunteers are qualified persons if the following requirement is met: The executive department or agency by or for which the federal service member, employee, contractor, or volunteer is employed, contracts, or volunteers has authorized or could authorize that service member, employee, contractor, or volunteer to prescribe, administer, deliver, distribute, or dispense the Covered Countermeasure as any part of the duties or responsibilities of that service member, employee, contractor, or volunteer, even if those authorized duties or responsibilities ordinarily would not extend to members of the public or otherwise would be more limited in scope than the activities such service member, employees, contractors,

or volunteers are authorized to carry out under this Declaration.

(h) The following healthcare professionals and students in a healthcare profession training program subject to the requirements of this paragraph:

1. Any midwife, paramedic, advanced or intermediate emergency medical technician (EMT), physician assistant, respiratory therapist, dentist, podiatrist, optometrist, or veterinarian licensed or certified to practice under the law of any state who prescribes, dispenses, or administers COVID-19 vaccines that are Covered Countermeasures under section VI of this Declaration in any jurisdiction where the PREP Act applies in association with a COVID-19 vaccination effort by a state, local, tribal or territorial authority or by an institution in which the COVID-19 vaccine covered countermeasure is administered;

2. Any physician, advanced practice registered nurse, registered nurse, practical nurse, pharmacist, pharmacy intern, midwife, paramedic, advanced or intermediate EMT, respiratory therapist, dentist, physician assistant, podiatrist, optometrist, or veterinarian who has held an active license or certification under the law of any State within the last five years, which is inactive, expired or lapsed, who prescribes, dispenses, or administers COVID-19 vaccines that are Covered Countermeasures under section VI of this Declaration in any jurisdiction where the PREP Act applies in association with a COVID-19 vaccination effort by a state, local, tribal or territorial authority or by an institution in which the COVID-19 vaccine Covered Countermeasure is administered, so long as the license or certification was active and in good standing prior to the date it went inactive, expired or lapsed and was not revoked by the licensing authority, surrendered while under suspension, discipline, or investigation by a licensing authority or surrendered following an arrest, and the individual is not on the List of Excluded Individuals/Entities maintained by the Office of Inspector General;

3. Any medical, nursing, pharmacy, pharmacy intern, midwife, paramedic, advanced or intermediate EMT, physician assistant, respiratory therapy, dental, podiatry, optometry or veterinary student with appropriate training in administering vaccines as determined by his or her school or training program and supervision by a currently practicing healthcare professional experienced in administering intramuscular injections

who administers COVID-19 vaccines that are Covered Countermeasures under section VI of this Declaration in any jurisdiction where the PREP Act applies in association with a COVID-19 vaccination effort by a state, local, tribal or territorial authority or by an institution in which the COVID-19 vaccine Covered Countermeasure is administered;

Subject to the following requirements:

i. The vaccine must be authorized, approved, or licensed by the FDA;

ii. Vaccination must be ordered and administered according to CDC’s/ACIP’s COVID-19 vaccine recommendation(s);

iii. The healthcare professionals and students must have documentation of completion of the CDC COVID-19 Vaccine Training Modules; and if applicable, such additional training as may be required by the state, territory, locality, or tribal area in which they are prescribing, dispensing, or administering COVID-19 vaccines;

iv. The healthcare professionals and students must have documentation of an observation period by a currently practicing healthcare professional experienced in administering intramuscular injections, and for whom administering vaccinations is in their ordinary scope of practice, who confirms competency of the healthcare provider or student in preparation and administration of the COVID-19 vaccine(s) to be administered and, if applicable, such additional training as may be required by the state, territory, locality, or tribal area in which they are prescribing, dispensing, or administering COVID-19 vaccines;

v. The healthcare professionals and students must have a current certificate in basic cardiopulmonary resuscitation;

vi. The healthcare professionals and students must comply with recordkeeping and reporting requirements of the jurisdiction in which he or she administers vaccines, including informing the patient’s primary-care provider when available, submitting the required immunization information to the state or local immunization information system (vaccine registry), complying with requirements with respect to reporting adverse events, and complying with requirements whereby the person administering a vaccine must review the vaccine registry or other vaccination records prior to administering a vaccine; and

vii. The healthcare professionals and students comply with any applicable requirements (or conditions of use) as set forth in the CDC COVID-19 vaccination provider agreement and any other federal requirements that apply to

the administration of COVID-19 vaccine(s).

(i) A State-licensed pharmacist who orders and administers, and pharmacy interns and qualified pharmacy technicians who administer (if the pharmacy intern or technician acts under the supervision of such pharmacist and the pharmacy intern or technician is licensed or registered by his or her State board of pharmacy) FDA-authorized, approved, or licensed COVID-19 therapeutics. Such State-licensed pharmacists and the State licensed or registered interns or technicians under their supervision are qualified persons only if the following requirements are met:

i. The COVID-19 therapeutic must be authorized, approved, or licensed by the FDA;

ii. In the case of a licensed pharmacist ordering a COVID-19 therapeutic, the therapeutic must be ordered for subcutaneous, intramuscular, or oral administration and in accordance with the FDA approval, authorization, or licensing;

iii. In the case of licensed pharmacists, qualified pharmacy technicians, and licensed or registered pharmacy interns administering the COVID-19 therapeutic, the therapeutic must be administered subcutaneously, intramuscularly, or orally in accordance with the FDA approval, authorization, or licensing;

iv. In the case of qualified pharmacy technicians, the supervising pharmacist must be readily and immediately available to the qualified pharmacy technician;

v. In the case of COVID-19 therapeutics administered through intramuscular or subcutaneous injections, the licensed pharmacist, licensed or registered pharmacy intern and qualified pharmacy technician must complete a practical training program that is approved by the ACPE. This training program must include hands-on injection technique, clinical evaluation of indications and contraindications of COVID-19 therapeutics, the recognition and treatment of emergency reactions to COVID-19 therapeutics, and any additional training required in the FDA approval, authorization, or licensing;

vi. The licensed pharmacist, licensed or registered pharmacy intern and qualified pharmacy technician must have a current certificate in basic cardiopulmonary resuscitation;

vii. The licensed pharmacist must comply with recordkeeping and reporting requirements of the jurisdiction in which he or she administers COVID-19 therapeutics; including informing the patient's

primary-care provider when available and complying with requirements with respect to reporting adverse events; and

viii. The licensed pharmacist, the licensed or registered pharmacy intern and the qualified pharmacy technician must comply with any applicable requirements (or conditions of use) that apply to the administration of COVID-19 therapeutics.

(j) Any pharmacist who holds an active license or certification permitting the person to prescribe, dispense, or administer vaccines under the law of any State or who is authorized under section V(d) of this Declaration who prescribes, dispenses, or administers seasonal influenza vaccines, or a pharmacy intern as authorized under the section V(d) of this Declaration who administers seasonal influenza vaccines, in any jurisdiction where the PREP Act applies, other than the State in which the license or certification is held, so long as the license or certification of the pharmacist or pharmacy intern has not been suspended or restricted by any licensing authority, surrendered while under suspension, discipline or investigation by a licensing authority or surrendered following an arrest, and the individual is not on the List of Excluded Individuals/Entities maintained by the Office of Inspector General.

Nothing in this Declaration shall be construed to affect the National Vaccine Injury Compensation Program, including an injured party's ability to obtain compensation under that program. Covered countermeasures that are subject to the National Vaccine Injury Compensation Program authorized under 42 U.S.C. 300aa-10 *et seq.* are covered under this Declaration for the purposes of liability immunity and injury compensation only to the extent that injury compensation is not provided under that Program. All other terms and conditions of the Declaration apply to such covered countermeasures.

VI. Covered Countermeasures

42 U.S.C. 247d-6b(c)(1)(B), 42 U.S.C. 247d-6d(i)(1) and (7)

Covered Countermeasures are:

(a) Any antiviral, any drug, any biologic, any diagnostic, any other device, any respiratory protective device, or any vaccine manufactured, used, designed, developed, modified, licensed, or procured:

i. To diagnose, mitigate, prevent, treat, or cure COVID-19, or the transmission of SARS-CoV-2 or a virus mutating therefrom; or

ii. to limit the harm that COVID-19, or the transmission of SARS-CoV-2 or

a virus mutating therefrom, might otherwise cause;

(b) a product manufactured, used, designed, developed, modified, licensed, or procured to diagnose, mitigate, prevent, treat, or cure a serious or life-threatening disease or condition caused by a product described in paragraph (a) above;

(c) a product or technology intended to enhance the use or effect of a product described in paragraph (a) or (b) above; or

(d) any device used in the administration of any such product, and all components and constituent materials of any such product.

To be a Covered Countermeasure under the Declaration, a product must also meet 42 U.S.C. 247d-6d(i)(1)'s definition of "Covered Countermeasure."

VII. Limitations on Distribution

42 U.S.C. 247d-6d(a)(5) and (b)(2)(E)

I have determined that liability protections are afforded to Covered Persons only for Recommended Activities involving:

(a) Covered Countermeasures that are related to present or future federal contracts, cooperative agreements, grants, other transactions, interagency agreements, memoranda of understanding, or other federal agreements;

(b) Covered Countermeasures that are related to activities authorized in accordance with the public health and medical response of the Authority Having Jurisdiction to prescribe, administer, deliver, distribute or dispense the Covered Countermeasures following a Declaration of Emergency;

(c) Covered Countermeasures other than licensed COVID-19 vaccines that are:

i. Licensed, approved, or cleared by the FDA (or that are permitted to be used under an Investigational New Drug Application or an Investigational Device Exemption) under the FD&C Act or PHS Act to treat, diagnose, cure, prevent, mitigate, or limit the harm from COVID-19, or the transmission of SARS-CoV-2 or a virus mutating therefrom; or

ii. A respiratory protective device approved by NIOSH under 42 CFR part 84, or any successor regulations, that the Secretary determines to be a priority for use during a public health emergency declared under section 319 of the PHS Act to prevent, mitigate, or limit the harm from COVID-19, or the transmission of SARS-CoV-2 or a virus mutating therefrom.

To qualify for this third distribution channel, a Covered Person must

manufacture, test, develop, distribute, administer, or use the Covered Countermeasure pursuant to the FDA licensure, approval, or clearance (or pursuant to an Investigational New Drug Application or Investigational Device Exemption), or the NIOSH approval;

(d) Covered Countermeasures that are authorized by the FDA under section 564 of the FD&C Act to treat, diagnose, cure, prevent, mitigate, or limit the harm from COVID-19, or the transmission of SARS-CoV-2 or a virus mutating therefrom. To qualify for this fourth distribution channel, a Covered Person must manufacture, test, develop, distribute, administer, or use the Covered Countermeasure pursuant to the FDA authorization; or

(e) Covered Countermeasures that are COVID-19 vaccines licensed by the FDA to prevent, mitigate, or limit the harm from COVID-19, or the transmission of SARS-CoV-2 or a virus mutating therefrom and any approved or cleared in vitro diagnostic product or other device used to treat, diagnose, cure, prevent, or mitigate COVID-19, or the transmission of SARS-CoV-2 or a virus mutating therefrom. To qualify for this fifth distribution channel, a Covered Person must manufacture, test, develop, distribute, administer, or use the Covered Countermeasure pursuant to the FDA license, clearance, or approval.

As used in this Declaration, the terms “Authority Having Jurisdiction” and “Declaration of Emergency” have the following meanings:

(i) The Authority Having Jurisdiction means the public agency or its delegate that has legal responsibility and authority for responding to an incident, based on political or geographical (*e.g.*, city, county, tribal, state, or federal boundary lines) or functional (*e.g.*, law enforcement, public health) range or sphere of authority.

(ii) A Declaration of Emergency means any declaration by any authorized local, regional, state, or federal official of an emergency specific to events that indicate an immediate need to administer and use the Covered Countermeasures, with the exception of a federal declaration in support of an Emergency Use Authorization under section 564 of the FD&C Act unless such declaration specifies otherwise.

I have also determined that, for governmental program planners only, liability protections are afforded only to the extent such program planners obtain Covered Countermeasures through voluntary means, such as (a) donation; (b) commercial sale; (c) deployment of Covered Countermeasures from federal stockpiles; or (d) deployment of

donated, purchased, or otherwise voluntarily obtained Covered Countermeasures from state, local, or private stockpiles.

VIII. Category of Disease, Health Condition, or Threat

42 U.S.C. 247d-6d(b)(2)(A)

The category of disease, health condition, or threat for which I recommend the administration or use of the Covered Countermeasures is not only COVID-19 caused by SARS-CoV-2, or a virus mutating therefrom, but also other diseases, health conditions, or threats that may have been caused by COVID-19, SARS-CoV-2, or a virus mutating therefrom, including the threat of increased burden on the healthcare system due to seasonal influenza infections occurring at the same time as COVID-19 infections, which will lead to an increase in the rate of infectious diseases.

IX. Administration of Covered Countermeasures

42 U.S.C. 247d-6d(a)(2)(B)

Administration of the Covered Countermeasure means physical provision of the countermeasures to recipients, or activities and decisions directly relating to public and private delivery, distribution and dispensing of the countermeasures to recipients, management and operation of countermeasure programs, or management and operation of locations for the purpose of distributing and dispensing countermeasures. Where there are limited Covered Countermeasures, *not* administering a Covered Countermeasure to one individual in order to administer it to another individual can constitute “relating to . . . the administration to . . . an individual” under 42 U.S.C. 247d-6d. For example, consider a situation where there is only one dose of a COVID-19 vaccine, and a person in a vulnerable population and a person in a less vulnerable population both request it from a healthcare professional. In that situation, the healthcare professional administers the one dose to the person who is more vulnerable to COVID-19. In that circumstance, the failure to administer the COVID-19 vaccine to the person in a less-vulnerable population “relat[es] to . . . the administration to” the person in a vulnerable population. The person in the vulnerable population was able to receive the vaccine only because it was not administered to the person in the less-vulnerable population. Prioritization or purposeful allocation of a Covered Countermeasure, particularly

if done in accordance with a public health authority’s directive, can fall within the PREP Act and this Declaration’s liability protections.

X. Population

42 U.S.C. 247d-6d(a)(4), 247d-6d(b)(2)(C)

The populations of individuals to whom the liability protections of this Declaration extend include any individual who uses or is administered the Covered Countermeasures in accordance with this Declaration.

Liability protections are afforded to manufacturers and distributors without regard to whether the countermeasure is used by or administered to this population; liability protections are afforded to program planners and qualified persons when the countermeasure is used by or administered to this population, or the program planner or qualified person reasonably could have believed the recipient was in this population.

XI. Geographic Area

42 U.S.C. 247d-6d(a)(4), 247d-6d(b)(2)(D)

Liability protections are afforded for the administration or use of a Covered Countermeasure without geographic limitation.

Liability protections are afforded to manufacturers and distributors without regard to whether the Covered Countermeasure is used by or administered in any designated geographic area; liability protections are afforded to program planners and qualified persons when the countermeasure is used by or administered in any designated geographic area, or the program planner or qualified person reasonably could have believed the recipient was in that geographic area.

COVID-19 is a global challenge that requires a whole-of-nation response. There are substantial federal legal and policy issues, and substantial federal legal and policy interests within the meaning of *Grable & Sons Metal Products, Inc. v. Darue Eng’g. & Mfg.*, 545 U.S. 308 (2005), in having a unified, whole-of-nation response to the COVID-19 pandemic among federal, state, local, and private-sector entities. The world faced an unprecedented pandemic. To effectively respond, there needed to be a more consistent pathway for Covered Persons to manufacture, distribute, administer or use Covered Countermeasures across the nation and the world. Thus, there are substantial federal legal and policy issues, and substantial federal legal and policy

interests within the meaning of *Grable & Sons Metal Products, Inc. v. Darue Eng'g. & Mfg.*, 545 U.S. 308 (2005), in having a uniform interpretation of the PREP Act. Under the PREP Act, the sole exception to the immunity from suit and liability of covered persons under the PREP Act is an exclusive federal cause of action against a covered person for death or serious physical injury proximately caused by willful misconduct by such covered person. In all other cases, an injured party's exclusive remedy is an administrative remedy under section 319F-4 of the PHS Act. Through the PREP Act, Congress delegated to me the authority to strike the appropriate federal-state balance with respect to Covered Countermeasures through PREP Act Declarations.

XII. Effective Time Period

42 U.S.C. 247d-6d(b)(2)(B)

The effective time period for Covered Countermeasures and Covered Persons depends on the means of distribution identified in Section VII of this Declaration as applied to categories of Countermeasures and Qualified Persons:

(a) Liability protections for any respiratory protective device approved by NIOSH under 42 CFR part 84, or any successor regulations, through the means of distribution identified in section VII(a) of this Declaration, begin on March 27, 2020, and extend through December 31, 2029.

(b) Liability protections for all other Covered Countermeasures identified in section VI of this Declaration, through means of distribution identified in section VII(a) of this Declaration, begin on February 4, 2020, and extend through December 31, 2029.

(c) Liability protections for all Covered Countermeasures administered and used in accordance with the public health and medical response of the Authority Having Jurisdiction, as identified in section VII(b) of this Declaration, begin with a Declaration of Emergency as that term is defined in section VII (except that, with respect to qualified persons who order or administer a routine childhood vaccination that CDC/ACIP recommends to persons ages three through 18 according to CDC's/ACIP's standard immunization schedule, liability protections began on August 24, 2020), and last through (a) the final day the Declaration of Emergency is in effect, or (b) December 31, 2029, whichever occurs first.

(d) Liability protections for all Covered Countermeasures identified in section VII(c)(i) of this Declaration begin

on December 9, 2020, and last through the final day the Declaration of Emergency is in effect or December 31, 2029, whichever occurs first. Liability protections for all Covered Countermeasures identified in section VII(c)(ii) of this Declaration last for the time period stated in section (a) of this section XII if applicable, or otherwise December 31, 2024.

(e) Liability protections for all Covered Countermeasures identified in section VII(d) of this Declaration begin on December 9, 2020, and last until December 31, 2029, regardless of any Declaration of Emergency that might otherwise terminate the time period of coverage under paragraphs (c) or (d) of this section XII.

(f) Liability protections for all Covered Countermeasures identified in section VII(e) of this Declaration begin on December 9, 2020, and last until December 31, 2029, regardless of any Declaration of Emergency that might otherwise terminate the time period of coverage under paragraphs (c) or (d) of this section XII.

(g) Liability protections for Manufacturers, Distributors, and Program Planners, as defined at 42 U.S.C. 247d-6d(i), begin on February 4, 2020, and last through the time periods stated in paragraphs (a)–(f) of this section XII.

(h) Liability protections for Qualified Persons who are a licensed health professional or other individual who is authorized to prescribe, administer, or dispense such countermeasures under the law of the State in which the countermeasure was prescribed, administered, or dispensed begin on February 4, 2020, and last through the time periods stated in paragraphs (a)–(f) of this section XII.

(i) Liability protections for Additional Qualified Persons identified under section V of the Declaration and in Guidance implementing section V of the Declaration begin on the dates listed below, and last through the time periods stated in paragraphs (a)–(d) of this section XII of the Declaration, unless otherwise stated in this paragraph (i).

i. Liability protections for Qualified Persons under section V(d) of the Declaration who are licensed pharmacists to order and administer, and licensed or registered pharmacy interns and qualified pharmacy technicians to administer CDC/ACIP recommended vaccines for persons aged three through 18 (other than seasonal influenza vaccines and COVID-19 vaccines) begins on August 24, 2020.

ii. Liability protections for Qualified Persons under section V(d) of the Declaration who are licensed

pharmacists to order and administer, and licensed or registered pharmacy interns and qualified pharmacy technicians to administer CDC/ACIP recommended seasonal influenza vaccines for persons aged three through 18 begins on August 24, 2020, and lasts through December 31, 2029, regardless of the time periods stated in paragraphs (c)–(d) of this section XII or limitations on distribution stated in section VII (a)–(b) of this Declaration.

iii. Liability protections for Qualified Persons under section V(d) of the Declaration who are licensed pharmacists to order and administer, and pharmacy interns and qualified pharmacy technicians to administer, COVID-19 vaccines to individuals aged three and above begins on February 4, 2020, and lasts through December 31, 2029, regardless of the time periods stated in paragraphs (c)–(d) of this section XII or limitations on distribution stated in section VII (a)–(b) of this Declaration.

iv. Liability protections for Qualified Persons under section V(d) of the Declaration who are licensed pharmacists to order and administer, and pharmacy interns and qualified pharmacy technicians to administer, seasonal influenza vaccines to individuals aged nineteen and above begins on August 4, 2021, and lasts through December 31, 2029, regardless of the time periods stated in paragraphs (c)–(d) of this section XII or limitations on distribution stated in section VII (a)–(b) of this Declaration.

v. Liability protections for Qualified Persons under section V(e) of the Declaration begin on February 4, 2020.

vi. Liability protections for Qualified Persons under section V(f) of the Declaration begin on February 2, 2021.

vii. Liability protections for Qualified Persons under section V(g) of the Declaration begin on February 16, 2021, and last through December 31, 2029.

viii. Liability protections for Qualified Persons who are physicians, advanced practice registered nurses, registered nurses, or practical nurses under section V(h) of the Declaration begin on February 2, 2021, with additional conditions effective as of March 11, 2021, and liability protections for all other Qualified persons under section V(h) begin on March 11, 2021.

ix. Liability protections for Qualified Persons under section V(i) of the Declaration who are licensed pharmacists to order and administer and qualified pharmacy technicians and licensed or registered pharmacy interns to administer COVID-19 therapeutics identified in section VII(d) of the Declaration begin on September 9, 2021,

and last through December 31, 2029, regardless of time periods stated in paragraphs (c)–(d) of this section or limitations on distribution stated in section VII (a)–(b) of this Declaration.

x. Liability protections for Qualified Persons under section V(i) of the Declaration who are licensed pharmacists to order and administer and qualified pharmacy technicians and licensed or registered pharmacy interns to administer COVID–19 therapeutics identified in section VII(c) of the Declaration begin on September 9, 2021.

xi. Liability protections for Qualified Persons under section V(j) of the Declaration begin on December 30, 2021.

xii. Liability protections for Qualified Persons authorized under Guidance issued by this Department as an Authority Having Jurisdiction to respond to a declared emergency, incorporated into this Declaration by reference, to administer COVID–19 tests who are licensed pharmacists begin April 8, 2020, and last until December 31, 2029, regardless of any limitations stated in paragraphs (c)–(d) of this section XII or limitations on distribution stated in section VII (a)–(b) of this Declaration.

xiii. Liability protections for Qualified Persons authorized under Guidance issued by this Department as an Authority Having Jurisdiction to respond to a declared emergency, incorporated into this Declaration by reference, to administer COVID–19 tests who are licensed or registered pharmacy interns or qualified pharmacy technicians begin October 20, 2020, and last until December 31, 2029, regardless of any limitations stated in paragraphs (c)–(d) of this section XII or limitations on distribution stated in section VII (a)–(b) of this Declaration.

xiv. Liability protections for Qualified Persons authorized under Guidance issued by this Department as an Authority Having Jurisdiction to respond to a declared emergency, incorporated into this Declaration by reference, who are pharmacies when their staff pharmacists order and administer, or their pharmacy interns and pharmacy technicians administer COVID–19 vaccines to individuals aged three and above, seasonal influenza vaccines to individuals aged three through eighteen, seasonal influenza vaccines to individuals aged nineteen and above, COVID–19 tests, and COVID–19 therapeutics identified in section VII(d) of the Declaration begin October 29, 2020, and last until December 31, 2029, regardless of any limitations stated in paragraphs (c)–(d) of this section XII or limitations on

distribution stated in section VII (a)–(b) of this Declaration.

xv. Liability protections for Qualified Persons authorized under Guidance issued by this Department as an Authority Having Jurisdiction to respond to a declared emergency, incorporated into this Declaration by reference, who are pharmacies when their staff pharmacists order and administer, or their pharmacy interns and pharmacy technicians administer CDC/ACIP recommended vaccines for persons aged three through 18 (other than seasonal influenza vaccines and COVID–19 vaccines) and countermeasures identified in section VII(c) of the Declaration begin October 29, 2020.

xvi. Liability protections for Qualified Persons authorized under Guidance issued by this Department as an Authority Having Jurisdiction to respond to a declared emergency, incorporated into this Declaration by reference to prescribe or administer point-of-care COVID–19 tests, using anterior nares specimen collection or self-collection, for screening in congregate facilities across the Nation who are licensed healthcare practitioners begin August 31, 2020, and last until December 31, 2029, regardless of any limitations stated in paragraphs (c)–(d) of this section XII or limitations on distribution stated in section VII (a)–(b) of this Declaration.

XIII. Additional Time Period of Coverage

42 U.S.C. 247d–6d(b)(3)(B) and (C)

I have determined that an additional 12 months of liability protection is reasonable to allow for the manufacturer(s) to arrange for disposition of the Covered Countermeasure, including return of the Covered Countermeasures to the manufacturer, and for Covered Persons to take such other actions as are appropriate to limit the administration or use of the Covered Countermeasures.

Covered Countermeasures obtained for the Strategic National Stockpile (SNS) during the effective period of this Declaration are covered through the date of administration or use pursuant to a distribution or release from the SNS, including NIOSH Approved® respirators that have been rescinded or are beyond their manufacturers' declared shelf life.

XIV. Countermeasures Injury Compensation Program

42 U.S.C 247d–6e

The PREP Act authorizes the Countermeasures Injury Compensation Program (CICP) to provide benefits to

certain individuals or estates of individuals who sustain a covered serious physical injury as the direct result of the administration or use of the Covered Countermeasures, and benefits to certain survivors of individuals who die as a direct result of the administration or use of the Covered Countermeasures. The causal connection between the countermeasure and the serious physical injury must be supported by compelling, reliable, valid, medical, and scientific evidence in order for the individual to be considered for compensation. The CICP is administered by the Health Resources and Services Administration, within the U.S. Department of Health and Human Services. Information about the CICP is available at the toll-free number 1–855–266–2427 or <http://www.hrsa.gov/cicp/>.

XV. Amendments

42 U.S.C. 247d–6d(b)(4)

Amendments to this Declaration will be published in the **Federal Register**, as warranted.

Authority: 42 U.S.C. 247d–6d.

Dated: December 6, 2024.

Xavier Becerra,

Secretary, U.S. Department of Health and Human Services.

[FR Doc. 2024–29108 Filed 12–10–24; 8:45 am]

BILLING CODE 4150–37–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Request for Public Comments on the Scientific Report of the 2025 Dietary Guidelines Advisory Committee

AGENCY: Office of Disease Prevention and Health Promotion, Office of the Assistant Secretary for Health (OASH), U.S. Department of Health and Human Services (HHS); Food, Nutrition, and Consumer Services (FNCS), U.S. Department of Agriculture (USDA).

ACTION: Notice and request for public comments on the Scientific Report of the 2025 Dietary Guidelines Advisory Committee (Scientific Report).

SUMMARY: The Departments of Health and Human Services and Agriculture invite the public to provide written comments and virtual oral comments on the Scientific Report.

DATES: The written and oral comment collection dates are scheduled as follows:

- Once the Scientific Report is published online, the public will have 60 days to provide written comments to HHS and USDA; this public comment period closes on the 60th calendar day

at 11:59 p.m. EST. Specific dates will be announced at www.DietaryGuidelines.gov.

- The public is invited to present virtual oral comments to HHS and USDA on Thursday, January 16, 2025, from 1:00 p.m. to 4:30 p.m. EST; pre-registration is required. Registration for oral comments will open on Monday, December 16, 2024, at 1:00 p.m. EST and close once capacity has been reached. Virtual oral comments can be pre-recorded or provided live virtually via videocast. More information on the oral comment opportunity will be available at www.DietaryGuidelines.gov.

FOR FURTHER INFORMATION CONTACT:

Designated Federal Officer, 2025 Dietary Guidelines Advisory Committee, Janet M. de Jesus, MS, RD; Office of Disease Prevention and Health Promotion, 1101 Wootton Parkway, Suite 420, Rockville, MD 20852; Phone: 240-453-8266; Email DietaryGuidelines@hhs.gov. Additional information is available at www.DietaryGuidelines.gov.

SUPPLEMENTARY INFORMATION:

Authority and Purpose: Under section 301 of Public Law 101-445 (7 U.S.C. 5341, the National Nutrition Monitoring and Related Research Act of 1990, title III), the Secretaries of HHS and USDA are directed to publish the *Dietary Guidelines for Americans* jointly at least every five years. See 88 FR 3423, January 19, 2023, for notice of the first meeting of the 2025 Dietary Guidelines Advisory Committee, the complete Authority and Purpose, and the Committee's Task. The 2025 Dietary Guidelines Advisory Committee is formed and governed under the provisions of the Federal Advisory Committee Act (FACA), Public Law 92-463, as amended (5 U.S.C. app).

Public Comments: Written comments from the public will be accepted once the Scientific Report of the 2025 Dietary Guidelines Advisory Committee is published online. The public will have 60 calendar days to provide written comments to HHS and USDA; this public comment period closes on the 60th day at 11:59 p.m. EST. Specific dates will be announced at www.DietaryGuidelines.gov.

- *Online (preferred method):* Follow the instructions for submitting comments at www.regulations.gov. Comments submitted electronically, including attachments, will be posted to Docket HHS-OASH-2024-0017.

- *Mail:* Mail/courier to Janet M. de Jesus, MS, RD, HHS/OASH/ODPHP, 1101 Wootton Parkway, Suite 420, Rockville, MD 20852. For written/paper submissions, ODPHP will post your

comment, and any attachments, to www.regulations.gov.

Oral Comments: HHS and USDA invite the public to present virtual oral comments on Thursday, January 16, 2025. Pre-registration is required, and the number of commenters is limited based on time constraints. Registration for oral comments will open on Monday, December 16, 2024, at 1:00 p.m. EST and will close once capacity has been reached. Oral comments will be confirmed on a first-come, first-served basis. Oral comments will be limited to one representative per organization. All commenters' remarks should be respectful and given in a manner that recognizes and protects the dignity of the proceedings. Oral comments should focus on the scientific review and evidence-based advice found in the Scientific Report of the 2025 Dietary Guidelines Advisory Committee. More information on the oral comment opportunity will be available at www.DietaryGuidelines.gov.

Registration for Oral Comments: Requests to present oral comments can be made by going to www.DietaryGuidelines.gov. For registration to be accepted, a written outline or a summary of the intended oral comment will be required as part of the registration process. Please limit your written outline or summary to no more than 250 words. A confirmation email with instructions will be sent to confirmed speakers from DietaryGuidelines@hhs.gov. Confirmed speakers will have the option to submit a pre-recorded video to be played at the public meeting on January 16, 2025, or present virtual live oral remarks via videocast on January 16, 2025. To avoid technical difficulties, submission of a pre-recorded video is strongly encouraged.

Paul L. Reed,

Deputy Assistant Secretary for Health, Office of Disease Prevention and Health Promotion.

[FR Doc. 2024-29100 Filed 12-10-24; 8:45 am]

BILLING CODE 4150-32-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Notice of Proposed Purchased/ Referred Care Delivery Area Redesignation for the Iowa Tribe of Kansas and Nebraska

AGENCY: Indian Health Service, HHS.

ACTION: Notice.

SUMMARY: This Notice advises the public that the Indian Health Service (IHS)

proposes to expand the geographic boundaries of the Purchased/Referred Care Delivery Area (PRCDA) for the Iowa Tribe of Kansas and Nebraska (Iowa Tribe, or Tribe) to include the counties of Jackson in the State of Kansas, and Holt in the State of Missouri. The current PRCDA for the Iowa Tribe includes the Kansas counties of Doniphan and Brown, as well as Richardson County, Nebraska. Iowa Tribe members who reside outside of the PRCDA are eligible for direct care services; however, they are not eligible for Purchased/Referred Care (PRC) services. The sole purpose of this expansion would be to authorize additional Iowa Tribe members and beneficiaries to receive PRC services.

DATES: Comments must be submitted by January 10, 2025.

ADDRESSES: Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission. You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to <http://www.regulations.gov>. Follow the "Submit a Comment" instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Carl Mitchell, Director, Division of Regulatory and Policy Coordination, Indian Health Service, 5600 Fishers Lane, Mail Stop: 09E70, Rockville, Maryland 20857.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the above address.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments before the close of the comment period to the address above.

If you intend to deliver your comments to the Rockville address, please call telephone number (301) 443-1116 in advance to schedule your arrival with a staff member.

FOR FURTHER INFORMATION CONTACT:

CAPT John Rael, Director, Office of Resource Access and Partnerships, Indian Health Service, 5600 Fishers Lane, Mail Stop: 10E85C, Rockville, Maryland 20857. Telephone (301) 443-0969 (This is not a toll-free number).

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.

Background: The IHS provides services under regulations in effect as of September 15, 1987, and republished at 42 CFR part 136, subparts A–C. Subpart C defines a Contract Health Service Delivery Area (CHSDA), now referred to as a PRCDA, as the geographic area within which PRC will be made available by the IHS to members of an identified Indian community who reside in the PRCDA. Residence within a PRCDA by a person who is within the scope of the Indian health program, as set forth in 42 CFR 136.12, creates no legal entitlement to PRC services but only potential eligibility for services. Services needed, but not available at an IHS/Tribal facility, are provided under the PRC program depending on the availability of funds, the relative medical priority of the services to be provided, and the actual availability and accessibility of alternate resources in accordance with the regulations.

The regulations at 42 CFR part 136, subpart C provide that, unless otherwise designated, a PRCDA shall consist of a county which includes all or part of a reservation and any county or counties which have a common boundary with the reservation. 42 CFR 136.22(a)(6). The regulations also provide that after consultation with the Tribal governing body or bodies on those reservations included within the PRCDA, the Secretary may, from time to time, redesignate areas within the United States for inclusion in or exclusion from a PRCDA. 42 CFR 136.22(b). The regulations require that certain criteria be considered before any redesignation is made. The criteria are as follows:

(1) The number of Indians residing in the area proposed to be so included or excluded;

(2) Whether the Tribal governing body has determined that Indians residing in the area near the reservation are socially and economically affiliated with the Tribe;

(3) The geographic proximity to the reservation of the area whose inclusion or exclusion is being considered; and

(4) The level of funding which would be available for the provision of PRC. Additionally, the regulations require that any redesignation of a PRCDA be made in accordance with the procedures of the Administrative Procedure Act (5 U.S.C. 553). 42 CFR 136.22(c). In compliance with this requirement, the IHS is publishing this Notice and requesting public comments.

The Iowa Tribe is located in White Cloud, Kansas, and operates their PRC program as a Tribal Health Program out of the White Cloud Health Center. The

IHS and the Iowa Tribe estimate that approximately 77 Tribal members reside in Jackson County, Kansas, and Holt County, Missouri, and would become PRC eligible through the proposed redesignation and expansion of the Tribe's PRCDA.

If the Iowa Tribe's PRCDA redesignation and expansion is finalized as proposed, the Tribe's expanded PRCDA would overlap the PRCDA's of three other Tribes: the Sac and Fox Nation of Missouri in Kansas and Nebraska, the Kickapoo Tribe of Indians of the Kickapoo Reservation (Jackson County, Kansas), and the Prairie Band of Potawatomi Nation (Jackson County, Kansas). The Iowa Tribe and the Sac and Fox Nation of Missouri in Kansas and Nebraska share a PRC program, but currently have different PRCDA's; the Sac and Fox Nation of Missouri has submitted a concurrent request for redesignation and expansion of their own PRCDA. Both redesignation requests were submitted to the IHS through the same correspondence from the White Cloud Health Center. If the Iowa Tribe's and Sac and Fox Nation of Missouri's PRCDA's are each redesignated and expanded as requested, the Tribes would have identical, overlapping PRCDA's, simplifying the administration and operation of their local PRC program.

The IHS has consulted with the Kickapoo Tribe of Indians of the Kickapoo Reservation and the Prairie Band of Potawatomi Nation regarding the potential for overlapping PRCDA's in Jackson County, Kansas. Neither the Kickapoo Tribe of Indians of the Kickapoo Reservation nor the Prairie Band of Potawatomi Nation expressed concerns regarding the proposed redesignation and expansion.

Under 42 CFR 136.23, those otherwise eligible Indians who do not reside on a reservation, but reside within a PRCDA, must be either members of the Tribe or other IHS beneficiaries who maintain close economic and social ties with the Tribe. In this case, applying the aforementioned PRCDA redesignation criteria required by operative regulations codified at 42 CFR part 136, subpart C, the following findings are made:

1. By expanding the PRCDA to include Jackson County, Kansas, and Holt County, Missouri, the Iowa Tribe's PRC eligible population will increase by an estimated 77 Tribal members.

2. The Iowa Tribe communicated its governing body's determination that their members residing in the proposed expansion counties are socially and economically affiliated with the Tribe. The IHS therefore finds that the Tribe's

members within the proposed, expanded PRCDA are socially and economically affiliated with the Iowa Tribe.

3. The expanded PRCDA counties form a contiguous area with the existing PRCDA. Holt County, Missouri, shares a common boundary with the Iowa Tribe's reservation lands in Richardson County, Nebraska. Jackson County, Kansas, is contiguous with Brown County, which includes part of the Iowa Tribe's reservation lands and is currently included in the Iowa Tribe's PRCDA. Members of the Iowa Tribe reside in each of the counties proposed for inclusion in the expanded PRCDA. For these reasons, the IHS has determined the additional counties proposed for inclusion herein to be geographically proximate, meaning "on or near," to the Tribe's reservation.

4. The White Cloud Health Center has indicated that the PRC program can continue providing the same level of care to the PRC eligible population if the PRCDA is expanded as proposed, without requiring additional funding or reduction of the current medical priority level.

Accordingly, the IHS proposes to expand the PRCDA of the Iowa Tribe to include the counties of Jackson in the State of Kansas, and Holt in the State of Missouri.

This Notice does not contain reporting or recordkeeping requirements subject to prior approval by the Office of Management and Budget under the Paperwork Reduction Act of 1980.

Roselyn Tso,

Director, Indian Health Service.

[FR Doc. 2024–29101 Filed 12–10–24; 8:45 am]

BILLING CODE 4166–14–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Notice of Proposed Purchased/ Referred Care Delivery Area Redesignation for the Sac and Fox Nation of Missouri in Kansas and Nebraska

AGENCY: Indian Health Service, HHS.

ACTION: Notice.

SUMMARY: This Notice advises the public that the Indian Health Service (IHS) proposes to expand the geographic boundaries of the Purchased/Referred Care Delivery Area (PRCDA) for the Sac and Fox Nation of Missouri in Kansas and Nebraska (Sac and Fox Nation of Missouri, or Tribe) to include the counties of Doniphan and Jackson in the

State of Kansas, and Holt in the State of Missouri. The current PRCDA for the Sac and Fox Nation of Missouri includes Brown County, Kansas, and Richardson County, Nebraska. The Sac and Fox Nation of Missouri Tribal members who reside outside of the PRCDA are eligible for direct care services; however, they are not eligible for Purchased/Referred Care (PRC) services. The sole purpose of this expansion would be to authorize additional Sac and Fox Nation of Missouri members and beneficiaries to receive PRC services.

DATES: Comments must be submitted by January 10, 2025.

ADDRESSES: Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission. You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to <http://www.regulations.gov>. Follow the "Submit a Comment" instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Carl Mitchell, Director, Division of Regulatory and Policy Coordination, Indian Health Service, 5600 Fishers Lane, Mail Stop: 09E70, Rockville, Maryland 20857.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the above address.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments before the close of the comment period to the address above.

If you intend to deliver your comments to the Rockville address, please call telephone number (301) 443-1116 in advance to schedule your arrival with a staff member.

FOR FURTHER INFORMATION CONTACT: CAPT John Rael, Director, Office of Resource Access and Partnerships, Indian Health Service, 5600 Fishers Lane, Mail Stop: 10E85C, Rockville, Maryland 20857. Telephone (301) 443-0969 (This is not a toll-free number).

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.

Background: The IHS provides services under regulations in effect as of September 15, 1987, and republished at

42 CFR part 136, subparts A–C. Subpart C defines a Contract Health Service Delivery Area (CHSDA), now referred to as a PRCDA, as the geographic area within which PRC will be made available by the IHS to members of an identified Indian community who reside in the PRCDA. Residence within a PRCDA by a person who is within the scope of the Indian health program, as set forth in 42 CFR 136.12, creates no legal entitlement to PRC services but only potential eligibility for services. Services needed, but not available at an IHS/Tribal facility, are provided under the PRC program depending on the availability of funds, the relative medical priority of the services to be provided, and the actual availability and accessibility of alternate resources in accordance with the regulations.

The regulations at 42 CFR part 136, subpart C provide that, unless otherwise designated, a PRCDA shall consist of a county which includes all or part of a reservation and any county or counties which have a common boundary with the reservation. 42 CFR 136.22(a)(6). The regulations also provide that after consultation with the Tribal governing body or bodies on those reservations included within the PRCDA, the Secretary may, from time to time, redesignate areas within the United States for inclusion in or exclusion from a PRCDA. 42 CFR 136.22(b). The regulations require that certain criteria be considered before any redesignation is made. The criteria are as follows:

(1) The number of Indians residing in the area proposed to be so included or excluded;

(2) Whether the Tribal governing body has determined that Indians residing in the area near the reservation are socially and economically affiliated with the Tribe;

(3) The geographic proximity to the reservation of the area whose inclusion or exclusion is being considered; and

(4) The level of funding which would be available for the provision of PRC. Additionally, the regulations require that any redesignation of a PRCDA be made in accordance with the procedures of the Administrative Procedure Act (5 U.S.C. 553). 42 CFR 136.22(c). In compliance with this requirement, the IHS is publishing this Notice and requesting public comments.

The Sac and Fox Nation of Missouri is located in Reserve, Kansas. The Sac and Fox Nation of Missouri's PRC program is operated, as authorized by Tribal resolution, by the Iowa Tribe of Kansas and Nebraska as a Tribal Health Program out of the White Cloud Health Center. The IHS and the Sac and Fox Nation of Missouri estimate that

approximately seven Tribal members reside in Doniphan and Jackson Counties, Kansas, and Holt County, Missouri, and would become PRC eligible through the proposed redesignation and expansion of the Tribe's PRCDA.

If the Sac and Fox Nation of Missouri's PRCDA redesignation and expansion is finalized as proposed, the Tribe's expanded PRCDA would overlap the PRCDA's of three other Tribes: the Iowa Tribe of Kansas and Nebraska, the Kickapoo Tribe of Indians of the Kickapoo Reservation (Jackson County, Kansas), and the Prairie Band of Potawatomi Nation (Jackson County, Kansas). The Sac and Fox Nation of Missouri and the Iowa Tribe of Kansas and Nebraska share a PRC program, but currently have different PRCDA's; the Iowa Tribe of Kansas and Nebraska has submitted a concurrent request for redesignation and expansion of their own PRCDA. Both redesignation requests were submitted to the IHS through the same correspondence from the White Cloud Health Center. If the Sac and Fox Nation of Missouri's and the Iowa Tribe's PRCDA's are each redesignated and expanded as requested, the Tribes would have identical, overlapping PRCDA's, simplifying the administration and operation of their local PRC program. The IHS has consulted with the Kickapoo Tribe of Indians of the Kickapoo Reservation and the Prairie Band of Potawatomi Nation regarding the potential for overlapping PRCDA's in Jackson County, Kansas. Neither the Kickapoo Tribe of Indians of the Kickapoo Reservation nor the Prairie Band of Potawatomi Nation expressed concerns regarding the proposed redesignation and expansion.

Under 42 CFR 136.23, those otherwise eligible Indians who do not reside on a reservation, but reside within a PRCDA, must be either members of the Tribe, or other IHS beneficiaries who maintain close economic and social ties with the Tribe. In this case, applying the aforementioned PRCDA redesignation criteria required by operative regulations codified at 42 CFR part 136, subpart C, the following findings are made:

1. By expanding the PRCDA to include Doniphan and Jackson Counties in Kansas, and Holt County, Missouri, the Sac and Fox Nation of Missouri's PRC eligible population will increase by an estimated seven Tribal members.

2. Through communication with the Tribe and information relayed by the White Cloud Health Center, the IHS understands that the Tribe's governing body has determined that its members

residing in the proposed expansion counties are socially and economically affiliated with the Tribe. The IHS therefore finds that the Tribal members within the proposed, expanded PRCA are socially and economically affiliated with the Sac and Fox Nation of Missouri.

3. The expanded PRCA counties form a contiguous area with the existing PRCA, and members of the Sac and Fox Nation of Missouri reside in each of the counties proposed for inclusion in the expanded PRCA. Jackson County, Kansas and Doniphan County, Kansas both share a common boundary with Brown County, Kansas, where the Sac and Fox Nation of Missouri has reservation lands. Holt County, Missouri, shares a common boundary with Richardson County, Nebraska, where the Sac and Fox Nation of Missouri has reservation lands. For these reasons, the IHS has determined the additional counties proposed for inclusion herein to be geographically proximate, meaning “on or near,” to the Tribe’s reservation.

4. The White Cloud Health Center has indicated that the PRC program can continue providing the same level of care to the PRC eligible population if the PRCA is expanded as proposed, without requiring additional funding or reduction of the current medical priority level.

Accordingly, the IHS proposes to expand the PRCA of the Sac and Fox Nation of Missouri in Kansas and Nebraska to include the counties of Doniphan and Jackson in the State of Kansas, and Holt in the State of Missouri.

This Notice does not contain reporting or recordkeeping requirements subject to prior approval by the Office of Management and Budget under the Paperwork Reduction Act of 1980.

Roselyn Tso,

Director, Indian Health Service.

[FR Doc. 2024–29102 Filed 12–10–24; 8:45 am]

BILLING CODE 4166–14–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Advisory Council on Aging.

The meeting will be open to the public as indicated below, with

attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council on Aging.

Date: May 13–14, 2025.

Closed: May 13, 2025, 2:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate of applications.

Address: National Institutes of Health, Natcher Building, 45 Center Drive, Bethesda, MD 20892, (In Person Meeting).

Closed: May 14, 2025, 8:00 a.m. to 9:00 a.m.

Agenda: NIA IRP Review.

Address: National Institutes of Health, Natcher Building, 45 Center Drive, Bethesda, MD 20892, (In Person Meeting).

Open: May 14, 2025, 9:00 a.m. to 12:30 p.m.

Agenda: Call to Order and Director’s Status Report; Council Business; Meeting Adjourned.

Address: National Institutes of Health, Natcher Building, 45 Center Drive, Bethesda, MD 20892, (In Person Meeting).

Contact Person: Kenneth Santora, Director, Office of Extramural Activities, National Institute on Aging, National Institutes of Health, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20814, (301) 496–9322, ksantora@nih.gov.

Information is also available on the Institute’s/Center’s home page: www.nia.nih.gov/about/naca, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 5, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–29077 Filed 12–10–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; HHS–NIH–CDC–SBIR PHS 2025–1 Diagnostics to Detect Host Immunity to *Coccidioidomycosis* (Valley fever) or *Histoplasmosis* (Topic 145).

Date: January 9, 2025.

Time: 10:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3F52A, Rockville, MD 20892 (Video Assisted Meeting).

Contact Person: Shilpakala Ketha, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3F52A, Rockville, MD 20892, (301) 761–6821, shilpa.ketha@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: December 5, 2024.

Lauren A. Fleck,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–29078 Filed 12–10–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Prospective Grant of an Exclusive Patent License: Anti-KK-LC-1 T Cell Receptors for the Treatment of Cancer

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The National Cancer Institute (NCI), 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 StraightLine Bio, Inc. located in Princeton, New Jersey.

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 26, 2024 will be considered.

ADDRESSES: Requests for copies of the patent application, inquiries, and comments relating to the contemplated an Exclusive Patent License should be directed to: Suna Gulay French, Ph.D., Technology Transfer Manager, NCI Technology Transfer Center at Telephone: (240)-276-5530, Email: suna.gulay@nih.gov.

SUPPLEMENTARY INFORMATION:

Intellectual Property

1. United States Provisional Patent Application No. 62/327,529, filed April 26, 2016 and entitled "Anti-KK-LC-1 T Cell Receptors" [HHS Reference No. E-153-2016-0-US-01];

2. PCT Patent Application No. PCT/US2017/027865, filed April 17, 2017 and entitled "Anti-KK-LC-1 T Cell Receptors" [HHS Reference No. E-153-2016-0-PCT-02];

3. Australian Patent No. 2017258745, issued July 14, 2022 and entitled "Anti-KK-LC-1 T Cell Receptors" [HHS Reference No. E-153-2016-0-AU-03];

4. Canadian Patent Application No. 3021898, filed April 17, 2017 and entitled "Anti-KK-LC-1 T Cell Receptors" [HHS Reference No. E-153-2016-0-CA-04];

5. European Patent No. 3448882, issued November 24, 2021 and entitled "Anti-KK-LC-1 T Cell Receptors" [HHS Reference No. E-153-2016-0-EP-05];

a. Validated in the following jurisdictions: CH, DE, BE, DK, ES, FI, FR, GB, IE, IT, NL, NO and SE.

6. U.S. Patent No. 11,352,410, issued June 7, 2022 and entitled "Anti-KK-LC-1 T Cell Receptors" [HHS Reference No. E-153-2016-0-US-06].

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 autologous T cell therapy products that are genetically engineered via retroviral-mediated gene transfer or CRISPR-based gene transfer or transposon-mediated gene transfer to express a T cell receptor (TCR) targeting human Kita-Kyushu Lung Cancer Antigen 1 (KK-LC-1) restricted to HLA-A*01, as claimed in the Licensed Patent Rights, for the treatment of KK-LC-1 positive cancers and premalignant conditions in humans.

For the avoidance of doubt, specifically excluded from the Field of Use are:

1. Development, manufacture, and commercialization of Natural Killer cell therapy products engineered via viral vectors (including lentivirus or retrovirus) to express the TCR(s) claimed in the Licensed Patent Rights; and

2. Development, manufacture and commercialization of a combination therapy for the treatment of KK-LC-1 positive human cancers that do not have the HLA-A*01 genotype, wherein the treatment comprises as a step: Modification of the patient's tumor to express the HLA-A*01 restriction element.

This technology discloses isolated T cell receptors (TCR) reactive to the KK-LC-1 within the context of human leukocyte antigen (HLA) A*01:01. KK-LC-1 is expressed by various epithelial cancers including carcinomas of the bladder, cervix, stomach, breast, lung, and pancreas. Due to its minimal expression in normal tissues, this antigen may be targeted on KK-LC-1—expressing tumors with minimal normal tissue toxicity.

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 in these license applications will be made only as required and upon a request under the Freedom of Information Act, 5 U.S.C. 552.

Date: December 6, 2024.

Richard U. Rodriguez,
Associate Director, Technology Transfer Center, National Cancer Institute.

[FR Doc. 2024-29076 Filed 12-10-24; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Resource Related Research Projects (R24 Clinical Trial Not Allowed).

Date: January 30, 2025.

Time: 10:30 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G56, Rockville, MD 20892 (Video Assisted).

Contact Person: Maryam Rohani, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G56, Rockville, MD 20892, (301) 761-6656, maryam.rohani@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: December 4, 2024.

Lauren A. Fleck,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024-29022 Filed 12-10-24; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket Number USCG-2021-0183]

Final Programmatic Environmental Impact Statement for the Expansion and Modernization of Base Seattle

AGENCY: Coast Guard, DHS.

ACTION: Notice of Availability; extension of waiting period for the Final Programmatic Environmental Impact Statement Expansion and Modernization of Base Seattle.

SUMMARY: The Coast Guard is extending the waiting period for the Final Programmatic Environmental Impact Statement (PEIS) for the proposed Expansion and Modernization of Base Seattle. We published a Notice of Availability of the Final PEIS on November 15, 2024. That notice marked the start of a 30-day waiting period. We are extending the wait period. January 10, 2025, is the earliest date that the Coast Guard would issue a final decision.

DATES: The Coast Guard will not issue a final decision on the proposed action until at least January 10, 2025.

ADDRESSES: The complete text of the Final PEIS is available in the docket, which can be found by searching the docket number USCG-2021-0183 using the Federal eRulemaking Portal at <https://www.regulations.gov> or at <https://www.dcms.uscg.mil/NEPA>.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be sent to U.S. Coast Guard, Shore Infrastructure Logistics Center, Environmental Management Division, ATTN: Dean Amundson, 1301 Clay Street, Suite 700N, Oakland, CA 94612-5203; phone 510-637-5541; email BaseSeattlePEIS@uscg.mil.

SUPPLEMENTARY INFORMATION: The Final PEIS was prepared in accordance with the requirements of the National Environmental Policy Act (NEPA), the Council on Environmental Quality regulations implementing NEPA (40

CFR 1500-1508), DHS procedures for implementing NEPA (DHS Instruction Manual 023-01-001-01 (series)), Coast Guard Environmental Planning Policy (Commandant Instruction [COMDTINST] 5090.1), and other applicable DHS and Coast Guard policies and guidance. A Notice of Intent (NOI) to prepare the PEIS was published in the **Federal Register** on May 7, 2021 (86 FR 24637). On October 11, 2022, the Coast Guard published a Notice of Availability (NOA) and a request for comments on the Draft PEIS (87 FR 61344). In response to a comment in the Docket the Coast Guard extended the Public Comment Period until December 16, 2022, which was announced in the **Federal Register** (87 FR 73011) and in local newspapers on November 28, 2022.

The NOA for the Final PEIS was published on November 15, 2024, and the original wait period would have concluded on December 16, 2024. The Coast Guard will extend the wait period for the Final PEIS to allow for additional time for public review due to the complexity of the proposed action and the presence of multiple federal holidays during the review period. The Coast Guard will not issue a Record of Decision until after January 10, 2025.

For more detailed information, please see the original notice titled "Final Programmatic Environmental Impact Statement for the Expansion and Modernization of Base Seattle" published on November 15, 2024 (89 FR 90302). A copy of that notice is also available in the docket.

Following the wait period concluding on January 10, 2025, the Coast Guard will announce its Record of Decision, which will be published in the **Federal Register**.

Dated: December 5, 2024.

A. Grable,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Engineering and Logistics.

[FR Doc. 2024-29048 Filed 12-10-24; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA 2024-0034; OMB No. 1660-0068]

Agency Information Collection Activities: Proposed Collection; Comment Request; Federal Hotel and Motel Fire Safety Declaration Form

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: 60-Day notice of Extension extension and request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public to take this opportunity to comment on an extension, without change, of a currently approved information collection. In accordance with the Paperwork Reduction Act of 1995, this notice seeks comments concerning a list of hotels, motels, and similar places of public accommodations meeting minimum fire-safety requirements. The information collected is voluntary and if approved for listing, the lodging establishment may be used by Federal employees on government related travel and for Federal agency conferences. As the list is open to use by the public, non-government travelers may use the list to identify lodging meeting minimum life-safety criteria from fire.

DATES: Comments must be submitted on or before February 10, 2025.

ADDRESSES: To avoid duplicate submissions to the docket, please submit comments at www.regulations.gov under Docket ID FEMA-2024-0034. Follow the instructions for submitting comments.

All submissions received must include the agency name and Docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at <http://www.regulations.gov>, and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy and Security Notice that is available via a link on the homepage of www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Teressa Kaas, Fire Program Specialist, FEMA/U.S. Fire Administration, 301-447-1263, and teressa.kaas@

fema.dhs.gov. You may contact the Information Management Division for copies of the proposed collection of information at email address: *FEMA-Information-Collections-Management@fema.dhs.gov*.

SUPPLEMENTARY INFORMATION: The Hotel and Motel Fire Safety Act of 1990 (Pub. L. 101–391) requires FEMA to establish and maintain a list of hotels, motels, and similar places of public accommodation meeting minimum requirements for protection of life from fire. This list is known as the National Master List (NML). This law resulted from a series of deadly fires in hotels and motels, occurring in the late 1970's and 1980's, with high loss of life. The legislative intent of this public law is to provide all travelers the assurance of fire-safety in accommodations identified on the NML. Public Law 101–391 further stipulates that Federal employees on official travel stay in properties approved by the authority having jurisdiction and listed on the current NML. For statutory reference see 15 U.S.C. 2224–26.

Collection of Information

Title: Federal Hotel and Motel Fire Safety Declaration Form.

Type of Information Collection: Extension, without change, of a currently approved information collection.

OMB Number: 1660–0068.

FEMA Forms: FF–USFA–FY–21–112. (formerly FEMA Form 516–0–1).

Abstract: FF–USFA–FY–21–112 (formerly FEMA Form 516–0–1) collects basic information on life-safety systems related directly to fire-safety in hotels, motels, and similar places of accommodations applying for inclusion on the National Master List in compliance with the Hotel and Motel Fire Safety Act of 1990 (Pub. L. 101–391). Information is published in the National Master List and is publicly available.

Affected Public: Business or other for-profit; State, Local or Tribal Government.

Estimated Number of Respondents: 2,021.

Estimated Number of Responses: 2,630.

Estimated Total Annual Burden Hours: 710.

Estimated Total Annual Respondent Cost: \$40,178.

Estimated Respondents' Operation and Maintenance Costs: \$0.

Estimated Respondents' Capital and Start-Up Costs: \$0.

Estimated Total Annual Cost to the Federal Government: \$102,005.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the Agency, including whether the information shall have practical utility; (b) 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; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) 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.

Millicent Brown Wilson,

Records Management Branch Chief, Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2024–29012 Filed 12–10–24; 8:45 am]

BILLING CODE 9111–76–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2024–0023; OMB No. 1660–0026]

Agency Information Collection Activities: Submission for OMB Review, Comment Request; Administrative Plan for the Hazard Mitigation Grant Program

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: 30-Day notice of extension and request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA) will submit the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. FEMA invites the general public to take this opportunity to comment on an extension of a currently approved information collection. In accordance with the requirements of the Paperwork Reduction Act of 1995, this notice seeks comments concerning the State

Administrative Plan for the procedural guide that details how the State will administer the Hazard Mitigation Grant Program (HMGP).

DATES: Comments must be submitted on or before January 10, 2025.

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: Requests for additional information or copies of the information collection should be made to Director, Information Management Division, 500 C Street SW, Washington, DC 20472, email address *FEMA-Information-Collections-Management@fema.dhs.gov* or Travis Battiest, Section Chief for Tools, SOPS, and Implementation, Hazard Mitigation Assistance Division, Mitigation Directorate, FEMA, at (202) 714–8052 or *travis.battiest@fema.dhs.gov*.

SUPPLEMENTARY INFORMATION: FEMA regulations in 44 CFR 206.437 require development and updates to the Administrative Plan by Applicants or Recipients as a condition of receiving Hazard Mitigation Grant Program (HMGP) funding under Section 404 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988 (Pub. L. 93–288, as amended) (42 U.S.C. 5170c). Applicants or Recipients can be any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, or the government of a Federally-recognized Tribe that chooses to act as an Applicant or Recipient.

The regulation at 44 CFR 206.437 requires a State to have a FEMA-approved Administrative Plan to receive HMGP funding. At its minimum, the Administrative Plan will include the designated State agency or Indian Tribal government that will act as the Recipient, identify the State Hazard Mitigation Officer or Tribal Hazard Mitigation Officer, identify staffing requirements, and establish a guide for implementation activities and procedures to account for non-Federal cost sharing. Additional information requirements are guided by the type of mitigation activities being pursued.

The State, territorial, or Tribal government must establish procedures to guide the administration of the HMGP in the Administrative Plan, as outlined in the listed activities below.

FEMA will review the information provided to ensure proper documentation of each activity.

The Department of Homeland Security (DHS) adopted in its entirety the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR part 200) on December 26, 2014. This rule eliminates overlapping and duplicative requirements for stakeholders, including States, territories and Indian Tribal governments, by using general terms such as “recipient” or “pass-through entity.” FEMA is also avoiding unnecessary duplication, overlap and the demand for maintenance of requirements under HMGP in two documents, the State Administrative Plan, and the Tribal Administrative Plan. FEMA instead is offering and referring to one common set of requirements in an “Administrative Plan.” The term “State Administrative Plan” is now referred to “Administrative Plan for the Hazard Mitigation Grant Program.”

This proposed information collection previously published in the **Federal Register** on August 19, 2024, at 89 FR 67101 with a 60-day public comment period. Three public comments were received. Two of the comments discuss policy concerns with the HMGP and are not germane to this information collection. The third public comment is a statement of support from a private non-profit organization and FEMA thanks them for their comment.

The purpose of this notice is to notify the public that FEMA will submit the information collection abstracted below to the Office of Management and Budget for review and clearance.

Collection of Information

Title: Administrative Plan for the Hazard Mitigation Grant Program.

Type of Information Collection: Extension of a currently approved information collection.

OMB Number: 1660–0026.

FEMA Forms: Not applicable.

Abstract: The State Administrative Plan for the Hazard Mitigation Grant Program (HMGP) is a procedural guide that details how the State, territory, or Tribal government will administer the HMGP. The State, territory, or Tribal government (who acts as a recipient) must have a current administrative plan approved by the appropriate FEMA Regional Administrator before receiving HMGP funds. The administrative plan may take any form including a chapter within a comprehensive State, territory, or Tribal mitigation program strategy.

Affected Public: State, Local, or Tribal Government.

Estimated Number of Respondents:

35.

Estimated Number of Responses: 70.

Estimated Total Annual Burden

Hours: 560.

Estimated Total Annual Respondent

Cost: \$37,257.

Estimated Respondents’ Operation and Maintenance Costs: \$0.

Estimated Respondents’ Capital and Start-Up Costs: \$0.

Estimated Total Annual Cost to the Federal Government: \$26,581.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the Agency, including whether the information shall have practical utility; (b) 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; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) 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.

Millicent Brown Wilson,

Records Management Branch Chief, Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2024–29011 Filed 12–10–24; 8:45 am]

BILLING CODE 9111–BW–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7080–N–57]

30-Day Notice of Proposed Information Collection; 2025 American Housing Survey; OMB Control No.: 2528–0017

AGENCY: Office of Policy Development and Research, Chief Data Officer, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of

information. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* January 10, 2025.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function. Interested persons are also invited to submit comments regarding this proposal and comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Anna Guido, Clearance Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410.

FOR FURTHER INFORMATION CONTACT:

Anna Guido, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Anna.P.Guido@hud.gov or telephone (202) 402–3400. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit: <https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs>.

Copies of available documents submitted to OMB may be obtained from Ms. Guido.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on September 3, 2024 at 89 FR 71384.

A. Overview of Information Collection

Title of Information Collection: 2025 American Housing Survey.

MB Approval Number: 2528–0017.

Type of Request: Revision of a currently approved collection.

Form Number: N/A.

Description of the need for the information and proposed use:

The purpose of the American Housing Survey (AHS) is to supply the public with detailed and timely information

about housing quality, housing costs, and neighborhood assets, in support of effective housing policy, programs, and markets. Title 12, United States Code, Sections 1701Z–1, 1701Z–2(g), and 1710Z–10a mandates the collection of this information.

Increasing field costs and declining response rates have led HUD to adopt a continuous data collection model as opposed to the periodic 5-month data collection every other year. HUD believes continuous data collection will be more effective, primarily because: (1) it eliminates the expensive, time-consuming Regional Office AHS ramp-up costs every two years, and (2) it puts in place a more experienced AHS workforce with a constant workload. An added benefit is that we will be able to increase the frequency of national and metro AHS estimates, allowing for more current estimates and better comparability to other data sources which collect annual data (surveys such as the American Community Survey and key estimates such as homeownership/vacancy rates).

The survey will continue to be longitudinal, interviewing the same housing unit every two years. The sample will be divided into 12 cohorts where each cohort has a 2-month data collection period. Data collection will begin May 2025.

In addition to the “core” data, HUD plans to collect supplemental data on climate risk and insurance, arts and culture, home accessibility, accessory dwelling units, and housing costs roster. Additionally wording variations related to sexual orientation and gender will be tested in support of the American Community Survey Content Test.

The 2025 survey will begin a new longitudinal sample consisting of approximately 175,000 housing units. The sample is designed to provide

estimates twenty metropolitan areas and at least seventeen states. An oversample of HUD-assisted housing units is included in the sample design. For the first survey cycle (2025–26) a bridge sample will be fielded. The bridge sample will be drawn from housing units that were successfully interviewed in 2023.

The bridge sample serves as an evaluation tool. If something unforeseen were to happen with the 2025 sample, the estimates from the bridge sample can measure what the 2025 estimates would have looked like if we had not redesigned the AHS sample. The bridge sample size will be 8,500. Approximately seven percent of all interviews will be reinterviewed for the purpose of interviewer quality control (an estimated total of 12,845 housing units).

To help reduce respondent burden on households in the longitudinal sample, the 2025 AHS will make use of dependent interviewing techniques, which will decrease the number of questions asked. Policy analysts, program managers, budget analysts, and Congressional staff use AHS data to advise executive and legislative branches about housing conditions and the suitability of public policy initiatives. Academic researchers and private organizations also use AHS data in efforts of specific interest and concern to their respective communities.

The Department of Housing and Urban Development (HUD) needs the AHS data for the following two reasons:

1. With the data, policy analysts can monitor the interaction among housing needs, demand and supply, as well as changes in housing conditions and costs, to aid in the development of housing policies and the design of housing programs appropriate for

different target groups, such as first-time home buyers and the elderly.

2. With the data, HUD can evaluate, monitor, and design HUD programs to improve efficiency and effectiveness.

HUD received two comments.

The first, from the Pine Street Inn, a nonprofit organization that provides resources and support to the homeless population in the greater Boston area. The organization expressed strong support for the proposed changes to the American Housing Survey data collection process and commented that “data regarding the country’s current housing crisis, including the physical condition of homes and neighborhoods, the cost of financing and maintaining homes, and the characteristics of households, is of great importance to our organization.” HUD appreciates the Pine Street Inn’s comments and support of the proposed changes for the 2025 AHS.

The second, from Manufactured Housing Institute (MHI), expressed support for the change to continuous data collection, stating “MHI collects and analyzes information to produce research publications on a near real-time basis. MHI relies on reliable up-to-date information to do so. Therefore, a continuous data collection process would be more accurate and improve MHI’s capabilities in this area.” MHI also asked for clarification on the intervals for release of data and if the releases would be annual or even monthly. HUD appreciates the Manufactured Housing Institute’s comments and support of the proposed changes for the 2025 AHS. Currently, HUD plans to release annual and biennial PUF data products. The biennial file will produce two-year estimates, similar to an average of two consecutive annual estimates.

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
Occupied Interviews	59,500	1	59,500	0.75	44,625	23.11	\$1,031,283.75
Vacant Interviews	8,750	1	8,750	0.08	700	23.11	16,177.00
Non-interviews	16,625	1	16,625	0	0	23.11	0
Ineligible	2,625	1	2,625	0	0	23.11	0
Subtotal	87,500	1	87,500	.....	45,325.00	.....	1,047,460.75
Reinterviews	6,423	1	6,423	0.17	1,091.91	23.11	25,234.04
Total	93,923	1	93,923	.....	46,416.91	.....	1,072,694.79

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

- (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- (2) The accuracy of the agency’s estimate of the burden of the proposed collection of information;
- (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and
- (4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of

information technology, *e.g.*, permitting electronic submission of responses.

(5) Ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

Colette Pollard,

*Department Reports Management Officer,
Office of Policy Development and Research,
Chief Data Officer.*

[FR Doc. 2024-29094 Filed 12-10-24; 8:45 am]

BILLING CODE 4210-67-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-7086-N-33]

60-Day Notice of Proposed Information Collection: Multifamily Insurance Benefits Claims Package, OMB Control No.: 2502-0418

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date:* February 10, 2025.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal.

Written comments and recommendations for the proposed information collection can be sent within 60 days of publication of this notice to www.regulations.gov. Interested persons are also invited to submit comments regarding this proposal by name and/or OMB Control Number and can be sent to: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410-5000; telephone (202) 402-3400. (this is not a toll-free number) or email at Colette.Pollard@hud.gov, for a copy of

the proposed forms or other available information.

FOR FURTHER INFORMATION CONTACT:

Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Colette.Pollard@hud.gov or telephone (202) 402-3400. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech and communication disabilities. To learn more about how to make an accessible telephone call, please visit <https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs>.

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: Multifamily Insurance Benefits Claims Package.

OMB Approval Number: 2502-0418.

OMB Expiration Date: 07/31/2025.

Type of Request: Extension of a currently approved collection.

Form Numbers: HUD-2741; HUD-2742; HUD-2744-A; HUD-2744-B; HUD-2744-C; HUD-2744-D; HUD-2744-E; HUD-434; HUD-1044-D.

Description of the need for the information and proposed use: A lender with an insured multifamily mortgage pays an annual insurance premium to the Department. When and if the mortgage goes into default, the lender may elect to file a claim for FHA Multifamily insurance benefits with the Department. HUD needs this information to determine if FHA multifamily insurance claims submitted to HUD are accurate, valid and support payment.

Respondents: Business or other for-profit; State, Local, or Tribal Government.

Estimated Number of Respondents: 110.

Estimated Number of Responses: 110.

Frequency of Response: Occasional.

Average Hours per Response: 6.25.

Total Estimated Burden: 688.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

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

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

HUD encourages interested parties to submit comments in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507.

Jeffrey D. Little,

General Deputy Assistant Secretary for Housing.

[FR Doc. 2024-29058 Filed 12-10-24; 8:45 am]

BILLING CODE 4210-67-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-6495-N-01]

Notice of Certain Operating Cost Adjustment Factors for 2025

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice; request for comment.

SUMMARY: This notice establishes operating cost adjustment factors (OCAFs) for project-based assistance contracts issued under section 8 of the United States Housing Act of 1937 and renewed under the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA) for eligible multifamily housing projects having an anniversary date on or after February 11, 2025. OCAFs are annual factors used to adjust section 8 rents renewed under section 515 or section 524 of MAHRA. Additionally, OCAFs are part of an allowable method of rent adjustment for project-based voucher contracts pursuant to the provision at section 8(o)(13)(I) of the United States Housing Act of 1937 that was implemented June 6, 2024. Through this notice HUD also seeks public input on the technical changes to its OCAF calculation method.

DATES: *Comment due date:* January 10, 2025.

Applicability Date: February 11, 2025.

ADDRESSES: HUD invites interested persons to submit comments regarding changes to the OCAF calculation method. Communications must refer to the above docket number and title and should contain the information specified in the “Request for Public Comments and FMR Reevaluations” section. There are two methods for submitting public comments:

1. *Electronic Submission of Comments.* Interested persons may submit comments or reevaluation requests electronically through the Federal eRulemaking Portal at <https://www.regulations.gov>. HUD strongly encourages commenters to submit comments or reevaluation requests electronically. Electronic submission of comments or reevaluation requests allows the author maximum time to prepare and submit a comment or reevaluation request, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments or reevaluation requests submitted electronically through the <https://www.regulations.gov> website can be viewed by other submitters and interested members of the public. Commenters or reevaluation requestors should follow instructions provided on that site to submit comments or reevaluation requests electronically.

2. *Submission of Comments by Mail.* Members of the public may submit comments or requests for reevaluation by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410–0500. Due to security measures at all federal agencies, however, submission of comments by standard mail often results in delayed delivery. To ensure timely receipt of comments or reevaluation requests, HUD recommends that comments or requests submitted by standard mail be submitted at least two weeks in advance of the deadline. HUD will make all comments or reevaluation requests received by mail available to the public at <https://www.regulations.gov>.

Note: To receive consideration as public comments or reevaluation requests, comments or requests must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the notice.

No Facsimile Comments or Reevaluation Requests. HUD does not accept facsimile (FAX) comments or requests.

FOR FURTHER INFORMATION CONTACT:

Jennifer Lavorel, Director, Office of Asset Management and Portfolio Oversight Program Administration Office, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; telephone number 202–402–2515 (this is not a toll-free number). HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit <https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs>.

SUPPLEMENTARY INFORMATION:

I. Background

Section 514(e)(2) and section 524(c)(1) of the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA) (42 U.S.C. 1437f note), as amended, require HUD to establish guidelines for the development of operating cost adjustment factors (OCAFs) for rent adjustments. Similar language is found in sections 524(a)(4)(C)(i), 524(b)(1)(A), and 524(b)(3)(A) of MAHRA, all of which prescribe the use of the OCAF in the calculation of renewal rents. MAHRA gives HUD broad discretion in setting OCAFs, referring, for example, in sections 524(a)(4)(C)(i), 524(b)(1)(A), 524(b)(3)(A), and 524(c)(1), to simply “an operating cost adjustment factor established by the Secretary.” HUD uses a single methodology for establishing OCAFs. The sole limitation to this grant of authority is a specific requirement in each of the foregoing provisions that application of an OCAF “shall not result in a negative adjustment.”

In addition to their use under MAHRA, section 8(o)(13)(I)(i) of the United States Housing Act of 1937 allows the use of OCAFs for project-based voucher contracts as implemented on June 6, 2024 in *Housing Opportunity Through Modernization Act of 2016—Housing Choice Voucher (HCV) and Project-Based Voucher Implementation; Additional Streamlining Changes* (89 FR 38224 (May 7, 2024)).

OCAFs vary among States and territories. Contract rents are adjusted by applying the OCAF for the State or territory in which the subject project is located to that portion of the rent attributable to operating expenses exclusive of debt service.

The OCAFs provided in this notice are applicable to eligible projects having a contract anniversary date on or after February 11, 2025.

II. Changes to OCAF Methodology

HUD seeks public input on the following technical changes to its OCAF calculation methodology.

Insurance component data source. To calculate the inflation factor for the insurance component, HUD has since 2023 used the industry data for Direct Property and Casualty Insurers-Commercial Multiple Peril Insurance series from the Bureau of Labor Statistics, Producer Price Index (PPI). Beginning with the 2025 OCAFs, HUD instead will use the year-to-year change in actual cost data from audited financial statements, as it better captures the significant rise in property insurance costs that multifamily properties have faced in recent years. Specifically, HUD will use actual State-level data, except for States that have fewer than 100 multifamily properties with submitted audited financial statements in 2022 and 2023. For those States, HUD instead uses the HUD Regional average change in actual insurance expenditures. By contrast, HUD’s former methodology of using the PPI failed to capture significant geographic variations in the cost of insurance, as it is a national index. With respect to these changes to OCAF methodology, HUD will consider all comments submitted not later than 30 days from the date of publication of this notice. Unless HUD receives comment that would lead to the reconsideration of these changes, the changes will become effective on February 11, 2025. If HUD receives adverse comment that leads to reconsideration, HUD will notify the public via a revised notice issued immediately following the close of the comment period.

III. OCAF Data Sources

OCAFs are calculated as the sum of weighted component cost changes for electricity, employee benefits, employee wages, fuel oil, goods/supplies/equipment, insurance, natural gas, property taxes, and water/sewer/trash, using publicly available indices. The weights used in the OCAF calculations for each of the nine cost component groupings are set using current percentages attributable to each of the nine expense categories. HUD calculates weights using three years of audited Annual Financial Statements from projects covered by OCAFs. The expenditure percentages for these nine categories have been found to be stable over time, and using three years of data increases their stability. The nine cost component weights, and, thus, the OCAFs, are calculated at the State level, which is the lowest level of

geographical aggregation with enough projects to permit statistical analysis. These data are not available for the Western Pacific Islands, so data for Hawaii are used as the best available indicator of OCAF's for these areas.

HUD uses the best current price data sources for the nine cost categories in calculating annual change factors. State-level data for electricity, fuel oil, and natural gas from Department of Energy surveys are relatively current and continue to be used. Data on changes in employee benefits, employee wages, goods/supplies/equipment, property taxes, and water/sewer/trash costs are available only at the national level. For insurance in 2025, HUD will use State and HUD Region data as described below.

The data sources used for the selected nine cost indicators are as follows:

- **Electricity:** Energy Information Agency (EIA), May 2024 "Electric Power Monthly" report, Table 5.6.B. HUD compares the January 2024 to May 2024 estimate to the January 2023 to May 2023 estimate. https://www.eia.gov/electricity/monthly/epm_table_grapher.php?t=epmt_5_06_b.

- **Employee benefits:** Bureau of Labor Statistics (BLS) Employment Cost Index (ECI), Private Industry Benefits, All Workers (Series ID CIU203000000000000I), at the national level. HUD compares the second quarter 2024 to the second quarter of 2023.

- **Employee wages:** Bureau of Labor Statistics (BLS) ECI, Private Industry Wages and Salaries, All Workers (Series ID CIU202000000000000I), at the national level. HUD compares the second quarter 2024 to the second quarter of 2023.

- **Fuel Oil:** EIA U.S. Weekly Heating Oil and Propane Prices report. Average weekly residential heating oil prices in cents per gallon excluding taxes for the period from October 2, 2023, through the week of March 25, 2024, are compared to the average from October 3, 2022, through the week of March 27, 2023. For the States with insufficient fuel oil consumption to have separate estimates, the relevant regional Petroleum Administration for Defense Districts (PADD) change between these two periods is used; if there is no regional PADD estimate, the U.S. change between these two periods is used. https://www.eia.gov/dnav/pet/pet_pri_wfr_a_EPD2F_PRS_dpgal_w.htm.

- **Goods/Supplies/Equipment:** Bureau of Labor Statistics (BLS) Consumer Price Index, All Items Less Food, Energy and Shelter (Series ID CUUR0000SA0L12E) at the national level. HUD compares the July 2024 estimate to the estimate for July 2023.

- **Insurance:** Audited Financial Statements (AFS), multifamily data for property insurance at the State-level or, for those States with fewer than 100 multifamily properties, at the HUD regional level.¹ HUD compares the average annual property insurance expenditures in 2022 to the expenditures in 2023.

- **Natural Gas:** Energy Information Agency (EIA), Natural Gas, Residential Energy Price, June 2023–May 2024 monthly prices in dollars per 1,000 cubic feet at the State level. Due to EIA data quality standards, several States were missing data for one or two months in 2023 and 2024; in these cases, data for these missing months were estimated using data from the surrounding months in that year and the relationship between that same month and the surrounding months in 2022. http://www.eia.gov/dnav/ng/ng_pri_sum_a_EPG0_PRS_DMcf_a.htm.

- **Property Taxes:** Census Quarterly Summary of State and Local Government Tax Revenue—Table 1 [https://www.census.gov/econ/currentdata/dbsearch?programCode=QTAX&startYear=2021&endYear=2024&categories\[\]=QTAXCAT1&dataType=TOTAL&geoLevel=US&adjusted=0&notAdjusted=1&errorData=0](https://www.census.gov/econ/currentdata/dbsearch?programCode=QTAX&startYear=2021&endYear=2024&categories[]=QTAXCAT1&dataType=TOTAL&geoLevel=US&adjusted=0&notAdjusted=1&errorData=0). Twelve-month property taxes are computed as the total of four quarters of tax receipts for the period from April through March. Total 12-month taxes are then divided by the number of occupied housing units to arrive at average 12-month tax per housing unit. The number of occupied housing units is taken from U.S. Census Bureau's Current Population Survey/Housing Vacancy Survey (CPS/HVS) housing inventory estimates, Table 8: <https://www.census.gov/housing/hvs/data/histtab8.xlsx>.

- **Water/Sewer/Trash:** Consumer Price Index, All Urban Consumers, Water and Sewer and Trash Collection Services (Series ID CUUR00 00SEHG) at the national level. HUD compares the estimate for July 2024 to the estimate for July 2023.

The sum of the nine cost component percentage weights equals 100 percent of operating costs for purposes of OCAF calculations. To calculate the OCAFs, State-level cost component weights developed from AFS data are multiplied by the selected inflation factors. For

¹ The financial statements comprise approximately 17,000 residential properties, including those in the section 8 (including RAD conversions), section 202, and section 811 programs of HUD's Office of Multifamily Housing. There are 17 States with fewer than 100 properties that receive a regional average.

instance, if wages in Virginia comprised 50 percent of total operating cost expenses and increased by 4 percent from 2023 to 2024, the wage increase component of the Virginia OCAF for 2025 would be 2.0 percent (50% * 4%). This 2.0 percent would then be added to the increases for the other eight expense categories to calculate the 2025 OCAF for Virginia. For States where the calculated OCAF is less than zero, the OCAF is floored at zero. The OCAFs for 2025 are included as an Appendix to this notice.

IV. Findings and Certifications: Environmental Impact

This notice sets forth rate determinations and related external administrative requirements and procedures that do not constitute a development decision affecting the physical condition of specific project areas or building sites. Accordingly, under 24 Code of Federal Regulations 50.19(c)(6), this notice is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

V. Paperwork Reduction Act

This notice does not impact the information collection requirements already approved by the Office of Management and Budget (OMB) with OMB Approval Number 2502–0587, under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number.

VI. Assistance Listing Number

The Assistance Listing number for this program is 14.195.

Julia R. Gordon,

Assistant Secretary for Housing—FHA Commissioner.

Appendix

Operating Cost Adjustment Factors for 2025

Alabama	5.3
Alaska	5.1
Arizona	5.5
Arkansas	4.7
California	5.0
Colorado	3.8
Connecticut	3.0
Delaware	4.4
District of Columbia	4.5
Florida	5.7
Georgia	4.9
Hawaii	5.0
Idaho	5.7
Illinois	4.2

Indiana	4.4
Iowa	4.6
Kansas	4.5
Kentucky	4.8
Louisiana	7.0
Maine	3.6
Maryland	4.6
Massachusetts	3.9
Michigan	4.3
Minnesota	4.2
Mississippi	5.4
Missouri	5.4
Montana	4.1
Nebraska	5.0
Nevada	4.8
New Hampshire	3.5
New Jersey	4.7
New Mexico	5.6
New York	4.5
North Carolina	5.2
North Dakota	4.3
Ohio	4.9
Oklahoma	4.5
Oregon	5.7
Pacific Islands	4.1
Pennsylvania	4.1
Puerto Rico	5.0
Rhode Island	4.9
South Carolina	5.0
South Dakota	4.4
Tennessee	5.4
Texas	5.9
Utah	4.7
Vermont	5.2
Virgin Islands	8.5
Virginia	4.3
Washington	5.8
West Virginia	5.1
Wisconsin	4.1
Wyoming	4.3
United States	4.8

[FR Doc. 2024–29016 Filed 12–10–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7086–N–32]

60-Day Notice of Proposed Information Collection: Disaster Response Survey and Disaster Recovery Survey, OMB Control No.: 2502–0615

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date:* February 10, 2025.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal.

Written comments and recommendations for the proposed information collection can be sent within 60 days of publication of this notice to www.regulations.gov. Interested persons are also invited to submit comments regarding this proposal by name and/or OMB Control Number and can be sent to: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410–5000; telephone (202) 402–3400. (this is not a toll-free number) or email at Colette.Pollard@hud.gov, for a copy of the proposed forms or other available information.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Colette.Pollard@hud.gov or telephone (202) 402–3400. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech and communication disabilities. To learn more about how to make an accessible telephone call, please visit <https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs>.

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: Disaster Response Survey and Disaster Recovery Survey.

OMB Approval Number: 2502–0615.

OMB Expiration Date: July 31, 2025.

Type of Request: Revision of a currently approved collection.

Form Number: None.

Description of the need for the information and proposed use: The two Disaster Surveys (Disaster Response Survey and Disaster Recovery Survey) will assess the operational and capacity status of Housing Counseling Agencies impacted disasters through the life cycle of the disasters. These Surveys are necessary to assess the impact of the disasters on the operation of HUD-approved housing counseling agencies. These surveys will more accurately assess the current operating status and

capacity of housing counseling agencies impacted by disasters through the life cycle of disasters. The information collected will be used to identify the needs of the housing counseling agency and to inform OHC about the types of support that would be the most responsive to the needs of agencies and their clients.

Respondents: Not-for-profit institutions.

Estimated Number of Respondents: 2,500.

Estimated Number of Responses: 5,000.

Frequency of Response: 1–3 per year.

Average Hours per Response: 1.

Total Estimated Burden: 5,000 hours.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

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

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

HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507.

Jeffrey D. Little,

General Deputy Assistant Secretary for Housing.

[FR Doc. 2024–29057 Filed 12–10–24; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7080–N–58]

30-Day Notice of Proposed Information Collection: Energy Efficient Mortgage (EEM) Program, OMB Control No.: 2502–0561

AGENCY: Office of Policy Development and Research, Chief Data Officer, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comments from all interested parties on the proposed collection of information. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* January 10, 2025.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function. Interested persons are also invited to submit comments regarding this proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410–5000; telephone 202–402–3577 (this is not a toll-free number) or email: PaperworkReductionActOffice@hud.gov.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email: Colette.Pollard@hud.gov, telephone (202) 402–3400. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit <https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs>.

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on May 24, 2024 at 89 FR 45913.

A. Overview of Information Collection

Title of Information Collection: Energy Efficient Mortgage (EEM) Program.

OMB Approval Number: 2502–0561.

Type of Request: Extension of a previously approved collection.

Form Number: N/A.

Description of the need for the information and proposed use: Lenders provide the required information to determine the eligibility of a mortgage to be insured under Section 513 of the Housing and Community Development Act of 1992 (Section 106 of the Energy Policy Act of 1992). Section 2123 of the Housing and Economic Recovery Act of 2008 (HERA) (Pub. L. 110–289, approved July 30, 2008) amended Section 106 of the Energy Policy Act of 1992 by revising the maximum dollar amount that can be added to an FHA-insured mortgage for energy efficient improvements.

Respondents: Business or other for-profit (lenders).

Estimated Number of Respondents: 3.

Estimated Number of Responses: 17.

Frequency of Response: On occasion.

Average Hours per Response: 4.25.

Total Estimated Burdens: 29.75.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

HUD encourages interested parties to submit comments in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

Colette Pollard,

*Department Reports Management Officer,
Office of Policy Development and Research,
Chief Data Officer.*

[FR Doc. 2024–29060 Filed 12–10–24; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service**

[FWS–R3–ES–2024–N062;
FXES11130300000–245–FF03E00000]

**Endangered and Threatened Species;
Receipt of Recovery Permit
Applications**

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, have received applications for permits to conduct scientific research to promote conservation or other activities intended to enhance the propagation or survival of endangered or threatened species under the Endangered Species Act. We invite the public and local, State, Tribal, and Federal agencies to comment on these applications. Before issuing any of the requested permits, we will take into consideration any information that we receive during the public comment period.

DATES: We must receive your written comments on or before January 10, 2025.

ADDRESSES: *Document availability and comment submission:* Submit requests for copies of the applications and related documents, as well as any comments, by one of the following methods. All requests and comments should specify the applicant name(s) and application number(s) (*e.g.*, ESXXXXXX; see table in

SUPPLEMENTARY INFORMATION):

- *Email (preferred method):* permitsR3ES@fws.gov. Please refer to the respective application number (*e.g.*, Application No. ESXXXXXX) in the subject line of your email message.

- *U.S. Mail:* Regional Director, Attn: Nathan Rathbun, U.S. Fish and Wildlife Service, Ecological Services, 5600 American Blvd. West, Suite 990, Bloomington, MN 55437–1458.

FOR FURTHER INFORMATION CONTACT: Nathan Rathbun, 612–713–5343

(phone); permitsR3ES@fws.gov (email). 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: We, the U.S. Fish and Wildlife Service, invite review and comment from the public and local, State, Tribal, and Federal agencies on applications we have received for permits to conduct certain activities with endangered and threatened species under section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and our regulations in the Code of Federal Regulations (CFR) at 50 CFR part 17. Documents and

other information submitted with the applications are available for review, subject to the requirements of the Privacy Act and the Freedom of Information Act.

Background

The ESA prohibits certain activities with endangered and threatened species unless authorized by a Federal permit. The ESA and our implementing regulations in part 17 of title 50 of the Code of Federal Regulations (CFR) provide for the issuance of such permits and require that we invite public comment before issuing permits for activities involving endangered species.

A recovery permit issued by us under section 10(a)(1)(A) of the ESA authorizes the permittee to conduct activities with endangered species for scientific purposes that promote recovery or for enhancement of propagation or survival of the species. Our regulations implementing section

10(a)(1)(A) for these permits are found at 50 CFR 17.22 for endangered wildlife species, 50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

Permit Applications Available for Review and Comment

The ESA requires that we invite public comment before issuing these permits. Accordingly, we invite local, State, Tribal, and Federal agencies and the public to submit written data, views, or arguments with respect to these applications. The comments and recommendations that will be most useful and likely to influence agency decisions are those supported by quantitative information or studies. Proposed activities in the following permit requests are for the recovery and enhancement of propagation or survival of the species in the wild.

Application No.	Applicant	Species	Location	Activity	Type of take	Permit action
ES06801A	Pittsburgh Wildlife & Environmental, Inc., McDonald, PA.	Indiana bat (<i>Myotis sodalis</i>), gray bat (<i>M. grisescens</i>), northern long-eared bat (<i>M. septentrionalis</i>).	AL, AR, CT, DE, FL, GA, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MO, MS, MT, NE, NH, NJ, NY, NC, ND, OK, OH, PA, RI, SC, SD, TN, TX, VT, VA, WV, WI, WY.	Conduct presence/absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Capture, handle, band, radiotelemetry, enter hibernacula, release.	Renew.
ESPER13438511 ...	Michael Moore, Ames, IA.	Topeka shiner (<i>Notropis topeka</i>).	IA	Conduct presence/absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Capture, handle, release.	New.
ES53616C	Illinois Natural History Survey, Champaign, IL.	Add—Hines' Emerald Dragonfly (<i>Somatochlora hineana</i>)—to existing authorized species: rusty patched bumble bee (<i>Bombus affinis</i>).	Add WI to existing authorized location IL.	Conduct presence/absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Capture, handle, release.	Amend.
PER13512632	Abigail Westendorf, Minnetonka, MN.	Rusty patched bumble bee (<i>Bombus affinis</i>).	IA, IL, IN, MA, MD, ME, MN, OH, VA, WI, VA.	Conduct presence/absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Capture, handle, release.	New.
TE85231B-4	Kalamazoo Nature Center, Kalamazoo, MI.	Mitchell's satyr (<i>Neonympha mitchellii mitchellii</i>).	MI	Conduct presence/absence surveys, conduct captive rearing.	Capture, handle, hold, rear and release.	Renew and Amend.

Public Availability of Comments

Written comments we receive become part of the administrative record associated with this action. 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 request in your comment

that we withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. Moreover, all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

Next Steps

If we decide to issue permits to any of the applicants listed in this notice, we will publish a notice in the **Federal Register**.

Authority

We publish this notice under section 10(c) of the Endangered Species Act of

1973, as amended (16 U.S.C. 1531 *et seq.*).

Lori Nordstrom,

Assistant Regional Director, Ecological Service, Midwest Region.

[FR Doc. 2024–29018 Filed 12–10–24; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[256A2100DD/AAKC001030/
A0A501010.999900]

Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes the current list of 574 Tribal entities recognized by and eligible for funding and services from the Bureau of Indian Affairs (BIA) by virtue of their status as Indian Tribes.

DATES: The list is updated from the notice published on January 8, 2024 (88 FR 944).

FOR FURTHER INFORMATION CONTACT: Ms. Shyla Joe, Bureau of Indian Affairs, Tribal Relations Specialist, Office of Indian Services, Mail Stop 3645–MIB, 1849 C Street NW, Washington, DC 20240. Telephone number: (202) 513–7641.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to section 104 of the Federally Recognized Indian Tribe List Act of November 2, 1994 (Pub. L. 103–454; 108 Stat. 4791, 4792), in accordance with section 83.6(a) of part 83 of title 25 of the Code of Federal Regulations, and in exercise of authority delegated to the Assistant Secretary—Indian Affairs under 25 U.S.C. 2 and 9 and Department of the Interior Manual part 209, chapter 8. Published below is an updated list of federally recognized Indian Tribes within the contiguous 48 states and Alaska. Amendments to the list include formatting edits and name changes.

To aid in identifying Tribal name changes, Tribes' previously listed, former names, or also known as (aka) names are included in parentheses after the correct current Tribal name. The BIA will continue to list the Tribe's former or previously listed name for several years before dropping the former or previously listed name from the list.

The listed Indian entities are recognized to have the immunities and privileges available to federally

recognized Indian Tribes by virtue of their Government-to-Government relationship with the United States as well as the responsibilities, powers, limitations, and obligations of such Indian Tribes. The BIA has continued the practice of listing the Alaska Native entities separately for the purpose of facilitating identification of them.

Bryan Newland,

Assistant Secretary—Indian Affairs.

Indian Tribal Entities Within the Contiguous 48 States Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs

Absentee-Shawnee Tribe of Indians of Oklahoma
 Agua Caliente Band of Cahuilla Indians of the Agua Caliente Indian Reservation, California
 Ak-Chin Indian Community
 Alabama-Coushatta Tribe of Texas
 Alabama-Quassarte Tribal Town
 Alturas Indian Rancheria, California
 Apache Tribe of Oklahoma
 Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana
 Augustine Band of Cahuilla Indians, California
 Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin
 Bay Mills Indian Community, Michigan
 Bear River Band of the Rohnerville Rancheria, California
 Berry Creek Rancheria of Maidu Indians of California
 Big Lagoon Rancheria, California
 Big Pine Paiute Tribe of the Owens Valley
 Big Sandy Rancheria of Western Mono Indians of California
 Big Valley Band of Pomo Indians of the Big Valley Rancheria, California
 Bishop Paiute Tribe
 Blackfeet Tribe of the Blackfeet Indian Reservation of Montana
 Blue Lake Rancheria, California
 Bridgeport Indian Colony
 Buena Vista Rancheria of Me-Wuk Indians of California
 Burns Paiute Tribe
 Cabazon Band of Cahuilla Indians (*previously* listed as Cabazon Band of Mission Indians, California)
 Cachil DeHe Band of Wintun Indians of the Colusa Indian Community of the Colusa Rancheria, California
 Caddo Nation of Oklahoma
 Cahto Tribe of the Laytonville Rancheria
 Cahuilla Band of Indians
 California Valley Miwok Tribe, California
 Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, California

Capitan Grande Band of Diegueno Mission Indians of California (Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California)
 Catawba Indian Nation
 Cayuga Nation
 Cedarville Rancheria, California
 Chemehuevi Indian Tribe of the Chemehuevi Reservation, California
 Cher-Ae Heights Indian Community of the Trinidad Rancheria, California
 Cherokee Nation
 Cheyenne and Arapaho Tribes, Oklahoma
 Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota
 Chickahominy Indian Tribe
 Chickahominy Indian Tribe—Eastern Division
 Chicken Ranch Rancheria of Me-Wuk Indians of California
 Chippewa Cree Indians of the Rocky Boy's Reservation, Montana
 Chitimacha Tribe of Louisiana
 Citizen Potawatomi Nation, Oklahoma
 Cloverdale Rancheria of Pomo Indians of California
 Cocopah Tribe of Arizona
 Coeur D'Alene Tribe
 Cold Springs Rancheria of Mono Indians of California
 Colorado River Indian Tribes of the Colorado River Indian Reservation, Arizona and California
 Comanche Nation, Oklahoma
 Confederated Salish and Kootenai Tribes of the Flathead Reservation
 Confederated Tribes and Bands of the Yakama Nation
 Confederated Tribes of Siletz Indians of Oregon
 Confederated Tribes of the Chehalis Reservation
 Confederated Tribes of the Colville Reservation
 Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians
 Confederated Tribes of the Goshute Reservation, Nevada and Utah
 Confederated Tribes of the Grand Ronde Community of Oregon
 Confederated Tribes of the Umatilla Indian Reservation
 Confederated Tribes of the Warm Springs Reservation of Oregon
 Coquille Indian Tribe
 Coushatta Tribe of Louisiana
 Cow Creek Band of Umpqua Tribe of Indians
 Cowlitz Indian Tribe
 Coyote Valley Band of Pomo Indians of California
 Crow Creek Sioux Tribe of the Crow Creek Reservation, South Dakota

Crow Tribe of Montana
 Delaware Nation, Oklahoma
 Delaware Tribe of Indians
 Dry Creek Rancheria Band of Pomo Indians, California
 Duckwater Shoshone Tribe (*previously* listed as Duckwater Shoshone Tribe of the Duckwater Reservation, Nevada)
 Eastern Band of Cherokee Indians
 Eastern Shawnee Tribe of Oklahoma
 Eastern Shoshone Tribe of the Wind River Reservation, Wyoming
 Elem Indian Colony of Pomo Indians of the Sulphur Bank Rancheria, California
 Elk Valley Rancheria, California
 Ely Shoshone Tribe of Nevada
 Enterprise Rancheria of Maidu Indians of California
 Ewiiapaay Band of Kumeyaay Indians, California
 Federated Indians of Graton Rancheria, California
 Flandreau Santee Sioux Tribe of South Dakota
 Forest County Potawatomi Community, Wisconsin
 Fort Belknap Indian Community of the Fort Belknap Reservation of Montana
 Fort Bidwell Indian Community of the Fort Bidwell Reservation of California
 Fort Independence Indian Community of Paiute Indians of the Fort Independence Reservation, California
 Fort McDermitt Paiute and Shoshone Tribes of the Fort McDermitt Indian Reservation, Nevada and Oregon
 Fort McDowell Yavapai Nation, Arizona
 Fort Mojave Indian Tribe of Arizona, California & Nevada
 Fort Sill Apache Tribe of Oklahoma
 Gila River Indian Community of the Gila River Indian Reservation, Arizona
 Grand Traverse Band of Ottawa and Chippewa Indians, Michigan
 Greenville Rancheria
 Grindstone Indian Rancheria of Wintun-Wailaki Indians of California
 Guidiville Rancheria of California
 Habematolel Pomo of Upper Lake, California
 Hannahville Indian Community, Michigan
 Havasupai Tribe of the Havasupai Reservation, Arizona
 Ho-Chunk Nation of Wisconsin
 Hoh Indian Tribe
 Hoopa Valley Tribe, California
 Hopi Tribe of Arizona
 Hopland Band of Pomo Indians, California
 Houlton Band of Maliseet Indians
 Hualapai Indian Tribe of the Hualapai Indian Reservation, Arizona
 Iipay Nation of Santa Ysabel, California
 Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California
 Ione Band of Miwok Indians of California
 Iowa Tribe of Kansas and Nebraska
 Iowa Tribe of Oklahoma
 Jackson Band of Miwok Indians
 Jamestown S'Klallam Tribe
 Jamul Indian Village of California
 Jena Band of Choctaw Indians
 Jicarilla Apache Nation, New Mexico
 Kaibab Band of Paiute Indians of the Kaibab Indian Reservation, Arizona
 Kalispel Indian Community of the Kalispel Reservation
 Karuk Tribe
 Kashia Band of Pomo Indians of the Stewarts Point Rancheria, California
 Kaw Nation, Oklahoma
 Keweenaw Bay Indian Community, Michigan
 Kialegee Tribal Town
 Kickapoo Traditional Tribe of Texas
 Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas
 Kickapoo Tribe of Oklahoma
 Kiowa Indian Tribe of Oklahoma
 Klamath Tribes
 Kletsel Dehe Wintun Nation of the Cortina Rancheria (*previously* listed as Kletsel Dehe Band of Wintun Indians)
 Koi Nation of Northern California
 Kootenai Tribe of Idaho
 La Jolla Band of Luiseno Indians, California
 La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, California
 Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin
 Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin
 Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan
 Las Vegas Tribe of Paiute Indians of the Las Vegas Indian Colony, Nevada
 Little River Band of Ottawa Indians, Michigan
 Little Shell Tribe of Chippewa Indians of Montana
 Little Traverse Bay Bands of Odawa Indians, Michigan
 Lone Pine Paiute-Shoshone Tribe
 Los Coyotes Band of Cahuilla and Cupeno Indians, California
 Lovelock Paiute Tribe of the Lovelock Indian Colony, Nevada
 Lower Brule Sioux Tribe of the Lower Brule Reservation, South Dakota
 Lower Elwha Tribal Community
 Lower Sioux Indian Community in the State of Minnesota
 Lummi Tribe of the Lummi Reservation
 Lytton Rancheria of California
 Makah Indian Tribe of the Makah Indian Reservation
 Manchester Band of Pomo Indians of the Manchester Rancheria, California
 Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California
 Mashantucket Pequot Indian Tribe
 Mashpee Wampanoag Tribe
 Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan
 Mechoopda Indian Tribe of Chico Rancheria, California
 Menominee Indian Tribe of Wisconsin
 Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, California
 Mescalero Apache Tribe of the Mescalero Reservation, New Mexico
 Miami Tribe of Oklahoma
 Miccosukee Tribe of Indians
 Middletown Rancheria of Pomo Indians of California
 Mi'kmaq Nation (*previously* listed as Aroostook Band of Micmacs)
 Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band)
 Mississippi Band of Choctaw Indians
 Moapa Band of Paiute Indians of the Moapa River Indian Reservation, Nevada
 Modoc Nation
 Mohegan Tribe of Indians of Connecticut
 Monacan Indian Nation
 Mooretown Rancheria of Maidu Indians of California
 Morongo Band of Mission Indians, California
 Muckleshoot Indian Tribe
 Nansemond Indian Nation
 Narragansett Indian Tribe
 Navajo Nation, Arizona, New Mexico, & Utah
 Nez Perce Tribe
 Nisqually Indian Tribe
 Nooksack Indian Tribe
 Northern Arapaho Tribe of the Wind River Reservation, Wyoming
 Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana
 Northfork Rancheria of Mono Indians of California
 Northwestern Band of the Shoshone Nation
 Nottawaseppi Huron Band of the Potawatomi, Michigan
 Oglala Sioux Tribe
 Ohkay Owingeh, New Mexico
 Omaha Tribe of Nebraska
 Oneida Indian Nation
 Oneida Nation
 Onondaga Nation
 Otoe-Missouria Tribe of Indians, Oklahoma
 Ottawa Tribe of Oklahoma
 Paiute Indian Tribe of Utah (Cedar Band of Paiutes, Kanosh Band of Paiutes, Koosharem Band of Paiutes, Indian Peaks Band of Paiutes, and Shivwits Band of Paiutes)

Paiute-Shoshone Tribe of the Fallon Reservation and Colony, Nevada
 Pala Band of Mission Indians
 Pamunkey Indian Tribe
 Pascua Yaqui Tribe of Arizona
 Paskenta Band of Nomlaki Indians of California
 Passamaquoddy Tribe
 Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation, California
 Pawnee Nation of Oklahoma
 Pechanga Band of Indians (*previously* listed as Pechanga Band of Luiseno Mission Indians of the Pechanga Reservation, California)
 Penobscot Nation
 Peoria Tribe of Indians of Oklahoma
 Picayune Rancheria of Chukchansi Indians of California
 Pinoleville Pomo Nation, California
 Pit River Tribe, California (includes XL Ranch, Big Bend, Likely, Lookout, Montgomery Creek, and Roaring Creek Rancherias)
 Poarch Band of Creek Indians
 Pokagon Band of Potawatomi Indians, Michigan and Indiana
 Ponca Tribe of Indians of Oklahoma
 Ponca Tribe of Nebraska
 Port Gamble S'Klallam Tribe
 Potter Valley Tribe, California
 Prairie Band Potawatomi Nation
 Prairie Island Indian Community in the State of Minnesota
 Pueblo of Acoma, New Mexico
 Pueblo of Cochiti, New Mexico
 Pueblo of Isleta, New Mexico
 Pueblo of Jemez, New Mexico
 Pueblo of Laguna, New Mexico
 Pueblo of Nambe, New Mexico
 Pueblo of Picuris, New Mexico
 Pueblo of Pojoaque, New Mexico
 Pueblo of San Felipe, New Mexico
 Pueblo of San Ildefonso, New Mexico
 Pueblo of Sandia, New Mexico
 Pueblo of Santa Ana, New Mexico
 Pueblo of Santa Clara, New Mexico
 Pueblo of Taos, New Mexico
 Pueblo of Tesuque, New Mexico
 Pueblo of Zia, New Mexico
 Pulikla Tribe of Yurok People (*previously* listed as Resighini Rancheria, California)
 Puyallup Tribe of the Puyallup Reservation
 Pyramid Lake Paiute Tribe of the Pyramid Lake Reservation, Nevada
 Quapaw Nation
 Quartz Valley Indian Community of the Quartz Valley Reservation of California
 Quechan Tribe of the Fort Yuma Indian Reservation, California & Arizona
 Quileute Tribe of the Quileute Reservation
 Quinault Indian Nation
 Ramona Band of Cahuilla, California
 Rappahannock Tribe, Inc.
 Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin
 Red Lake Band of Chippewa Indians, Minnesota
 Redding Rancheria, California
 Redwood Valley or Little River Band of Pomo Indians of the Redwood Valley Rancheria California
 Reno-Sparks Indian Colony, Nevada
 Rincon Band of Luiseno Mission Indians of Rincon Reservation, California
 Robinson Rancheria
 Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota
 Round Valley Indian Tribes, Round Valley Reservation, California
 Sac & Fox Nation of Missouri in Kansas and Nebraska
 Sac & Fox Nation, Oklahoma
 Sac & Fox Tribe of the Mississippi in Iowa
 Saginaw Chippewa Indian Tribe of Michigan
 Saint Regis Mohawk Tribe
 Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona
 Samish Indian Nation
 San Carlos Apache Tribe of the San Carlos Reservation, Arizona
 San Juan Southern Paiute Tribe of Arizona
 San Pasqual Band of Diegueno Mission Indians of California
 Santa Rosa Band of Cahuilla Indians, California
 Santa Rosa Indian Community of the Santa Rosa Rancheria, California
 Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation, California
 Santee Sioux Nation, Nebraska
 Santo Domingo Pueblo
 Sauk-Suiattle Indian Tribe
 Sault Ste. Marie Tribe of Chippewa Indians, Michigan
 Scotts Valley Band of Pomo Indians of California
 Seminole Tribe of Florida
 Seneca Nation of Indians
 Seneca-Cayuga Nation
 Shakopee Mdewakanton Sioux Community of Minnesota
 Shawnee Tribe
 Sherwood Valley Rancheria of Pomo Indians of California
 Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria (Verona Tract), California
 Shinnecock Indian Nation
 Shoalwater Bay Indian Tribe of the Shoalwater Bay Indian Reservation
 Shoshone-Bannock Tribes of the Fort Hall Reservation
 Shoshone-Paiute Tribes of the Duck Valley Reservation, Nevada
 Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota
 Skokomish Indian Tribe
 Skull Valley Band of Goshute Indians of Utah
 Snoqualmie Indian Tribe
 Soboba Band of Luiseno Indians, California
 Sokaogon Chippewa Community, Wisconsin
 Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado
 Spirit Lake Tribe, North Dakota
 Spokane Tribe of the Spokane Reservation
 Squaxin Island Tribe of the Squaxin Island Reservation
 St. Croix Chippewa Indians of Wisconsin
 Standing Rock Sioux Tribe of North & South Dakota
 Stillaguamish Tribe of Indians of Washington
 Stockbridge Munsee Community, Wisconsin
 Summit Lake Paiute Tribe of Nevada
 Suquamish Indian Tribe of the Port Madison Reservation
 Susanville Indian Rancheria, California
 Swinomish Indian Tribal Community
 Sycuan Band of the Kumeyaay Nation
 Table Mountain Rancheria
 Tejon Indian Tribe
 Te-Moak Tribe of Western Shoshone Indians of Nevada (Four constituent bands: Battle Mountain Band; Elko Band; South Fork Band; and Wells Band)
 The Chickasaw Nation
 The Choctaw Nation of Oklahoma
 The Muscogee (Creek) Nation
 The Osage Nation
 The Seminole Nation of Oklahoma
 Thlopthlocco Tribal Town
 Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota
 Timbisha Shoshone Tribe
 Tohono O'odham Nation of Arizona
 Tolowa Dee-ni' Nation
 Tonawanda Band of Seneca
 Tonkawa Tribe of Indians of Oklahoma
 Tonto Apache Tribe of Arizona
 Torres Martinez Desert Cahuilla Indians, California
 Tulalip Tribes of Washington
 Tule River Indian Tribe of the Tule River Reservation, California
 Tunica-Biloxi Indian Tribe
 Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria of California
 Turtle Mountain Band of Chippewa Indians of North Dakota
 Tuscarora Nation
 Twenty-Nine Palms Band of Mission Indians of California
 United Auburn Indian Community of the Auburn Rancheria of California
 United Keetoowah Band of Cherokee Indians in Oklahoma
 Upper Mattaponi Tribe
 Upper Sioux Community, Minnesota

Upper Skagit Indian Tribe
 Ute Indian Tribe of the Uintah & Ouray
 Reservation, Utah
 Ute Mountain Ute Tribe
 Utu Utu Gwaitu Paiute Tribe of the
 Benton Paiute Reservation, California
 Walker River Paiute Tribe of the Walker
 River Reservation, Nevada
 Wampanoag Tribe of Gay Head
 (Aquinnah)
 Washoe Tribe of Nevada & California
 (Carson Colony, Dresslerville Colony,
 Woodfords Community, Stewart
 Community, & Washoe Ranches)
 White Mountain Apache Tribe of the
 Fort Apache Reservation, Arizona
 Wichita and Affiliated Tribes (Wichita,
 Keechi, Waco, & Tawakonie),
 Oklahoma
 Wilton Rancheria, California
 Winnebago Tribe of Nebraska
 Winnemucca Indian Colony of Nevada
 Wiyot Tribe, California
 Wyandotte Nation
 Yankton Sioux Tribe of South Dakota
 Yavapai-Apache Nation of the Camp
 Verde Indian Reservation, Arizona
 Yavapai-Prescott Indian Tribe
 Yerington Paiute Tribe of the Yerington
 Colony & Campbell Ranch, Nevada
 Yocha Dehe Wintun Nation, California
 Yomba Shoshone Tribe of the Yomba
 Reservation, Nevada
 Ysleta del Sur Pueblo
 Yuhaaviatam of San Manuel Nation
 (*previously* listed as San Manuel Band
 of Mission Indians, California)
 Yurok Tribe of the Yurok Reservation,
 California
 Zuni Tribe of the Zuni Reservation, New
 Mexico

**Native Entities Within the State of
 Alaska Recognized by and Eligible To
 Receive Services From the United
 States Bureau of Indian Affairs**

Agdaagux Tribe of King Cove
 Akiachak Native Community
 Akiak Native Community
 Alatna Village
 Algaaciq Native Village (St. Mary's)
 Allakaket Village
 Alutiiq Tribe of Old Harbor
 Angoon Community Association
 Anvik Village
 Arctic Village (See Native Village of
 Venetie Tribal Government)
 Asa'carsarmiut Tribe
 Beaver Village
 Birch Creek Tribe
 Central Council of the Tlingit & Haida
 Indian Tribes
 Chalkyitsik Village
 Cheesh-Na Tribe
 Chevak Native Village
 Chickaloon Native Village
 Chignik Bay Tribal Council
 Chignik Lake Village
 Chilkat Indian Village (Klukwan)

Chilkoot Indian Association (Haines)
 Chinik Eskimo Community (Golovin)
 Chuloonawick Native Village
 Circle Native Community
 Craig Tribal Association
 Curyung Tribal Council
 Douglas Indian Association
 Egegik Village
 Eklutna Native Village
 Emmonak Village
 Evansville Village (aka Bettles Field)
 Gulkana Village Council
 Healy Lake Village
 Holy Cross Tribe
 Hoonah Indian Association
 Hughes Village
 Huslia Village
 Hydaburg Cooperative Association
 Igiugig Village
 Inupiat Community of the Arctic Slope
 Iqumiut Traditional Council
 Ivanof Bay Tribe
 Kaguyak Village
 Kaktovik Village (aka Barter Island)
 Kasigluk Traditional Elders Council
 Kenaitze Indian Tribe
 Ketchikan Indian Community
 King Island Native Community
 King Salmon Tribe
 Klawock Cooperative Association
 Knik Tribe
 Kokhanok Village
 Koyukuk Native Village
 Levelock Village
 Lime Village
 Louden Tribe (*previously* listed as
 Galena Village (aka Louden Village))
 Manley Hot Springs Village
 Manokotak Village
 McGrath Native Village
 Mentasta Traditional Council
 Metlakatla Indian Community, Annette
 Island Reserve
 Naknek Native Village
 Native Village of Afognak
 Native Village of Akhiok
 Native Village of Akutan
 Native Village of Aleknagik
 Native Village of Ambler
 Native Village of Atka
 Native Village of Atkasuk
 Native Village of Barrow Inupiat
 Traditional Government
 Native Village of Belkofski
 Native Village of Brevig Mission
 Native Village of Buckland
 Native Village of Cantwell
 Native Village of Chenega (aka Chanega)
 Native Village of Chignik Lagoon
 Native Village of Chitina
 Native Village of Chuathbaluk (Russian
 Mission, Kuskokwim)
 Native Village of Council
 Native Village of Deering
 Native Village of Diomedea (aka Inalik)
 Native Village of Eagle
 Native Village of Eek
 Native Village of Ekuk
 Native Village of Ekwok

Native Village of Elim
 Native Village of Eyak (Cordova)
 Native Village of False Pass
 Native Village of Fort Yukon
 Native Village of Gakona
 Native Village of Gambell
 Native Village of Georgetown
 Native Village of Goodnews Bay
 Native Village of Hamilton
 Native Village of Hooper Bay
 Native Village of Kanatak
 Native Village of Karluk
 Native Village of Kiana
 Native Village of Kipnuk
 Native Village of Kivalina
 Native Village of Kluti Kaah (aka Copper
 Center)
 Native Village of Kobuk
 Native Village of Kongiganak
 Native Village of Kotzebue
 Native Village of Koyuk
 Native Village of Kwigillingok
 Native Village of Kwinhagak (aka
 Quinhagak)
 Native Village of Larsen Bay
 Native Village of Marshall (aka Fortuna
 Ledge)
 Native Village of Mary's Igloo
 Native Village of Mekoryuk
 Native Village of Minto
 Native Village of Nanwalek (aka English
 Bay)
 Native Village of Napaimute
 Native Village of Napakiak
 Native Village of Napaskiak
 Native Village of Nelson Lagoon
 Native Village of Nightmute
 Native Village of Nikolski
 Native Village of Noatak
 Native Village of Nuiqsut (aka Nooiksut)
 Native Village of Nunam Iqua
 Native Village of Nunapitchuk
 Native Village of Ouzinkie
 Native Village of Paimiut
 Native Village of Perryville
 Native Village of Pilot Point
 Native Village of Point Hope
 Native Village of Point Lay
 Native Village of Port Graham
 Native Village of Port Heiden
 Native Village of Port Lions
 Native Village of Ruby
 Native Village of Saint Michael
 Native Village of Savoonga
 Native Village of Scammon Bay
 Native Village of Selawik
 Native Village of Shaktolik
 Native Village of Shishmaref
 Native Village of Shungnak
 Native Village of Stevens
 Native Village of Tanacross
 Native Village of Tanana
 Native Village of Tatitlek
 Native Village of Tazlina
 Native Village of Teller
 Native Village of Tetlin
 Native Village of Tuntutuliak
 Native Village of Tununak
 Native Village of Tyonek

Native Village of Unalakleet
 Native Village of Unga
 Native Village of Venetie Tribal
 Government (Arctic Village and
 Village of Venetie)
 Native Village of Wales
 Native Village of White Mountain
 Nenana Native Association
 New Koliganek Village Council
 New Stuyahok Village
 Newhalen Village
 Newtok Village
 Nikolai Village
 Ninilchik Village
 Nome Eskimo Community
 Nondalton Village
 Noorvik Native Community
 Northway Village
 Nulato Village
 Nunakauyarmiut Tribe
 Organized Village of Grayling (aka
 Holikachuk)
 Organized Village of Kake
 Organized Village of Kasaan
 Organized Village of Kwethluk
 Organized Village of Saxman
 Orutsarmiut Traditional Native
 Council
 Oscarville Traditional Village
 Pauloff Harbor Village
 Pedro Bay Village
 Petersburg Indian Association
 Pilot Station Traditional Village
 Pitka's Point Traditional Council
 Platinum Traditional Village
 Portage Creek Village (aka Ohgsenakale)
 Pribilof Islands Aleut Communities of
 St. Paul & St. George Islands (St.
 George Island and Saint Paul Island)
 Qagan Tayagungin Tribe of Sand Point
 Qawalangin Tribe of Unalaska
 Rampart Village
 St. George Island (*See* Pribilof Islands
 Aleut Communities of St. Paul & St.
 George Islands)
 Saint Paul Island (*See* Pribilof Islands
 Aleut Communities of St. Paul & St.
 George Islands)
 Salamatof Tribe
 Seldovia Village Tribe
 Shageluk Native Village
 Sitka Tribe of Alaska
 Skagway Village
 South Naknek Village
 Stebbins Community Association
 Sun'aq Tribe of Kodiak
 Takotna Village
 Tangirnaq Native Village
 Telida Village
 Traditional Village of Togiak
 Tuluksak Native Community
 Twin Hills Village
 Ugashik Village
 Umkumiut Native Village
 Village of Alakanuk
 Village of Anaktuvuk Pass
 Village of Aniak
 Village of Atmautluak
 Village of Bill Moore's Slough

Village of Chefornak
 Village of Clarks Point
 Village of Crooked Creek
 Village of Dot Lake
 Village of Iliamna
 Village of Kalskag
 Village of Kaltag
 Village of Kotlik
 Village of Lower Kalskag
 Village of Ohogamiut
 Village of Red Devil
 Village of Sleetmute
 Village of Solomon
 Village of Stony River
 Village of Venetie (*See* Native Village of
 Venetie Tribal Government)
 Village of Wainwright
 Wrangell Cooperative Association
 Yakutat Tlingit Tribe
 Yupiit of Andreafski

[FR Doc. 2024–29005 Filed 12–10–24; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[256A2100DD/AAKC001030/
 A0A501010.999900]

Receipt of Documented Petition for Federal Acknowledgment as an American Indian Tribe

AGENCY: Bureau of Indian Affairs,
 Interior.

ACTION: Notice.

SUMMARY: The Department of the Interior (Department) gives notice that the group known as the Tuskarora Nation of Moratoc Indians has filed a documented petition for Federal acknowledgment as an American Indian Tribe with the Assistant Secretary—Indian Affairs. The Department seeks comment and evidence from the public on the petition.

DATES: Comments and evidence must be received or postmarked by April 15, 2025.

ADDRESSES: Copies of the narrative portion of the documented petition, as submitted by the petitioner (with any redactions appropriate under 25 CFR 83.21(b)), and other information are available at the Office of Federal Acknowledgment's (OFA) website: www.bia.gov/as-ia/ofa. Submit any comments or evidence to: Department of the Interior, Office of the Assistant Secretary—Indian Affairs, Attention: Office of Federal Acknowledgment, Mail Stop 4071 MIB, 1849 C Street NW, Washington, DC 20240, or by email to: Ofa_Info@bia.gov.

FOR FURTHER INFORMATION CONTACT:
 Nikki Bass, OFA Director, Office of the

Assistant Secretary—Indian Affairs,
 Department of the Interior, telephone:
 (202) 513–7650.

SUPPLEMENTARY INFORMATION: On July 31, 2015, the Department's revisions to 25 CFR part 83 became final and effective (80 FR 37862). A key goal of the revisions was to improve transparency through increased notice of petitions and providing improved public access to petitions. Today the Department informs the public that a complete documented petition has been submitted under the current regulations, that portions of that petition are publicly available on the website identified above for easy access, and that we are seeking public comment early in the process on this petition.

Under 25 CFR 83.22(b)(1), OFA publishes notice that the following group has filed a documented petition for Federal acknowledgment as an American Indian Tribe to the Assistant Secretary—Indian Affairs: Tuskarora Nation of Moratoc Indians. The contact information for the petitioner is Mr. Gary Wayne Revels, Jr, 193 Coon Trail Lane, Saint Pauls, North Carolina 28384.

Also, under 25 CFR 83.22(b)(1), OFA publishes on its website the following:

- i. The narrative portion of the documented petition, as submitted by the petitioner (with any redactions appropriate under 25 CFR 83.21(b));
- ii. The name, location, and mailing address of the petitioner and other information to identify the entity;
- iii. The date of receipt;
- iv. The opportunity for individuals and entities to submit comments and evidence supporting or opposing the petitioner's request for acknowledgment within 120 days of the date of the website posting; and
- v. The opportunity for individuals and entities to request to be kept informed of general actions regarding a specific petitioner.

The Department publishes this notice and request for comment in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by Department Manual part 209, chapter 8.

Bryan Newland,

Assistant Secretary—Indian Affairs.

[FR Doc. 2024–29003 Filed 12–10–24; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR**Bureau of Land Management****[BLM_ID_FRN; MO# 4500183156]****Notice of Availability of the Record of Decision for the Lava Ridge Wind Project in Jerome, Lincoln, and Minidoka Counties, Idaho****AGENCY:** Bureau of Land Management, Interior.**ACTION:** Notice of availability.**SUMMARY:** The Bureau of Land Management (BLM) announces the availability of the Record of Decision (ROD) for the Lava Ridge Wind Project Final Environmental Impact Statement (EIS). The ROD constitutes the decision of the BLM, as approved by the Department of the Interior (DOI).**DATES:** The ROD was signed on Dec. 5, 2024.**ADDRESSES:** The ROD is available at <https://eplanning.blm.gov/eplanning-ui/project/2013782/510> and in hard copy at the BLM Shoshone Field Office, 400 W F St., Shoshone, ID 83352.**FOR FURTHER INFORMATION CONTACT:**

Kasey Prestwich, project manager, telephone 208-732-7204; address in

ADDRESSES above; and email kprestwich@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 for contacting Mr. Prestwich. 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:** The DOI has approved the BLM's decision to issue a right-of-way (ROW) grant for the Lava Ridge Wind Project. Consistent with the direction provided through the ROD and applicable laws and regulations, the BLM will issue Magic Valley Energy (MVE) a non-exclusive, non-possessory ROW grant with stipulations, to construct, operate and maintain, and decommission a wind-powered electrical generation facility on public lands within Jerome, Lincoln, and Minidoka counties, Idaho. The ROW grant will authorize MVE to develop and operate the project as described in an approved plan of development, updated consistent with the terms established in the ROD.

The ROW authorizes installation of up to 231 wind turbines, along with related infrastructure and facilities on BLM-managed public lands. The ROW

grant issued by the BLM will require MVE to comply with terms and conditions, including project avoidance and minimization measures, fulfill compensatory mitigation requirements, adhere to processes established for the preservation of historic properties, and meet any additional requirements, such as obtaining additional permits or authorizations, established by Federal, State, or local laws.

The ROW area encompasses the BLM-managed public lands delineated and described in Appendices A and B of the ROD. The estimated total area of the ROW is 57,447 acres, with all project-related infrastructure and facilities confined within the designated siting corridors. The siting corridors, estimated to be 38,535 acres, limit the location of the project infrastructure to areas considered within the Lava Ridge Wind Project Final EIS; however, the final footprint of the project will be smaller and consistent with the disturbance area described in the Final EIS (the portion of ground disturbance on public lands is estimated to be 3,926 acres).

The decision to authorize this energy generation project on BLM-managed public lands is consistent with the Federal Land Policy and Management Act, as amended, and the BLM's ROW regulations (43 U.S.C. 1761; 43 CFR part 2800).

Approval of this ROW constitutes the final decision of the DOI and, in accordance with the regulations at 43 CFR 4.410(a)(3), is not subject to appeal under DOI regulations at 43 CFR part 4.

Michael C. Courtney,*Twin Falls District Manager.*

[FR Doc. 2024-29099 Filed 12-10-24; 8:45 am]

BILLING CODE 4331-21-P**DEPARTMENT OF THE INTERIOR****Bureau of Ocean Energy Management****[Docket No. BOEM-2023-0061]****Notice of Availability of the California Offshore Wind Draft Programmatic Environmental Impact Statement; Correction****AGENCY:** Bureau of Ocean Energy Management, Interior.**ACTION:** Notice of availability; correction.**SUMMARY:** BOEM published a document in the **Federal Register** of November 14, 2024, concerning a Notice of Availability for the California Offshore Wind Draft Programmatic Environmental Impact Statement. The

document contained the incorrect start date of the 90-day comment period.

FOR FURTHER INFORMATION CONTACT: Lisa Gilbane, Chief, Environmental Analysis Section, Bureau of Ocean Energy Management, Camarillo, California Office, 760 Paseo Camarillo, Suite 102, Camarillo, CA 93010, (805) 384-6387 or lisa.gilbane@boem.gov.**SUPPLEMENTARY INFORMATION:****Correction**In the **Federal Register** of November 14, 2024, in FR Doc. 2024-26424, at 89 FR 90051, in the second column, correct "Submission of Public Comments" to read: The 90-day comment period began on November 14, 2024.**Douglas P. Boren,***Pacific Regional Director, Bureau of Ocean Energy Management.*

[FR Doc. 2024-29103 Filed 12-10-24; 8:45 am]

BILLING CODE 4340-98-P**INTERNATIONAL TRADE COMMISSION****[Investigation Nos. 701-TA-716-719 and 731-TA-1683-1687 (Final)]****Epoxy Resins From China, India, South Korea, Taiwan, and Thailand; Revised Schedule for the Subject Investigations****AGENCY:** United States International Trade Commission.**ACTION:** Notice.**DATES:** November 29, 2024.**FOR FURTHER INFORMATION CONTACT:**Alejandro Orozco (202-205-3177), 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 investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>.**SUPPLEMENTARY INFORMATION:** Effective November 13, 2024, the Commission established a schedule for the conduct of the final phase of the subject investigations (89 FR 92719, November 22, 2024) following the U.S. Department of Commerce's ("Commerce")

preliminary affirmative sales-at-less-than-fair-value determination with respect to epoxy resins from China (89 FR 89594, November 13, 2024). Commerce subsequently postponed the date for its final determination in the sales-at-less-than-fair-value investigation with respect to China from January 21, 2025 to March 28, 2025 (89 FR 94709, November 29, 2024). The Commission, therefore, is revising its schedule to conform with Commerce's new schedule.

The Commission's revised dates in the schedule are as follows: the prehearing staff report will be placed in the nonpublic record on March 18, 2025; the deadline for filing prehearing briefs is 5:15 p.m. on March 25, 2025; requests to appear at the hearing must be filed with the Secretary to the Commission not later than 5:15 p.m. on March 26, 2025; the prehearing conference, if deemed necessary, will be held at the U.S. International Trade Commission Building on March 28, 2025; the hearing will be held at the U.S. International Trade Commission Building at 9:30 a.m. on April 3, 2025; the deadline for filing posthearing briefs is 5:15 p.m. on April 10, 2025; the Commission will make its final release of information on April 23, 2025; and final party comments are due on 5:15 p.m. on April 25, 2025.

For further information concerning this proceeding, see the Commission's notice cited above and the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

Authority: This investigation is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.21 of the Commission's rules.

By order of the Commission.

Issued: December 6, 2024.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2024–29106 Filed 12–10–24; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1426]

Certain Crafting Machines and Components Thereof; Notice of Institution of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on October 4, 2024, under section 337 of the Tariff Act of 1930, as amended, on behalf of Cricut, Inc. of South Jordan, Utah. Supplements were filed on October 24, 2024, October 25, 2024, and October 29, 2024. The complaint, as supplemented, alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain crafting machines and components thereof by reason of infringement of certain claims of U.S. Patent No. 11,208,758 (“the ‘758 patent”); U.S. Patent No. 11,905,646 (“the ‘646 patent”); U.S. Patent No. D893,563 (“the ‘D563 patent”); U.S. Patent No. D910,724 (“the ‘D724 patent”); U.S. Patent No. D926,237 (“the ‘D237 patent”); and U.S. Patent No. D1,029,090 (“the ‘D090 patent”). The complaint further alleges that an industry in the United States exists or is in the process of being established as required by the applicable Federal Statute. The complaint requests that the Commission institute an investigation pursuant to Section 337 and, after the investigation, issue a limited exclusion order with respect to the ‘758 Patent, the ‘646 Patent, and the ‘D090 Patent; issue a general exclusion order, or in the alternative a limited exclusion order, with respect to the ‘D563 Patent, the ‘D724 Patent, and the ‘D237 Patent; and issue cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email EDIS3Help@usitc.gov. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at <https://www.usitc.gov>.

FOR FURTHER INFORMATION CONTACT: Pathenia M. Proctor, The Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2560.

SUPPLEMENTARY INFORMATION:

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff

Act of 1930, as amended, 19 U.S.C. 1337, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2024).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on December 5, 2024, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of infringement of one or more of claims 18–23 of the ‘758 patent; and claims 1, 2, 8–12, and 14–16 of the ‘646 patent; the claim of the ‘D563 patent; the claim of the ‘D724 patent; the claim of the ‘D237 patent; and the claim of the ‘D090 patent, and whether an industry in the United States exists or is in the process of being established as required by subsection (a)(2) of section 337;

(2) Pursuant to section 210.10(b)(1) of the Commission's Rules of Practice and Procedure, 19 CFR 210.10(b)(1), the plain language description of the accused products or category of accused products, which defines the scope of the investigation, is “cutting machines and heat press machines for use in crafting and components thereof”;¹

(3) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is: Cricut, Inc., 10855 South River Front Parkway, South Jordan, Utah 84095.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Hunan Sijiu Technology, Co. Ltd., 1301, Building B–8, Lugu Yuyuan Production Workshop, No. 27 Wenxuan Road, High-tech Zone, Changsha, China 410000

Hunan Sijiu Electronic Technology Co., Ltd., 1301, Building B–8, Lugu Yuyuan Production Workshop, No. 27

¹ In this plain English statement of the scope of investigation, “components thereof” is included pursuant to the allegations in the complaint. To the extent that the Complainant has included such an allegation based upon a concern regarding specific components, the Complainant should, during the course of this investigation, seek adjudication and specifically identify the components of the claimed invention sought for exclusion. The lack of adjudication of specific components, however, would not affect any later ability to adjudicate and remedy circumvention through the importation of components with additional enforcement actions.

Wenxuan Road, High-tech Zone,
Changsha, China 410000
Guangdong Rongtu Technology Co.,
Ltd., Floor 8, No. 15, Huafa Road,
Huakou Community, Ronggui Street,
Sunde District, Foshan City,
Guangdong Province, China 528305
LiPing Zhan, No. 187, Yanglinguan
Street, Xingou Town, Jianli County,
Jingzhou, China 433300
SainStore Technology Co., Ltd., Room
908, Building 2, No. 16, Keji 4th Road,
Songshan Lake Park, Dongguan City,
Guangdong Province, China 523808
Shanghai Sishun E-commerce Co., Ltd.,
5th Floor, Building 6, Lane 958,
Jinsha Jiangxi Road, Jiading District,
Shanghai, China 201824
Bozhou Wanxingyu Technology Co.
Ltd., No. 26, Guangming Rd.,
Qiaocheng Dist., Bozhou, Anhui,
China, 236800
Bozhou Zhongdaxiang Technology Co.,
Ltd., No. 41, Zhaoyangzhuang Vil.,
Dawang Xingzheng Vil., Niuji Town,
Qiaocheng Dist., Bozhou, Anhui,
China 236800

(c) The Office of Unfair Import
Investigations, U.S. International Trade
Commission, 500 E Street SW, Suite
401, Washington, DC 20436; and

(4) For the investigation so instituted,
the Chief Administrative Law Judge,
U.S. International Trade Commission,
shall designate the presiding
Administrative Law Judge.

Responses to the complaint and the
notice of investigation must be
submitted by the named respondents in
accordance with section 210.13 of the
Commission's Rules of Practice and
Procedure, 19 CFR 210.13. Pursuant to
19 CFR 201.16(e) and 210.13(a), as
amended in 85 FR 15798 (March 19,
2020), such responses will be
considered by the Commission if
received not later than 20 days after the
date of service by the complainant of the
complaint and the notice of
investigation. Extensions of time for
submitting responses to the complaint
and the notice of investigation will not
be granted unless good cause therefor is
shown.

Failure of a respondent to file a timely
response to each allegation in the
complaint and in this notice may be
deemed to constitute a waiver of the
right to appear and contest the
allegations of the complaint and this
notice, and to authorize the
administrative law judge and the
Commission, without further notice to
the respondent, to find the facts to be as
alleged in the complaint and this notice
and to enter an initial determination
and a final determination containing
such findings, and may result in the

issuance of an exclusion order or a cease
and desist order or both directed against
the respondent.

By order of the Commission.

Issued: December 6, 2024.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2024-29107 Filed 12-10-24; 8:45 am]

BILLING CODE 7020-02-P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: International Trade
Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that
the U.S. International Trade
Commission has received a complaint
entitled *Certain Composite Intermediate
Bulk Containers, DN 3789*; the
Commission is soliciting comments on
any public interest issues raised by the
complaint or complainant's filing
pursuant to the Commission's Rules of
Practice and Procedure.

FOR FURTHER INFORMATION CONTACT: Lisa
R. Barton, Secretary to the Commission,
U.S. International Trade Commission,
500 E Street SW, Washington, DC
20436, telephone (202) 205-2000. The
public version of the complaint can be
accessed on the Commission's
Electronic Document Information
System (EDIS) at <https://edis.usitc.gov>.
For help accessing EDIS, please email
EDIS3Help@usitc.gov.

General information concerning the
Commission may also be obtained by
accessing its internet server at United
States International Trade Commission
(USITC) at <https://www.usitc.gov>. The
public record for this investigation may
be viewed on the Commission's
Electronic Document Information
System (EDIS) at <https://edis.usitc.gov>.
Hearing-impaired persons are advised
that information on this matter can be
obtained by contacting the
Commission's TDD terminal on (202)
205-1810.

SUPPLEMENTARY INFORMATION: The
Commission has received a complaint
and a submission pursuant to § 210.8(b)
of the Commission's Rules of Practice
and Procedure filed on behalf of Schütz
Container Systems, Inc. and Protechna
S.A. on December 5, 2024. The
complaint alleges violations of section
337 of the Tariff Act of 1930 (19 U.S.C.
1337) in the importation into the United
States, the sale for importation, and the

sale within the United States after
importation of certain composite
intermediate bulk containers. The
complaint names as respondents:
Shandong Jinshan Jieyuan Container
Co., Ltd. of China; Zibo Jieli Plastic
Pipe Manufacture Co. Ltd. of China;
Shanghai Sakura Plastic Products Co.,
Ltd. (d/b/a Shanghai Yinghua Plastic
Products Co., LTD) of China; and Hebei
Shijiheng Plastics, Co., Ltd. of China.
The complainant requests that the
Commission issue a general exclusion
order or, in the alternative, issue a
limited exclusion order, and cease and
desist orders.

Proposed respondents, other
interested parties, members of the
public, and interested government
agencies are invited to file comments on
any public interest issues raised by the
complaint or § 210.8(b) filing.
Comments should address whether
issuance of the relief specifically
requested by the complainant in this
investigation would affect the public
health and welfare in the United States,
competitive conditions in the United
States economy, the production of like
or directly competitive articles in the
United States, or United States
consumers.

In particular, the Commission is
interested in comments that:

(i) explain how the articles potentially
subject to the requested remedial orders
are used in the United States;

(ii) identify any public health, safety,
or welfare concerns in the United States
relating to the requested remedial
orders;

(iii) identify like or directly
competitive articles that complainant,
its licensees, or third parties make in the
United States which could replace the
subject articles if they were to be
excluded;

(iv) indicate whether complainant,
complainant's licensees, and/or third
party suppliers have the capacity to
replace the volume of articles
potentially subject to the requested
exclusion order and/or a cease and
desist order within a commercially
reasonable time; and

(v) explain how the requested
remedial orders would impact United
States consumers.

Written submissions on the public
interest must be filed no later than by
close of business, eight calendar days
after the date of publication of this
notice in the **Federal Register**. There
will be further opportunities for
comment on the public interest after the
issuance of any final initial
determination in this investigation. Any
written submissions on other issues
must also be filed by no later than the

close of business, eight calendar days after publication of this notice in the **Federal Register**. Complainant may file replies to any written submissions no later than three calendar days after the date on which any initial submissions were due, notwithstanding § 201.14(a) of the Commission's Rules of Practice and Procedure. No other submissions will be accepted, unless requested by the Commission. Any submissions and replies filed in response to this Notice are limited to five (5) pages in length, inclusive of attachments.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. Submissions should refer to the docket number ("Docket No. 3789") in a prominent place on the cover page and/or the first page. (See Handbook for Electronic Filing Procedures, Electronic Filing Procedures¹). Please note the Secretary's Office will accept only electronic filings during this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, <https://edis.usitc.gov>.) No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice. Persons with questions regarding filing should contact the Secretary at EDIS3Help@usitc.gov.

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. See 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract

personnel², solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS³.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: December 5, 2024.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2024-29034 Filed 12-10-24; 8:45 am]

BILLING CODE 7020-02-P

DEPARTMENT OF JUSTICE

Notice of Proposed Settlement Agreement Under the Oil Pollution Act

On December 5, 2024, the Department of Justice approved a proposed Settlement Agreement among the United States, State of California, and settling defendant United Molasses, Inc. under the Oil Pollution Act, related to the Port of Richmond Terminal 4 site in Richmond, California. The Settlement Agreement requires the settling defendant to pay \$650,000.00 to resolve a claim for damages for injuries to natural resources from alleged oil discharges from the site.

The publication of this notice opens a period for public comment on the Settlement Agreement. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to Settlement Agreement among the United States, State of California, and United Molasses, Inc., D.J. Ref. No. 90-5-1-1-12847. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

<i>To submit comments:</i>	<i>Send them to:</i>
By email	pubcomment-ees.enrd@usdoj.gov .
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044-7611.

During the public comment period, the Settlement Agreement may be examined at and downloaded from this

Justice Department website: <https://www.justice.gov/enrd/consent-decrees>. If you require assistance accessing the Consent Decree you may request assistance by email or by mail to the addresses provided above for submitting comments.

Scott Bauer,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2024-29046 Filed 12-10-24; 8:45 am]

BILLING CODE 4410-15-P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the System Unit Resource Protection Act

On December 6, 2024, the Department of Justice lodged a proposed consent decree with the United States District Court for the District of Colorado in the lawsuit entitled *United States v. Water Supply and Storage Company, in personam, and Grand River Ditch, in rem*, Civil Action No. 1:23-cv-00533-CNS-TPO.

On February 27, 2023, the United States filed a lawsuit alleging that Defendants, Water Supply and Storage Company ("WSSC"), *in personam*, and Grand River Ditch, *in rem*, are liable for damages and response costs under the System Unit Resource Protection Act and that WSSC is liable under a March 21, 1907 stipulation between WSSC and the U.S. Forest Service regarding operation and maintenance of the Grand River Ditch. The verified complaint alleges that on or around June 17, 2017, a closed culvert/pipe system, which forms part of the Grand River Ditch's infrastructure, ruptured, causing substantial water to flow into the drainage below in Rocky Mountain National Park and resulting in significant damage to natural resources.

The consent decree requires Defendants to pay the United States \$2,680,000 in response costs and damages, to enter into an operations and maintenance agreement governing management of the Grand River Ditch, and to hire a third-party independent consultant to develop a comprehensive operations and maintenance plan for the Grand River Ditch.

The publication of this notice opens a period for public comment on the consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States v. Water Supply and Storage Company, in personam, and Grand River Ditch, in rem*, D.J. Ref. No.

¹ Handbook for Electronic Filing Procedures: https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf

² All contract personnel will sign appropriate nondisclosure agreements.

³ Electronic Document Information System (EDIS): <https://edis.usitc.gov>

90–5–1–1–08154/1. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

<i>To submit comments:</i>	<i>Send them to:</i>
By email	<i>pubcomment-ees.enrd@usdoj.gov.</i>
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Any comments submitted in writing may be filed by the United States in whole or in part on the public court docket without notice to the commenter.

During the public comment period, the consent decree may be examined and downloaded at this Justice Department website: <https://www.justice.gov/enrd/consent-decrees>. If you require assistance accessing the consent decree, you may request assistance by email or by mail to the addresses provided above for submitting comments.

Jason A. Dunn,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2024–29126 Filed 12–10–24; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Employment and Training Administration

Agency Information Collection Activities; Comment Request; Criteria and Non-Criteria Agricultural Clearance Order Forms and H–2A Application for Temporary Employment Certification in States and by Employers Covered by Injunction of the Farmworker Protection

ACTION: Notice.

SUMMARY: The Department of Labor’s (DOL) Employment and Training Administration (ETA) is soliciting comments concerning a proposed extension for the authority to conduct the information collection request (ICR) titled, “Criteria and Non-Criteria Agricultural Clearance Order Forms and H–2A Application for Temporary Employment Certification in States and by Employers Covered by Injunction of the Farmworker Protection Rule” and the related information collection and retention requirements (Office of Management and Budget (OMB) Control Number 1205–0562), which covers

Forms ETA–9142A, *Application for H–2A Temporary Employment Certification*; ETA–9142A, Appendix A, *Assurances and Obligations*; ETA–9142A, *Final Determination: H–2A Temporary Labor Certification Approval*; ETA–790, *Agricultural Clearance Order*; ETA–790A, *H–2A Agricultural Clearance Order*; ETA–790/790A, Addendum A, *Additional Crops or Agricultural Activities*; ETA–790/790A, Addendum B, *Additional Worksite and/or Housing Information*; ETA–790B, (Non-Criteria) *Agricultural Clearance Order*; and related form instructions. This comment request is part of continuing Departmental efforts to reduce paperwork and respondent burden in accordance with the Paperwork Reduction Act of 1995 (PRA).

DATES: Consideration will be given to all written comments received by February 10, 2025.

ADDRESSES: A copy of this ICR with applicable supporting documentation, including a description of the likely respondents, proposed frequency of response, and estimated total burden, may be obtained for free by contacting Brian Pasternak, Administrator, Office of Foreign Labor Certification, by telephone at 202–693–8200 (this is not a toll-free number), TTY 1–877–889–5627 (this is not a toll-free number), or by email at ETA-PRA@dol.gov.

Instructions: Submit written comments about, or requests for a copy of, this ICR by email at ETA-PRA@dol.gov. To ensure proper consideration, include the OMB Control number 1205–0562.

FOR FURTHER INFORMATION CONTACT: Patrice Gibson, by telephone at 202–693–8200 (this is not a toll-free number) or by email at ETA-PRA@dol.gov.

SUPPLEMENTARY INFORMATION: DOL, as part of continuing efforts to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies an opportunity to comment on proposed and/or continuing collections of information before submitting them to the Office of Management and Budget (OMB) for final approval. This program helps to ensure 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 can be properly assessed.

The information collection is required by secs. 101(a)(15)(H)(ii)(a), 214(c), and 218 of the Immigration and Nationality Act (INA) (8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188), as well as 8 CFR

214.2(h)(5) and 20 CFR part 655, subpart B, and 20 CFR part 653, subpart F, and 29 CFR part 501. The H–2A visa program enables employers to bring nonimmigrant foreign workers to the United States to perform agricultural work of a seasonal or temporary nature as defined in 8 U.S.C.

1101(a)(15)(H)(ii)(a). Before an employer can file a petition with the Department of Homeland Security (DHS) to import temporary workers as H–2A nonimmigrants, the INA and DHS regulations require an employer to first obtain a determination from DOL certifying whether a qualified U.S. worker is available to fill the job opportunity described in the employer’s petition for a temporary agricultural worker and whether a foreign worker’s employment in the job opportunity will adversely affect the wages or working conditions of similarly employed workers in the U.S. 8 U.S.C. 1188, INA sec. 218; 8 CFR 214.2(h)(5)(i), (ii), and (iv)(B). DOL’s regulations establish the processes by which an employer must obtain a temporary labor certification from DOL and the rights and obligations of workers and employers. 20 CFR part 655, subpart B; 29 CFR part 501.

This ICR, OMB Control No. 1205–0562, includes the collection of information related to the temporary labor certification process and agricultural clearance order process, which may or may not be connected to the H–2A program. The information contained in the application Form ETA–9142A, *H–2A Application for Temporary Employment Certification*, and job order Form ETA–790/790A, *H–2A Agricultural Clearance Order*, together serve as the basis for the Secretary of Labor’s determination that qualified U.S. workers are not available to perform the services or labor needed by the employer and that the wages and working conditions of similarly employed workers in the U.S. will not be adversely affected by the employment of H–2A workers. Employers use *Appendix A* of Form ETA–9142A to attest that they will comply with all of the terms, conditions, and obligations of the H–2A program. ETA is seeking a three-year extension, without change, for each of these forms.

DOL uses Form ETA–9142A and Forms ETA 790/790A to meet its statutory and regulatory responsibilities for administering the H–2A program. Similarly, DOL uses Forms ETA 790/790B to administer the Agricultural Recruitment System (ARS). Employers seeking to use the H–2A program to employ nonimmigrant workers to perform agricultural services or labor on

a temporary or seasonal basis must submit a completed agricultural clearance order (Forms ETA790/790A) and *Application for Temporary Employment Certification* (Form ETA 9142A) electronically through the Office of Foreign Labor Certification's Foreign Labor Application Gateway (FLAG) system. Employers seeking to employ U.S. workers through the ARS intrastate and interstate job clearance system, without also intending to use the H-2A visa program, must submit a completed agricultural clearance order (Forms ETA 790/790B) to the applicable State Workforce Agency.

DOL published an emergency PRA **Federal Register** Notice that would allow the Department to retain the current H-2A and ARS forms for use by the parties subject to the *Kansas v. DOL* litigation, while also providing DOL the authority to simultaneously proceed with implementation of the new H-2A forms under OMB number 1205-0466 that went into effect under the Farmworker Protection Rule on September 12, 2024, and the new ARS forms under OMB number 1205-0134 that went into effect on July 11, 2024. The emergency PRA clearance would allow DOL to utilize prior approved Forms ETA 790, 790A, 790B, and 9142A, which are necessary to ensure continuity in administering the H-2A program and the ARS nationwide. See 89 FR 73725. On September 12, 2024, OMB approved and granted DOL emergency approval of this new OMB Control number through February 28, 2025, and provided a new OMB Control Number of 1205-0562 for this new ICR.

This information collection is subject to the PRA. 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.

Interested parties are encouraged to provide comments to the contact shown in the **ADDRESSES** section. Comments must be written to receive consideration, and they will be summarized and included in the request for OMB approval of the final ICR. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1205-0562.

Submitted comments will also be a matter of public record for this ICR and posted on the internet, without redaction. DOL encourages commenters not to include personally identifiable information, confidential business data, or other sensitive statements/information in any comments.

DOL is particularly interested in comments that:

- 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).

Agency: DOL-ETA.

Type of Review: Extension Without Changes.

Title of Collection: Criteria and Non-Criteria Agricultural Clearance Order Forms and H-2A Application for Temporary Employment Certification in States and by Employers Covered by Injunction of the Farmworker Protection Rule.

Forms: ETA-9142A, H-2A *Application for Temporary Employment Certification*; ETA-9142A—*Appendix A*; ETA-9142A—*Final Determination: H-2A Temporary Labor Certification Approval*; ETA-790, *Agricultural Clearance Order*; ETA-790A, H-2A *Agricultural Clearance Order*; ETA-790/790A—*Addendum A*; ETA-790/790A—*Addendum B*; ETA-790B (Non-Criteria) *Agricultural Clearance Order*.

OMB Control Number: 1205-0562.

Affected Public: Individuals or Households, Private Sector—businesses or other for-profits, Government, State, Local and Tribal Governments.

Estimated Number of Respondents: 11,905.

Frequency: On Occasion.

Total Estimated Annual Responses: 141,472.

Estimated Average Time per Response: Varies.

Estimated Total Annual Burden Hours: 63,906.94 hours.

Total Estimated Annual Other Cost Burden: \$0.

Authority: 44 U.S.C. 3506(c)(2)(A).

José Javier Rodríguez,

Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2024-29026 Filed 12-10-24; 8:45 am]

BILLING CODE 4510-FP-P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petition for Modification of Application of Existing Mandatory Safety Standards

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice.

SUMMARY: This notice is a summary of a petition for modification submitted to the Mine Safety and Health Administration (MSHA) by Rockwell Mining, LLC.

DATES: All comments on the petition must be received by MSHA's Office of Standards, Regulations, and Variances on or before January 10, 2025.

ADDRESSES: You may submit comments identified by Docket No. MSHA-2024-0103 by any of the following methods:

1. *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments for MSHA-2024-0103.

2. *Fax:* 202-693-9441.

3. *Email:* petitioncomments@dol.gov.

4. *Regular Mail or Hand Delivery:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202-5452.

Attention: S. Aromie Noe, Director, Office of Standards, Regulations, and Variances. Persons delivering documents are required to check in at the receptionist's desk, 4th Floor West. Individuals may inspect copies of the petition and comments during normal business hours at the address listed above. Before visiting MSHA in person, call 202-693-9455 to make an appointment.

FOR FURTHER INFORMATION CONTACT: S. Aromie Noe, Office of Standards, Regulations, and Variances at 202-693-9440 (voice), Petitionsformodification@dol.gov (email), or 202-693-9441 (fax). [These are not toll-free numbers.]

SUPPLEMENTARY INFORMATION: Section 101(c) of the Federal Mine Safety and Health Act of 1977 and Title 30 of the Code of Federal Regulations (CFR) part 44 govern the application, processing, and disposition of petitions for modification.

I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary of Labor determines that:

1. An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or

2. The application of such standard to such mine will result in a diminution of safety to the miners in such mine.

In addition, sections 44.10 and 44.11 of 30 CFR establish the requirements for filing petitions for modification.

II. Petition for Modification

Docket Number: M–2024–078–C.

Petitioner: Rockwell Mining, LLC, 250 West Main Street, Suite 2000, Lexington, KY 40507.

Mine: Eagle #3 Mine, MSHA ID No. 46–09427, located in Wyoming County, West Virginia.

Regulation Affected: 30 CFR 75.1002(a), Permissible electric equipment.

Modification Request: The petitioner requests a modification of 30 CFR 75.1002(a) to allow the use of unapproved Powered Air Purifying Respirators (PAPRs) within 150 feet of pillar workings or longwall faces. Specifically, the petitioner is requesting to utilize the CleanSpace EX PAPR and sealed motor/blower/battery power pack assembly, and the 3M Versaflo TR–800 Intrinsically Safe PAPR motor/blower and battery with battery pack. The petitioner states that:

(a) The 3M Versaflo TR–800 PAPR with motor/blower and battery qualifies as intrinsically safe.

(b) The CleanSpace EX PAPR also qualifies as intrinsically safe.

(c) Both the CleanSpace EX and the 3M Versaflo TR–800 PAPRs provide a constant flow of air inside the mask or helmet. This airflow provides respiratory protection and comfort in hot working conditions.

(d) Neither the 3M Versaflo TR–800 nor the CleanSpace EX PAPR is MSHA-approved as permissible.

(e) Neither the 3M nor the CleanSpace is pursuing MSHA approval.

(f) Eagle #3 Mine currently makes available to all miners NIOSH-approved high efficiency 100 series respirators to protect the miners against potential exposure to respirable coal mine dust, including crystalline silica, during

normal mining conditions. Eagle #3 Mine desires to expand the miners' option in choosing a respirator that provides the greatest degree of protection as well as comfort while being worn. Powered PAPRs provide a constant flow of filtered air and serve that purpose.

(g) On June 17, 2024, MSHA's final rule *Lowering Miners' Exposure to Respirable Crystalline Silica and Improving Respiratory Protection* took effect. The rule requires the mine operator to have a written respiratory protection program in place when miners are required to use respirators. Adding the CleanSpace EX and the 3M TR–800 Versaflo PAPRs to the respiratory protection program as additional options will provide the miners with alternatives to the series 100 high efficiency respirators already in use at the mine. The PAPRs will also serve as a respirator option to protect the miners with facial hair who may not be able to pass the "fit test" requirement of the program. In addition, the positive flow of filtered air provided by the PAPRs will provide a solution for the miners who are unable to wear a tight-fitting respirator.

(h) Since the 3M Airstream Headgear-Mounted PAPR System has been discontinued by the manufacturer, there are no other MSHA-approved units available that can be used within 150 feet of pillar workings or longwall faces.

(i) The alternative method in the petition will at all times guarantee no less than the same measure of protection afforded to the miners by the standard. The petitioner proposes the following alternative method:

(a) All miners who will be involved with or affected by the use of the 3M Versaflo TR–800 or CleanSpace EX PAPRs shall receive training in accordance with 30 CFR 48.7 on the requirements of the Proposed Decision and Order (PDO) granted by MSHA and manufacturer guidelines. Such training shall be completed before any 3M Versaflo TR–800 or CleanSpace EX PAPR can be used within 150 feet of pillar workings or longwall faces. The operator shall keep a record of such training and provide such record to MSHA upon request.

(b) The PAPRs, battery packs, and all associated wiring and connections shall be inspected before use to determine if there is any damage to the units that would negatively impact intrinsic safety. If any defects are found, the PAPR shall be removed from service.

(c) A separate logbook shall be maintained for the 3M Versaflo TR–800 and CleanSpace EX PAPRs that will be kept with the equipment, or in a

location with other mine record books and shall be made available to MSHA upon request. The equipment shall be examined at least weekly by a qualified person as defined in 30 CFR 75.512–1 and the examination results recorded in the logbook. Examination records shall be maintained for one year.

(d) All 3M Versaflo TR–800 and CleanSpace EX PAPRs to be used within 150 feet of pillar workings or longwall faces shall be physically examined prior to initial use and each unit shall be assigned a unique identification number. Each unit shall be examined by the person to operate the equipment, prior to taking the equipment underground, to ensure that the equipment is used according to the original equipment manufacturer's recommendations and maintained in a safe operating condition. The examinations for the 3M Versaflo TR–800 PAPRs shall include:

(1) Check the equipment for any physical damage and the integrity of the case.

(2) Remove the battery and inspect for corrosion.

(3) Inspect the contact points to ensure a secure connection to the battery.

(4) Reinsert the battery and power up and shut down to ensure proper connections.

(5) Check the battery compartment cover or battery attachment to ensure that it is securely fastened.

(6) For equipment utilizing lithium type cells, ensure that lithium cells and/or packs are not damaged or swelled in size.

The CleanSpace EX PAPR does not have an accessible/removable battery. The internal battery and motor/blower assembly are both contained within the "power unit" assembly, and the battery cannot be removed, reinserted or fastened. Therefore, examination of the CleanSpace EX PAPR shall include any indications of physical damage.

(e) All 3M Versaflo TR–800 and CleanSpace EX PAPR units shall be serviced according to the manufacturer's recommendations.

(f) Prior to energizing and during use of the 3M Versaflo TR–800 or the CleanSpace EX PAPR within 150 feet of pillar workings or longwall faces, procedures in accordance with 30 CFR 75.323 shall be followed.

(g) Only the 3M TR–830 Battery Pack, which meets lithium battery safety standard UL 1642 or IEC 62133, in the 3M Versaflo TR–800 PAPR shall be used. Only the CleanSpace EX Power Unit, which meets lithium battery safety standard UL 1642 or IEC 62133, in the CleanSpace EX shall be used.

(h) If battery packs for the 3M Versaflo TR-800 PAPR are provided, all battery "change outs" shall occur in intake air outby the last open crosscut.

(i) The following maintenance and use conditions shall apply to equipment containing lithium type batteries:

(1) Neither the 3M TR-830 Battery Pack nor the CleanSpace EX Power Unit shall be disassembled or modified by anyone other than permitted by the manufacturer of the equipment.

(2) The 3M TR-830 Battery Pack shall be charged only in an area free of combustible material and in intake air outby the last open crosscut. The 3M TR-830 Battery Pack shall be charged only by a manufacturer's recommended battery charger, such as:

(i) 3M Battery Charger Kit TR-641N, which includes one 3M Charger Cradle TR-640 and one 3M Power Supply TR-941N; or

(ii) 3M 4-Station Battery Charger Kit TR-644N, which includes four 3M Charger Cradles TR-640 and one 3M 4-Station Battery Charger Base/Power Supply TR-944N.

(3) The CleanSpace EX internal battery, which is contained within the power unit assembly, shall be charged in areas located outby the last open crosscut in intake air, and only the manufacturer's recommended battery chargers shall be used, such as the CleanSpace EX Battery Charger, Product Code PAF-0066.

(4) Neither the 3M TR-830 Battery Pack nor the CleanSpace EX power unit which contains the internal battery, shall be exposed to water, allowed to get wet or immersed in liquid. This does not preclude incidental exposure of the 3M TR-830 Battery Pack or the CleanSpace EX power unit assembly.

(5) Neither the 3M Versaflo TR-800 PAPR nor the CleanSpace EX PAPR, including the internal battery, shall be used, charged or stored in locations where the manufacturer's recommended temperature limits are exceeded. Neither the 3M Versaflo TR-800 PAPR or the CleanSpace EX PAPR shall be placed in direct sunlight nor stored near a source of heat.

(j) Annual retraining shall be given to all miners who will be involved with or affected by the use of the 3M Versaflo TR-800 or CleanSpace EX PAPRs in accordance with 30 CFR 48.8. Training of new miners on the requirements of the PDO granted by MSHA in accordance with 30 CFR 48.5, and training of experienced miners on the requirements of the PDO granted by MSHA in accordance with 30 CFR 48.6 shall be given. The operator shall keep a record of such training and provide such record to MSHA upon request.

(k) The miners at Rockwell Mining LLC, Eagle #3 Mine, are not represented by a labor organization and there are no representatives of miners at the mine. A copy of this petition has been posted on the bulletin board at Rockwell Mining LLC, Eagle #3 Mine, on November 21, 2024.

The petitioner asserts that the alternative method in the petition will at all times guarantee no less than the same measure of protection afforded to the miners by the standard.

Song-ae Aromie Noe,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. 2024-29029 Filed 12-10-24; 8:45 am]

BILLING CODE 4520-43-P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petition for Modification of Application of Existing Mandatory Safety Standards

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice.

SUMMARY: This notice is a summary of a petition for modification submitted to the Mine Safety and Health Administration (MSHA) by Rockwell Mining, LLC.

DATES: All comments on the petition must be received by MSHA's Office of Standards, Regulations, and Variances on or before January 10, 2025.

ADDRESSES: You may submit comments identified by Docket No. MSHA-2024-0102 by any of the following methods:

1. *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments for MSHA-2024-0102.

2. *Fax:* 202-693-9441.

3. *Email:* petitioncomments@dol.gov.

4. *Regular Mail or Hand Delivery:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202-5452.

Attention: S. Aromie Noe, Director, Office of Standards, Regulations, and Variances. Persons delivering documents are required to check in at the receptionist's desk, 4th Floor West. Individuals may inspect copies of the petition and comments during normal business hours at the address listed above. Before visiting MSHA in person, call 202-693-9455 to make an appointment.

FOR FURTHER INFORMATION CONTACT: S. Aromie Noe, Office of Standards,

Regulations, and Variances at 202-693-9440 (voice), Petitionsformodification@dol.gov (email), or 202-693-9441 (fax). [These are not toll-free numbers.]

SUPPLEMENTARY INFORMATION: Section 101(c) of the Federal Mine Safety and Health Act of 1977 and title 30 of the Code of Federal Regulations (CFR) part 44 govern the application, processing, and disposition of petitions for modification.

I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary of Labor determines that:

1. An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or

2. The application of such standard to such mine will result in a diminution of safety to the miners in such mine.

In addition, sections 44.10 and 44.11 of 30 CFR establish the requirements for filing petitions for modification.

II. Petition for Modification

Docket Number: M-2024-077-C.

Petitioner: Rockwell Mining, LLC, 250 West Main Street, Suite 2000, Lexington, KY 40507.

Mine: Eagle #3 Mine, MSHA ID No. 46-09427, located in Wyoming County, West Virginia.

Regulation Affected: 30 CFR 75.507-1(a), Permissible electric equipment.

Modification Request: The petitioner requests a modification of 30 CFR 75.507-1(a) to allow the use of unapproved Powered Air Purifying Respirators (PAPRs) taken into or used inby the last open crosscut or used in the return air outby the last open crosscut. Specifically, the petitioner is requesting to utilize the CleanSpace EX PAPR and sealed motor/blower/battery power pack assembly, and the 3M Versaflo TR-800 Intrinsically Safe PAPR motor/blower and battery with battery pack.

The petitioner states that:

(a) The 3M Versaflo TR-800 PAPR with motor/blower and battery qualifies as intrinsically safe.

(b) The CleanSpace EX PAPR also qualifies as intrinsically safe.

(c) Both the CleanSpace EX and the 3M Versaflo TR-800 PAPRs provide a constant flow of air inside the mask or helmet. This airflow provides

respiratory protection and comfort in hot working conditions.

(d) Neither the 3M Versaflo TR-800 nor the CleanSpace EX PAPR is MSHA-approved as permissible.

(e) Neither the 3M nor the CleanSpace is pursuing MSHA approval.

(f) Eagle #3 Mine currently makes available to all miners NIOSH-approved high efficiency 100 series respirators to protect the miners against potential exposure to respirable coal mine dust, including crystalline silica, during normal mining conditions. Eagle #3 Mine desires to expand the miners' option in choosing a respirator that provides the greatest degree of protection as well as comfort while being worn. Powered PAPRs provide a constant flow of filtered air and serve that purpose.

(g) On June 17, 2024, MSHA's final rule *Lowering Miners' Exposure to Respirable Crystalline Silica and Improving Respiratory Protection* took effect. The rule requires the mine operator to have a written respiratory protection program in place when miners are required to use respirators. Adding the CleanSpace EX and the 3M TR-800 Versaflo PAPRs to the respiratory protection program as additional options will provide the miners with alternatives to the series 100 high efficiency respirators already in use at the mine. The PAPRs will also serve as a respirator option to protect the miners with facial hair who may not be able to pass the "fit test" requirement of the program. In addition, the positive flow of filtered air provided by the PAPRs will provide a solution for the miners who are unable to wear a tight-fitting respirator.

(h) Since the 3M Airstream Headgear-Mounted PAPR System has been discontinued by the manufacturer, there are no other MSHA-approved units available that can be taken into or used inby the last open crosscut or in the return air outby the last open crosscut.

(i) The alternative method in the petition will at all times guarantee no less than the same measure of protection afforded to the miners by the standard.

The petitioner proposes the following alternative method:

(a) All miners who will be involved with or affected by the use of the 3M Versaflo TR-800 or CleanSpace EX PAPRs shall receive training in accordance with 30 CFR 48.7 on the requirements of the Proposed Decision and Order (PDO) granted by MSHA and manufacturer guidelines. Such training shall be completed before any 3M Versaflo TR-800 or CleanSpace EX PAPR can be used inby the last open crosscut or in the return air outby the

last open crosscut. The operator shall keep a record of such training and provide such record to MSHA upon request.

(b) The PAPRs, battery packs, and all associated wiring and connections shall be inspected before use to determine if there is any damage to the units that would negatively impact intrinsic safety. If any defects are found, the PAPR shall be removed from service.

(c) A separate logbook shall be maintained for the 3M Versaflo TR-800 and CleanSpace EX PAPRs that will be kept with the equipment, or in a location with other mine record books and shall be made available to MSHA upon request. The equipment shall be examined at least weekly by a qualified person as defined in 30 CFR 75.512-1 and the examination results recorded in the logbook. Examination records shall be maintained for one year.

(d) All 3M Versaflo TR-800 and CleanSpace EX PAPRs to be used inby the last open crosscut or in the return air outby the last open crosscut shall be physically examined prior to initial use and each unit shall be assigned a unique identification number. Each unit shall be examined by the person to operate the equipment, prior to taking the equipment underground, to ensure that the equipment is used according to the original equipment manufacturer's recommendations and maintained in a safe operating condition. The examinations for the 3M Versaflo TR-800 PAPRs shall include:

(1) Check the equipment for any physical damage and the integrity of the case.

(2) Remove the battery and inspect for corrosion.

(3) Inspect the contact points to ensure a secure connection to the battery.

(4) Reinsert the battery and power up and shut down to ensure proper connections.

(5) Check the battery compartment cover or battery attachment to ensure that it is securely fastened.

(6) For equipment utilizing lithium type cells, ensure that lithium cells and/or packs are not damaged or swelled in size.

The CleanSpace EX PAPR does not have an accessible/removable battery. The internal battery and motor/blower assembly are both contained within the "power unit" assembly, and the battery cannot be removed, reinserted or fastened. Therefore, examination of the CleanSpace EX PAPR shall include any indications of physical damage.

(e) All 3M Versaflo TR-800 and CleanSpace EX PAPR units shall be

serviced according to the manufacturer's recommendations.

(f) Prior to energizing and during use of the 3M Versaflo TR-800 or the CleanSpace EX PAPR inby the last open crosscut or in the return air outby the last open crosscut, procedures in accordance with 30 CFR 75.323 shall be followed.

(g) Only the 3M TR-830 Battery Pack, which meets lithium battery safety standard UL 1642 or IEC 62133, in the 3M Versaflo TR-800 PAPR shall be used. Only the CleanSpace EX Power Unit, which meets lithium battery safety standard UL 1642 or IEC 62133, in the CleanSpace EX shall be used.

(h) If battery packs for the 3M Versaflo TR-800 PAPR are provided, all battery "change outs" shall occur in intake air outby the last open crosscut.

(i) The following maintenance and use conditions shall apply to equipment containing lithium type batteries:

(1) Neither the 3M TR-830 Battery Pack nor the CleanSpace EX Power Unit shall be disassembled or modified by anyone other than permitted by the manufacturer of the equipment.

(2) The 3M TR-830 Battery Pack shall be charged only in an area free of combustible material and in intake air outby the last open crosscut. The 3M TR-830 Battery Pack shall be charged only by a manufacturer's recommended battery charger, such as:

(i) 3M Battery Charger Kit TR-641N, which includes one 3M Charger Cradle TR-640 and one 3M Power Supply TR-941N; or

(ii) 3M 4-Station Battery Charger Kit TR-644N, which includes four 3M Charger Cradles TR-640 and one 3M 4-Station Battery Charger Base/Power Supply TR-944N.

(3) The CleanSpace EX internal battery, which is contained within the power unit assembly, shall be charged in areas located outby the last open crosscut in intake air, and only the manufacturer's recommended battery chargers shall be used, such as the CleanSpace EX Battery Charger, Product Code PAF-0066.

(4) Neither the 3M TR-830 Battery Pack nor the CleanSpace EX power unit which contains the internal battery, shall be exposed to water, allowed to get wet or immersed in liquid. This does not preclude incidental exposure of the 3M TR-830 Battery Pack or the CleanSpace EX power unit assembly.

(5) Neither the 3M Versaflo TR-800 PAPR nor the CleanSpace EX PAPR, including the internal battery, shall be used, charged or stored in locations where the manufacturer's recommended temperature limits are exceeded. Neither the 3M Versaflo TR-800 PAPR

or the CleanSpace EX PAPR shall be placed in direct sunlight nor stored near a source of heat.

(j) Annual retraining shall be given to all miners who will be involved with or affected by the use of the 3M Versaflo TR-800 or CleanSpace EX PAPRs in accordance with 30 CFR 48.8. Training of new miners on the requirements of the PDO granted by MSHA in accordance with 30 CFR 48.5, and training of experienced miners on the requirements of the PDO granted by MSHA in accordance with 30 CFR 48.6 shall be given. The operator shall keep a record of such training and provide such record to MSHA upon request.

(k) The miners at Rockwell Mining, LLC, Eagle #3 Mine are not represented by a labor organization and there are no representatives of miners at the mine. A copy of this petition has been posted on the bulletin board at Rockwell Mining, LLC, Eagle #3 Mine, on November 21, 2024.

The petitioner asserts that the alternative method in the petition will at all times guarantee no less than the same measure of protection afforded to the miners by the standard.

Song-ae Aromie Noe,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. 2024-29028 Filed 12-10-24; 8:45 am]

BILLING CODE 4520-43-P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA-24-0026; NARA-2025-010]

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice of certain Federal agency requests for records disposition authority (records schedules). We publish notice in the **Federal Register** and on *regulations.gov* for records schedules in which agencies propose to dispose of records they no longer need to conduct agency business. We invite public comments on such records schedules.

DATES: We must receive responses on the schedules listed in this notice by January 27, 2025.

ADDRESSES: To view a records schedule in this notice, or submit a comment on

one, use the following address: <https://www.regulations.gov/docket/NARA-24-0026/document>. This is a direct link to the schedules posted in the docket for this notice on *regulations.gov*. You may submit comments by the following method:

• **Federal eRulemaking Portal:** <https://www.regulations.gov>. On the website, enter either of the numbers cited at the top of this notice into the search field. This will bring you to the docket for this notice, in which we have posted the records schedules open for comment. Each schedule has a 'comment' button so you can comment on that specific schedule. For more information on *regulations.gov* and on submitting comments, see their FAQs at <https://www.regulations.gov/faq>.

If you are unable to comment via *regulations.gov*, you may email us at request.schedule@nara.gov for instructions on submitting your comment. You must cite the control number of the schedule you wish to comment on. You can find the control number for each schedule in parentheses at the end of each schedule's entry in the list at the end of this notice.

FOR FURTHER INFORMATION CONTACT:

Eddie Germino, Strategy and Performance Division, by email at regulation_comments@nara.gov or at 301-837-3758. For information about records schedules, contact Records Management Operations by email at request.schedule@nara.gov or by phone at 301-837-1799.

SUPPLEMENTARY INFORMATION:

Public Comment Procedures

We are publishing notice of records schedules in which agencies propose to dispose of records they no longer need to conduct agency business. We invite public comments on these records schedules, as required by 44 U.S.C. 3303a(a), and list the schedules at the end of this notice by agency and subdivision requesting disposition authority.

In addition, this notice lists the organizational unit(s) accumulating the records or states that the schedule has agency-wide applicability. It also provides the control number assigned to each schedule, which you will need if you submit comments on that schedule. We have uploaded the records schedules and accompanying appraisal memoranda to the *regulations.gov* docket for this notice as "other" documents. Each records schedule contains a full description of the records at the file unit level as well as their proposed disposition. The appraisal

memorandum for the schedule includes information about the records.

We will post comments, including any personal information and attachments, to the public docket unchanged. Because comments are public, you are responsible for ensuring that you do not include any confidential or other information that you or a third party may not wish to be publicly posted. If you want to submit a comment with confidential information or cannot otherwise use the *regulations.gov* portal, you may contact request.schedule@nara.gov for instructions on submitting your comment.

We will consider all comments submitted by the posted deadline and consult as needed with the Federal agency seeking the disposition authority. After considering comments, we may or may not make changes to the proposed records schedule. The schedule is then sent for final approval by the Archivist of the United States. After the schedule is approved, we will post on *regulations.gov* a "Consolidated Reply" summarizing the comments, responding to them, and noting any changes we made to the proposed schedule. You may elect at *regulations.gov* to receive updates on the docket, including an alert when we post the Consolidated Reply, whether or not you submit a comment. If you have a question, you can submit it as a comment, and can also submit any concerns or comments you would have to a possible response to the question. We will address these items in consolidated replies along with any other comments submitted on that schedule.

We will post schedules on our website in the Records Control Schedule (RCS) Repository, at <https://www.archives.gov/records-mgmt/rcs>, after the Archivist approves them. The RCS contains all schedules approved since 1973.

Background

Each year, Federal agencies create billions of records. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval. Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. The records schedules authorize agencies to preserve records of continuing value in the National Archives or to destroy, after a specified period, records lacking continuing administrative, legal, research, or other

value. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

Agencies may not destroy Federal records without the approval of the Archivist of the United States. The Archivist grants this approval only after thorough consideration of the records' administrative use by the agency of origin, the rights of the Government and of private people directly affected by the Government's activities, and whether or not the records have historical or other value. Public review and comment on these records schedules is part of the Archivist's consideration process.

Schedules Pending

1. Department of Defense, Defense Contract Audit Agency, Portfolio Management and Integrated Risk Management System (DAA-0372-2024-0001).
2. Department of Defense, Office of the Secretary of Defense, Records of Unidentified Anomalous Phenomena (DAA-0330-2023-0002).
3. Department of Energy, Federal Energy Regulatory Commission, Electric Reliability Standards (DAA-0138-2025-0003).
4. Department of Energy, Federal Energy Regulatory Commission, FERC Form 65-A and 65-B (PH Dockets) (DAA-0138-2024-0016).
5. Department of the Treasury, Internal Revenue Service, Issue Management System (DAA-0058-2024-0006).
6. National Aeronautics and Space Administration, Agency-wide, Agency Archival Collections (DAA-0255-2024-0002).

William P. Fischer,

Acting Chief Records Officer for the U.S. Government.

[FR Doc. 2024-29104 Filed 12-10-24; 8:45 am]

BILLING CODE 7515-01-P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50-275 and 50-323; NRC-2024-0148]

**Pacific Gas & Electric Company;
Diablo Canyon Nuclear Power Plant,
Units 1 and 2; Petition**

AGENCY: Nuclear Regulatory Commission.

ACTION: 10 CFR 2.206 request; supplement.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is giving notice that by petition dated March 4, 2024, as supplemented on June 7, 2024, and October 30, 2024, San Luis Obispo Mothers for Peace, Friends of the Earth, and Environmental Working Group (the petitioners) requested that the NRC exercise its supervisory authority to order the immediate closure of Diablo Canyon Nuclear Power Plant, Units 1 and 2 (Diablo Canyon) due to "the unacceptable risk of a seismically induced severe accident." The Commission referred the request to the enforcement petition process under NRC regulations. Details regarding NRC review of the petitioners' October 30, 2024, supplement is included in the Supplementary Information section of this document.

DATES: December 10, 2024.

ADDRESSES: Please refer to Docket ID NRC-2024-0148 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to <https://www.regulations.gov> and search for Docket ID NRC-2024-0148. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301-415-0624; email: Stacy.Schumann@nrc.gov. For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at <https://www.nrc.gov/reading-rm/adams.html>. To begin the search, select "Begin Web-based ADAMS Search." For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1-800-397-4209, at 301-415-4737, or by email to PDR.Resource@nrc.gov. For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the "Availability of Documents" section of this document.

- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to PDR.Resource@nrc.gov or call 1-800-397-4209 or 301-415-4737, between 8 a.m. and 4 p.m. eastern

time (ET), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT:

Perry Buckberg, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington DC 20555-0001; telephone: 301-415-1383; email: Perry.Buckberg@nrc.gov.

I. Supplementary Information

On March 4, 2024, the petitioners filed a petition requesting that the NRC exercise its supervisory authority to order the immediate closure of Diablo Canyon due to "the unacceptable risk of a seismically induced severe accident." An order was issued on March 12, 2024, referring the request to the enforcement petition process under section 2.206 of title 10 of the *Code of Federal Regulations* (10 CFR), "Requests for action under this subpart."

On August 27, 2024, the NRC staff issued an Acknowledgement Letter that summarized the evaluation activities of the March 4, 2024, petition, as supplemented on June 7, 2024, and described that the Petition Review Board (PRB) had accepted four specific concerns for further review.

Consistent with Section IV.B "Schedule," of the handbook for NRC Management Directive (MD) 8.11, "Review Process for 10 CFR 2.206 Petitions," and its associated Directive Handbook 8.11, the PRB intended to issue the proposed director's decision for comment within 120 days after issuing the August 27, 2024, acknowledgment letter. On October 24, 2024, Pacific Gas & Electric Company (PG&E) provided a voluntarily submittal to the NRC related to the PRB review of the petition. On October 31, 2024, the petitioners submitted a supplement to the petition. The PRB has considered information in the new supplement and intends to address the following supplemental concerns in the proposed director's decision:

1. PG&E's 2015 and 2024 seismic source characterizations omitted modern deformation modeling and failed to use globally-calibrated strainrate-to-seismicity conversions, that would have prevented their serious underestimates.

2. Additional justification supporting the use of the Noto Peninsula earthquake as a model characteristic thrust earthquake for the Irish Hills.

Consistent with Section III.I.6, "Supplements to the Petition," of the handbook for MD 8.11, the PRB now intends to issue the proposed director's decision for comment within 120 days of the issuance of the supplemental acknowledgement letter.

II. Availability of Documents

The documents identified in the following table are available to

interested persons through ADAMS, as indicated.

Document description	ADAMS accession No.
Petition submitted by San Luis Obispo Mothers for Peace, Friends of the Earth, and Environmental Working Group, dated March 4, 2024.	ML24067A066.
NRC SECY Order referring the petition to the 10 CFR 2.206 process, dated March 12, 2024	ML24072A529.
Petition Supplement, dated June 7, 2024	ML24162A079.
NRC Management Directive 8.11, "Review Process for 10 CFR 2.206 Petitions," dated March 1, 2019	ML18296A043.
NRC Acknowledgement Letter dated August 27, 2024	ML24205A066.
PG&E voluntarily submittal dated October 24, 2024	ML24298A234.
Petition Supplement, dated October 30, 2024	ML24305A187.

Dated: December 5, 2024.

For the Nuclear Regulatory Commission.

Michael X. Franovich,

Acting Deputy Director, Office of Nuclear Reactor Regulation.

[FR Doc. 2024–29066 Filed 12–10–24; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2025–598 and K2025–597; MC2025–599 and K2025–598; MC2025–600 and K2025–599; MC2025–601 and K2025–600; MC2025–602 and K2025–601; MC2025–603 and K2025–602; MC2025–604 and K2025–603; MC2025–605 and K2025–604; MC2025–606 and K2025–605; MC2025–607 and K2025–606; MC2025–608 and K2025–607; MC2025–609 and K2025–608; MC2025–610 and K2025–609; MC2025–611 and K2025–610; MC2025–612 and K2025–611; MC2025–625 and K2025–624; MC2025–626 and K2025–625; MC2025–627 and K2025–626; MC2025–628 and K2025–627]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* December 12, 2024.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at <http://www.prc.gov>. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT:

David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:**Table of Contents**

- I. Introduction
- II. Public Proceeding(s)
- III. Summary Proceeding(s)

I. Introduction

Pursuant to 39 CFR 3041.405, the Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to Competitive negotiated service agreement(s). The request(s) may propose the addition of a negotiated service agreement from the Competitive product list or the modification of an existing product currently appearing on the Competitive product list.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (<http://www.prc.gov>). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.¹

Section II identifies the docket number(s) associated with each Postal Service request, if any, that will be reviewed in a public proceeding as defined by 39 CFR 3010.101(p), the title of each such request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each such request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 and 39 CFR 3000.114 (Public Representative). Section II also establishes comment deadline(s) pertaining to each such request.

The Commission invites comments on whether the Postal Service's request(s) identified in Section II, if any, are consistent with the policies of title 39. Applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3041.

¹ See Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

Comment deadline(s) for each such request, if any, appear in Section II.

Section III identifies the docket number(s) associated with each Postal Service request, if any, to add a standardized distinct product to the Competitive product list or to amend a standardized distinct product, the title of each such request, the request's acceptance date, and the authority cited by the Postal Service for each request. Standardized distinct products are negotiated service agreements that are variations of one or more Competitive products, and for which financial models, minimum rates, and classification criteria have undergone advance Commission review. See 39 CFR 3041.110(n); 39 CFR 3041.205(a). Such requests are reviewed in summary proceedings pursuant to 39 CFR 3041.325(c)(2) and 39 CFR 3041.505(f)(1). Pursuant to 39 CFR 3041.405(c)-(d), the Commission does not appoint a Public Representative or request public comment in proceedings to review such requests.

II. Public Proceeding(s)

1. *Docket No(s).*: MC2025–598 and K2025–597; *Filing Title*: USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 875 to the Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date*: December 4, 2024; *Filing Authority*: 39 U.S.C. 3642, 39 CFR 3035.105, and 39 CFR 3041.310; *Public Representative*: Maxine Bradley; *Comments Due*: December 12, 2024.

2. *Docket No(s).*: MC2025–599 and K2025–598; *Filing Title*: USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 876 to the Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date*: December 4, 2024; *Filing Authority*: 39 U.S.C. 3642, 39 CFR 3035.105, and 39 CFR 3041.310; *Public Representative*: Maxine Bradley; *Comments Due*: December 12, 2024.

None. See Section II for public proceedings.

This Notice will be published in the **Federal Register**.

Erica A. Barker,
Secretary.

[FR Doc. 2024–29010 Filed 12–10–24; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

International Product Change—Priority Mail Express International, Priority Mail International & First-Class Package International Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a Priority Mail Express International, Priority Mail International & First-Class Package International Service contract to the list of Negotiated Service Agreements in the Competitive Product List in the Mail Classification Schedule.

DATES: Date of notice: December 10, 2024.

FOR FURTHER INFORMATION CONTACT: Christopher C. Meyerson, (202) 268–7820.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 25, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express International, Priority Mail International & First-Class Package International Service Contract 52 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–413 and K2025–411.

Christopher Doyle,
Attorney, Ethics & Legal Compliance.

[FR Doc. 2024–29051 Filed 12–10–24; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–101820; File No. SR–ICC–2024–010]

Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Relating to the Governance Playbook and Seventh Amended and Restated Operating Agreement

December 5, 2024

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934,¹ and Rule 19b-4 thereunder,² notice is hereby given that on November 22, 2024, ICE Clear Credit LLC (“ICE Clear Credit” or “ICC”) 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 primarily by ICC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and to approve the proposed rule change on an accelerated basis.

I. Clearing Agency’s Statement of the Terms of Substance of the Proposed Rule Change

The principal purpose of the proposed rule change is to revise ICC’s (i) Governance Playbook (the “Playbook”), and (ii) Seventh Amended and Restated Operating Agreement (the “Operating Agreement”).

II. Clearing Agency’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICC included statements concerning the purpose of and basis for the proposed rule change, security-based swap submission, or advance notice and discussed any comments it received on the proposed rule change, security-based swap submission, or advance notice. The text of these statements may be examined at the places specified in Item IV below. ICC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.

(A) Clearing Agency’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change, Security-Based Swap Submission, or Advance Notice

(a) Purpose

The amendments are intended principally to provide for the establishment of a Nominating

Committee. ICC believes that such revisions will facilitate the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts, and transactions for which it is responsible. ICC proposes to make such changes effective following Commission approval of the proposed rule change. The proposed revisions are described in detail as follows.

I. Operating Agreement

ICC would amend and restate its Operating Agreement³ to add a Nominating Committee. As provided in revised Section 3.12 of the Operating Agreement, the Board will establish and maintain a Board level Nominating Committee which will be responsible for evaluating the independence and fitness of the persons proposed to be designated as Managers of the Board. In connection with this addition, the amendments would add a definition of ‘Nominating Committee’ to Section 1.01 of the Operating Agreement. Furthermore, proposed Section 3.12(a) of the Operating Agreement provides that the Nominating Committee will be composed of at least three members, a majority of which are required to be independent (*i.e.*, either a Parent Independent Manager⁴ or a Risk Committee Independent Manager⁵). Two of the members of the Nominating Committee will be required to be Managers nominated to the Board by the Risk Committee, and one of these Risk Committee nominees will be required to be a Risk Committee Independent Manager, and the other Risk Committee nominee is not required to be an independent (*i.e.*, they may be a Risk Committee Non-Independent Manager⁶). The chairperson of the

³ Following Commission approval, ICC proposes to implement the collective changes to the Operating Agreement proposed herein and the changes to the Operating Agreement described in ICC rule filing SR–ICC–2024–009 (approved by the Commission and available here: <https://www.federalregister.gov/documents/2024/10/24/2024-24638/self-regulatory-organizations-ice-clear-credit-llc-order-approving-proposed-rule-change-as-modified>) in the same version of the amended and restated Operating Agreement.

⁴ As defined in the Operating Agreement, ‘Parent Independent Manager’ means a Manager of the Board elected by the Parent that meets the independence requirements of each of the New York Stock Exchange listing standards, the Securities Exchange Act of 1934, and Intercontinental Exchange, Inc. Board of Director Governance Principles (collectively, the “Independence Standards”).

⁵ As defined in the Operating Agreement, ‘Risk Committee Independent Manager’ means a Manager of the Board nominated by the Risk Committee that meets the Independence Standards.

⁶ As defined in the Operating Agreement, ‘Risk Committee Non-Independent Manager’ means a

Continued

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

Nominating Committee will be a Parent Independent Manager. Proposed Section 3.12(b) of the Operating Agreement provides that the Nominating Committee will have access to the records of ICC, as well as access to Managers of the Board, and ICC officers and employees. The Nominating Committee will meet as needed to fulfill its duties, but in no event less than annually. Proposed Section 3.12(c) of the Operating Agreement provides for the limitation of the fiduciary duties on the members of the Nominating Committee. Such proposed limitation of fiduciary duties on members of the Nominating Committee is analogous to the current limitation of fiduciary duties provided in the Operating Agreement for members of the ICC Audit Committee and Managers of the Board. Specifically, proposed Section 3.12(c) provides that notwithstanding any provision of, any duty otherwise existing under, or anything to the contrary at applicable law (whether common or statutory), in equity or otherwise, the Operating Agreement is not intended to, and does not, create or impose any fiduciary duties on the members of the Nominating Committee. Further, each of the Parent and the other parties to or bound under the Operating Agreement waives any and all fiduciary duties that, absent such waiver or otherwise, may be implied or may otherwise apply under applicable law (whether common or statutory), in equity or otherwise to the members of the Nominating Committee. In addition, the parties to the Operating Agreement agree that the only duties and obligations of the members of the Nominating Committee to ICC, the Parent, ICC Clearing Participants, or any other person under applicable law (whether common or statutory), in equity or otherwise, are limited solely to performing those contractual duties expressly set forth in the Operating Agreement. Proposed Section 3.12(c) further provides that that none of the foregoing waivers or limitations shall be construed as eliminating the implied covenant of good faith and fair dealing.

Furthermore, the amendments would modify Section 3.02 of the Operating Agreement to add the Nominating Committee's role in the evaluation of potential members of the Board. Specifically, Section 3.02(a) of the Operating Agreement would be revised to indicate that the Parent shall not elect any person as a Manager of the Board until the Nominating Committee

provides their evaluation of such person to the Parent. In addition, the amendments add the related definitions of 'Nominating Committee Evaluation' and 'Nominating Committee Charter' ⁷ to Section 1.01 of the Operating Agreement.

In addition, the amendments would add a definition of 'SEC' to Section 1.01 of the Operating Agreement. Furthermore, the amendments would modify the current definition of 'Governmental Authority' contained in Section 1.01 of the Operating Agreement to include reference to the SEC to reflect the list of governmental authorities more accurately with jurisdiction over ICC. Lastly, the amendments would add a reference to members of the Nominating Committee to the definition of 'Covered Persons' contained in Section 1.01 of the Operating Agreement. Such change properly adds members of the new Nominating Committee to the list of persons to which the liability and indemnification provisions (contained in Article VI of the Operating Agreement) apply.

II. Governance Playbook

ICE Clear Credit would also amend the Playbook to conform to the amendments to the Operating Agreement discussed above. Section I and Section III of the Playbook would be revised to add reference to Commission Rule 17Ad-25 ⁸ to the list of applicable regulations covering the governance structure of ICC. Such change properly adds reference to new Commission Rule 17Ad-25 ⁹ as such rule applies to the governance structure of Commission registered clearing agencies, including ICC. Section II of the Playbook would be amended to add the new Nominating Committee to the existing chart summarizing ICC's governance structure. Section III of the Playbook would be amended to add the defined term 'Manager' to reference any individual member of the Board. Furthermore, ICC's definition of the independence standards it applies to independent Managers of the Board would be revised to include a reference to Commission Rule 17Ad-25 ¹⁰ which provides for independence requirements for Commission registered clearing agencies, including ICC. The

⁷ 'Nominating Committee Evaluation' means, in respect of any person, the Nominating Committee's written evaluation of such person's independence and fitness for election as a Manager, based on the standards and pursuant to the process set forth in the Nominating Committee Charter. 'Nominating Committee Charter' means the Charter of the Nominating Committee.

⁸ 17 CFR 240.17ad-25.

⁹ *Id.*

¹⁰ *Id.*

amendments would also formalize the defined term 'Independence Standards.' Section III.A. of the Playbook would also be amended to remove the fitness standards for serving as a Manager on ICC's Board and, as a result, the related definition of 'Qualified Manager' would also be removed. As a replacement for these specified fitness standards, the amendments would add a reference that the fitness standards for serving as a Manager, and the criteria for selecting new Managers will be specified by the new Nominating Committee and thereafter approved by the Board. Such process for having Manager fitness standards specified by the Nominating Committee is intended to comply with new Commission Rule 17Ad-25(c)(3) ¹¹ which requires this process. The amendments would add the defined term 'Manager Fitness Standards' to refer to these Nominating Committee specified and Board approved fitness standards for Managers. The Nominating Committee will be formed, and their process of specifying the Manager Fitness Standards will occur, following Commission approval, and ICC implementation, of these proposed rule changes. Once such Manager Fitness Standards are specified by the new Nominating Committee and are approved by the Board, they will be included as new Appendix 1 to the Playbook. Due to the addition of Appendix 1, subsequent appendices would be renumbered and references to such appendices would be updated as well.

Section III.B. of the Playbook would be revised to add the Nominating Committee's role in the evaluation of potential members of the Board. Specifically, the Nominating Committee shall provide their evaluation and recommendation of an individual they believe to be qualified to become a Manager of the Board to the Parent, consistent with the Manager Fitness Standards. Furthermore, such section would be amended to reference that the Nominating Committee may consult with the Board, the Parent, the Risk Committee and ICC management regarding the skills, experience, and incentives of the potential new Manager. As a result of the addition of the Nominating Committee and its role in evaluating potential new Managers, the provisions in Section III.B. of the Playbook regarding the Parent's consultation and information sharing related to potential new Managers is proposed to be removed as this role will be assumed by the Nominating Committee. In addition, the

Manager of the Board nominated by the Risk Committee that is not required to meet the Independence Standards.

¹¹ 17 CFR 240.17ad-25(c)(3).

amendments will include a reference that the Parent will document their election of a new Manager, typically through a unanimous written consent of the directors of the Parent's general partner, to provide additional transparency on current practices. Section III of the Playbook would also be amended to add the Nominating Committee to the list of parties that will be notified regarding the removal or resignation of a current Manager. With respect to the election of Managers designated by the Risk Committee, the amendments would add the Nominating Committee to the list of parties that would receive the biographical information of potential Managers designated by the Risk Committee. The amendments would also indicate that the Nominating Committees shall provide their evaluation and recommendation of individuals designated by the Risk Committee for a Manager position.

Section III of the Playbook would also be revised with respect to the annual election process of Managers by the Parent, noting that in connection with this process, the Nominating Committee will provide the Parent with their evaluation of any proposed new Manager which will be based on the Board approved Manager Fitness Standards. With respect to any re-designated Manager, the Nominating Committee will be added to the list of parties that will receive details from ICC management regarding each re-designated Manager's performance/attendance from the previous year, including information specific to Nominating Committee performance such as results from the Nominating Committee evaluation process.

Section III.E. of the Playbook would be revised to add clarifying information to ICC's conflicts of interest process regarding potential Manager conflicts. Specifically, Section III.E. would be amended to clarify that ICC's Code of Business Conduct and Ethics policy applicable to Managers provides for the disclosure and resolution of conflicts of interest, and further clarifies that resolution of Manager conflicts of interest means mitigation or elimination.¹² Such section will also be amended to indicate that the ICC legal department will maintain documentation of any conflicts of

interest disclosed by Managers and the mitigation or elimination thereof.

Section III.F. of the Playbook would be revised to add the Nominating Committee's role in evaluating and recommending to the Board if each Manager, and any nominee for Manager, qualifies as independent under the Independence Standards. Such evaluation by the Nominating Committee shall be provided to the Board to aid in the Board's independence determination with respect to each Manager. In addition, ICC proposes amendments to clarify that (i) Nominating Committee members shall recuse themselves from evaluating their own independence and (ii) Managers shall recuse themselves from the determination of their own independence. Such section would also be modified to use the defined term Independence Standards. Furthermore, the independence qualifications described in Section III.F. of the Playbook would be modified to incorporate additional independence qualification definitions provided in new Commission Rule 17Ad-25(a), for example the definition of 'family member.' To ensure compliance with the independence qualification requirement of new Commission Rule 17Ad-25(a),¹³ Section III.F. of the Playbook would be augmented with the following additional relationships that would disqualify an individual from being deemed independent:

- In addition to an individual that is employee of an ICE Group company, an individual that otherwise receives compensation from an ICE Group company.
- An individual with a family member that is (or has been in the year prior to the determination date) an employee or otherwise receives compensation from any ICE Group company.
- An individual, or a family member of such individual, that is or has been in the year prior to the determination date, receiving payments from ICE Group companies that could reasonably affect the independent judgement or decision-making of the individual (other than director and committee fees of pension or other forms of deferred compensation for prior services not contingent on continued service).
- In addition to an individual that is an employee of a firm that is the ICE Group's internal or external auditor, an individual that has a family member who is either a partner of such auditing firm or a current employee of such auditing firm, or the individual has a

family member that was within the prior year from the determination date an employee or such auditing firm and personally worked on the ICE Group audit within that time.

- An individual with a family member that is, or has been within the prior year from the determination date, employed as an executive officer of another company where any of ICC's executive officers at the same time serves or served on that company's compensation committee.

- An individual, or a family member of such individual, that is or has been within the prior year from the determination date, a partner or controlling shareholder on any organization to or from which an ICE Group company is making or receiving payments for property or services other than: (i) payments arising solely from investments in the ICE Group company securities; or (ii) payments under non-discretionary charitable contribution matching programs.

Further amendments would be made to the description of the ICC annual independence questionnaire process to add the Nominating Committee's role with respect to evaluating and recommending to the Board if each Manager qualifies as independent under the Independence Standards. Specifically, the section would be amended to indicate that the completed independence questionnaires will be provided to the Nominating Committee to aid in their evaluation/recommendation process. In addition, ICC proposes amendments to describe the process followed should the circumstances regarding an existing Manager's independence change. Specifically, in such event, the Nominating Committee shall re-evaluate and recommend to the Board whether such Manager continues to qualify as independent under the Independence Standards. Following such re-evaluation and recommendation by the Nominating Committee, the Board shall determine if such Manager continues to be independent.

With respect to the Board performance review process described in Section III.G. of the Playbook, such section would be revised to indicate that the ICC General Counsel will provide a summary of all Board performance survey results (including survey results related to individual Board member performance) to the Nominating Committee.

In addition, Section IV of the Playbook would be revised to add the Nominating Committee to the list of ICC's primary governance committees. Furthermore, Section IV.B. would be

¹² Please note that the identification and resolution of conflicts of interest covered in the Playbook relate to conflicts of interest involving Managers. With respect to potential conflicts of interest involving ICC staff (including senior managers), such employee conflicts of interest are covered in other ICC policies and procedures outside of the Playbook.

¹³ 17 CFR 240.17ad-25(a).

added to the Playbook to describe the Nominating Committee's purpose, its membership composition, the new Nominating Committee member administration procedures, the Nominating Committee meeting frequency, the Nominating Committee performance review process, and the documents relevant to the Nominating Committee. The additional sections describing the Nominating Committee's purpose, its composition and its meeting frequency reflect the same changes made to the Operating Agreement described above. The section describing the new Nominating Committee member administrative procedures provides an overview of the steps that will be taken by the ICC legal department to onboard a new member of the Nominating Committee (*e.g.*, updating distribution lists and updating the permissions of such individual on the Diligent platform which is used to distribute materials to the Board and other committees, including the Nominating Committee). The proposed revisions also add a description of the Nominating Committee performance review process and procedures. Such performance review process is conducted on an annual basis and includes each member of the Nominating Committee completing a self-evaluation survey. The annual review process is designed to gather feedback on the operation of the Nominating Committee and solicit suggestions for improvements, as well as provide a forum for the identification of problems with respect to the performance of the Nominating Committee. Such process includes the compilation of a summary of the survey responses received from the Nominating Committee by the ICC legal department, which are presented to the entire Nominating Committee. Such summary shall include disclosure of the minimum, maximum, and average score for each survey item, as well as a summary of relevant comments received throughout the process. The proposed process and procedures for the Nominating Committee annual performance review process are fully analogous to the performance review processes currently in place for both the Board and the ICC Audit Committee. Lastly the revisions add information related to relevant documents of the Nominating Committee (*e.g.*, meeting agendas, minutes and meeting materials), noting that such relevant documents will be maintained by the ICC legal department on their shared network drive.

ICC also proposes a number of other drafting clarifications and conforming changes, such as updating use of relevant defined terms, rule references and other non-substantive drafting improvements, would also be made throughout the Playbook. Various provisions would also be relabeled or renumbered in the Playbook. The amendments would also update the revision history section to the Playbook.

(b) Statutory Basis

ICE Clear Credit believes that the proposed amendments to the Operating Agreement and the Playbook are consistent with the requirements of Section 17A of the Securities Exchange Act of 1934 (the "Act")¹⁴ and the regulations thereunder applicable to it. In particular, Section 17A(b)(3)(F) of the Act¹⁵ requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, the safeguarding of securities and funds in the custody or control of the clearing agency or for which it is responsible, and the protection of investors and the public interest.

The proposed amendments are designed to reflect the addition of the Nominating Committee to ICC's governance structure, consistent with requirements of new Commission Rule 17Ad-25. The amendments provide details on the purpose of the Nominating Committee and its composition. In ICC's view, the amendments will improve ICC's governance structure by reducing the likelihood that conflicts of interest may influence the Board. Thus, the proposed amendments enhance the overall risk management of ICC and are consistent with the prompt and accurate clearance and settlement of securities transactions and derivatives agreements, contracts and transactions, the safeguarding of securities and funds which are in the custody or control of ICC or for which it is responsible, and the protection of investors and the public interest in the operation of clearing services, within the meaning of Section 17A(b)(3)(F) of the Act.¹⁶

The proposed amendments are also consistent with relevant provisions of Rule 17Ad-22(e)(2) which provides that the "covered clearing agency shall establish, implement, maintain and enforce written policies and procedures

reasonably designed to, as applicable [. . .] provide for governance arrangements that are [c]lear and transparent"¹⁷ and "[c]onsider the interests of participants' customers . . . and other relevant stakeholders of the covered clearing agency."¹⁸ The proposed amendments are intended to add a Nominating Committee to ICC's governance structure with the role of evaluating the independence and fitness of the persons proposed to be designated as Managers of the Board. As such, the Nominating Committee is intended to improve ICC's governance structure by reducing the likelihood that conflicts of interest may influence the Board. In ICC's view, the amendments to the Operating Agreement and the Playbook are therefore consistent with the requirements of Rule 17Ad-22(e)(2).¹⁹

The proposed amendments also are consistent with the relevant provisions of Rule 17Ad-25(c) which provides that "Each registered clearing agency must establish a nominating committee and a written evaluation process whereby such nominating committee shall evaluate nominees for serving as directors and evaluate the independence of nominees and directors."²⁰ The proposed amendments add a new Nominating Committee to ICC's governance structure with the role of evaluating the independence and fitness of the persons proposed to be designated as Managers of the Board. In ICC's view, the amendments to the Operating Agreement and Playbook are therefore consistent with the requirements of Rule 17Ad-25(c).²¹

The proposed amendments also are consistent with the relevant provisions of Rule 17Ad-25(f) which provides for circumstances which would "preclude a director from being an independent director" ²² The proposed amendments would add circumstances that would disqualify individuals from being deemed independent consistent with the requirements of Rule 17Ad-25(f).²³ In ICC's view, the amendments to the Operating Agreement and Playbook are therefore consistent with the requirements of Rule 17Ad-25(f).²⁴

(B) Clearing Agency's Statement on Burden on Competition

ICE Clear Credit does not believe the proposed amendments would have any

¹⁷ 17 CFR 240.17ad-22(e)(2)(i).

¹⁸ 17 CFR 240.17ad-22(e)(2)(vi).

¹⁹ 17 CFR 240.17ad-22(e)(2).

²⁰ 17 CFR 240.17ad-25(c).

²¹ *Id.*

²² 17 CFR 240.17ad-25(f).

²³ *Id.*

²⁴ *Id.*

¹⁴ 15 U.S.C. 78q-1.

¹⁵ 15 U.S.C. 78q-1(b)(3)(F).

¹⁶ 15 U.S.C. 78q-1(b)(3)(F).

impact, or impose any burden, on competition not necessary or appropriate in furtherance of the purposes of the Act. The amendments are being adopted to add a Nominating Committee. The amendments do not otherwise change the rights and responsibilities of ICC or its market participants. Accordingly, ICE Clear Credit does not believe the amendments would affect the costs of clearing, the ability of market participants to access clearing, or the market for clearing services generally. Therefore, ICE Clear Credit does not believe the proposed rule change imposes any burden on competition that is inappropriate in furtherance of the purposes of the Act.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments relating to the proposed rule change have not been solicited or received. ICC will notify the Commission of any written comments received by ICC.

III. 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-regulations/self-regulatory-organization-rulemaking>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-ICC-2024-010 on the subject line.

Paper Comments

Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549. All submissions should refer to File Number SR-ICC-2024-010. 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 such filings will also be available for inspection and copying at the principal office of ICE Clear Credit and on ICE Clear Credit's website at <https://www.ice.com/clear-credit/regulation>.

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-ICC-2024-010 and should be submitted on or before December 31, 2024.

IV. Discussion and Commission's Findings

Section 19(b)(2)(C) of the Act requires the Commission to approve a proposed rule change of a self-regulatory organization if it finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the organization.²⁵ Under the Commission's Rules of Practice, the "burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the self-regulatory organization ['SRO'] that proposed the rule change."²⁶

The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,²⁷ and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.²⁸ Moreover, "unquestioning reliance" on an SRO's representations in a proposed rule change is not sufficient to justify

Commission approval of a proposed rule change.²⁹

After carefully considering the proposed rule change, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to ICC. More specifically, for the reasons given below, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(A) and (F) of the Act³⁰ and Rules 17Ad-22(e)(2) and 17Ad-25 thereunder.³¹

A. Consistency With Section 17A(b)(3) of the Act

Section 17A(b)(3) of the Act requires, among other things, that ICC be so organized and has the capacity to be able to comply with the provisions of the Act and the rules and regulations thereunder,³² and that ICC's rules be designed to foster cooperation and coordination with persons engaged in the clearance and settlement of securities transactions.³³ Based on review of the record, and for the reasons discussed below,³⁴ ICC's changes are consistent with ICC being so organized and having the capacity to comply with the provisions of the Act and the rules and regulations thereunder and with fostering cooperation and coordination with persons engaged in the clearance and settlement of securities transactions. Accordingly, the proposed rule change is consistent with the requirements of Sections 17A(b)(3)(A) and (F) of the Act.³⁵

B. Consistency With Rule 17Ad-22(e)(2) Under the Act

Rule 17Ad-22(e)(2) requires covered clearing agencies to, among other things, provide for governance arrangements that are clear and transparent,³⁶ establish that the board of directors and senior management have appropriate experience and skills to discharge their duties and responsibilities,³⁷ and specify clear and direct lines of responsibility.³⁸ In adopting Rule

²⁹ *Susquehanna Int'l Group, LLP v. Securities and Exchange Commission*, 866 F.3d 442, 447 (D.C. Cir. 2017) ("Susquehanna").

³⁰ 15 U.S.C. 78q-1(b)(3)(F) and 15 U.S.C. 78q-1(b)(3)(F).

³¹ 17 CFR 240.17Ad-22(e)(2) and 17 CFR 240.17Ad-25.

³² 15 U.S.C. 78q-1(b)(3)(A).

³³ 15 U.S.C. 78q-1(b)(3)(F).

³⁴ See *infra* Section IV. B. (Consistency with Rule 17Ad-22(e)(2) under the Act).

³⁵ 15 U.S.C. 78q-1(b)(3)(A) and 15 U.S.C. 78q-1(b)(3)(F).

³⁶ 17 CFR 240.17Ad-22(e)(2)(i).

³⁷ 17 CFR 240.17Ad-22(e)(2)(iv).

³⁸ 17 CFR 240.17Ad-22(e)(2)(v).

²⁵ 15 U.S.C. 78s(b)(2)(C).

²⁶ Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

²⁷ *Id.*

²⁸ *Id.*

17Ad–22(e)(2), the Commission provided guidance that a covered clearing agency generally should consider in establishing and maintaining policies and procedures, including, in part, whether the board of directors contains suitable members with the appropriate skills and incentives to fulfill the board's multiple roles, and whether the board of directors should include non-executive board members.³⁹

ICC's proposed changes would strengthen ICC's written independence qualifications for current and potential Board members and establish a Nominating Committee to evaluate Board members against these independence qualifications. As discussed above, the proposed rule change would update the Playbook to augment the list of relationships that disqualify a person from being an independent member of the Board by adding to the list new, additional relationships as specified in Rule 17Ad–25 under the Exchange Act.⁴⁰ For example, pursuant to the current Playbook, an individual that is an employee of an ICE Group company is not considered independent. Under the proposed rule change, the Playbook would be updated to specify that an individual that otherwise receives compensation from an ICE Group company also would not be considered independent.

Strengthening the criteria by which ICC evaluates both current Managers and nominees would help ICC review each individual nominee within the broader context of the Board's overall makeup and the specific skills, knowledge, experience, and perspectives represented by each Manager and nominee. An increased focus on director independence would help ensure that Managers have the appropriate incentives to perform the Board's functions and fulfill its responsibilities. Moreover, the addition of a Nominating Committee to ICC's governance structure will help ensure that ICC evaluates the independence and fitness of the persons proposed to be designated as Managers of the Board as required by Rule 17Ad–25 under the Exchange Act.⁴¹ Accordingly, the proposed changes are consistent with ensuring that ICC's board of directors contains members with the appropriate

skills and incentives to discharge their duties.

In addition to establishing the Nominating Committee, the proposed changes also would establish the Nominating Committee's role, responsibilities, and composition. Pursuant to ICC's revised Operating Agreement, the Nominating Committee would have at least three members, a majority of which would be independent. The Nominating Committee would be responsible for evaluating and recommending individuals to be members of the Board. For each potential member of the Board, the Nominating Committee would produce a written evaluation of such person's independence and fitness for election as a Manager, based on the standards and pursuant to the process set forth in the Nominating Committee Charter. These changes would establish clear and direct lines of responsibility for the Nominating Committee.

Based on the foregoing, the proposed rule change is consistent with the requirements of Rule 17Ad–22(e)(2) under the Act.⁴²

C. Consistency With Rule 17Ad–25 Under the Act

Rule 17Ad–25 requires, among other things, that covered clearing agencies establish a nominating committee, written evaluation process, fitness standards, and evaluation of the independence of nominees and directors.⁴³

The amendments and revisions discussed above are consistent with the relevant provisions of Rule 17Ad–25(c), which provides that “[e]ach registered clearing agency must establish a nominating committee and a written evaluation process whereby such nominating committee shall evaluate nominees for serving as directors and evaluate the independence of nominees and directors.”⁴⁴ As stated, ICC's proposed changes would add a new Nominating Committee to ICC's Board, with the role of evaluating the independence and fitness of the persons proposed to be designated as members of the Board. The proposed changes would establish the Nominating Committee's purpose, composition, authority, and responsibilities. As discussed above, ICC's proposed changes also would amend the Playbook to establish specific additional relationships, as enumerated in Rule 17Ad–25,⁴⁵ that would disqualify a

person from being an independent member of the Board.

Accordingly, based on the foregoing, the proposed rule change is consistent with the requirements of Rule 17Ad–25 under the Act.⁴⁶

V. Accelerated Approval of Proposed Rule Change

Under Section 19(b)(2) of the Act,⁴⁷ the Commission may approve a proposed rule change prior to the 30th day after the date of publication of notice of filing of the proposed rule change in the **Federal Register** if the Commission finds good cause for doing so.

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,⁴⁸ to approve the proposed rule change prior to the 30th day after the date of publication of notice of filing of the proposed rule change in the **Federal Register**. As discussed above, the proposed rule change would establish a Nominating Committee. The Nominating Committee would have at least three members, a majority of which would be independent. As further discussed above, the Nominating Committee would be responsible for evaluating and recommending individuals to be members of the Board. For each potential member of the Board, the Nominating Committee would produce a written evaluation of such person's independence and fitness for election as a Manager, based on the standards and pursuant to the process set forth in the Nominating Committee Charter.

Moreover, as discussed above, the proposed rule change would add to the list of relationships that disqualify a person from being an independent member of the Board. ICC currently has a list of relationships that disqualify a person from being considered independent, and the proposed rule change would add new, additional relationships to this list, based on the specific relationships enumerated in Rule 17Ad–25 under the Exchange Act.⁴⁹ For example, currently an individual that is employee of an ICE Group company is not considered independent. Under the proposed rule change, an individual that otherwise receives compensation from an ICE Group company would also not be considered independent.

Rule 17Ad–25 requires, among other things, that covered clearing agencies establish: a nominating committee;

³⁹ Securities Exchange Act Release No. 78961 (Sept. 28, 2016), 81 FR 70786, 70806 (Oct. 13, 2016) (File No. S7–03–14) (“Standards for Covered Clearing Agencies”).

⁴⁰ 17 CFR 240.17ad–25.

⁴¹ 17 CFR 240.17ad–25.

⁴² 17 CFR 240.17Ad–22(e)(2).

⁴³ 17 CFR 240.17ad–25.

⁴⁴ 17 CFR 240.17ad–25(c).

⁴⁵ 17 CFR 240.17ad–25.

⁴⁶ 17 CFR 240.17ad–25.

⁴⁷ 15 U.S.C. 78s(b)(2).

⁴⁸ 15 U.S.C. 78s(b)(2).

⁴⁹ 17 CFR 240.17ad–25.

written evaluation process; fitness standards; and standards for the evaluation of the independence of nominees and directors.⁵⁰ The proposed rule change would establish a Nominating Committee, make the Nominating Committee responsible for evaluating and recommending individuals to be potential members of the Board, and augment ICC's existing independence standards to be consistent with Rule 17Ad-25.⁵¹ Based on the foregoing, and as discussed above, the proposed rule change is consistent with the requirements of Rule 17Ad-25 under the Act.⁵²

The compliance date for Rule 17Ad-25 generally is December 5, 2024.⁵³ Approving the proposed rule change on an accelerated basis will allow ICC to establish, among other things, a nominating committee and additional independence standards, by this compliance date. Accordingly, the Commission finds good cause to approve the proposed rule change on an accelerated basis prior to the 30th day after the date of publication of notice of filing of the proposed rule change in the **Federal Register**, pursuant to Section 19(b)(2) of the Act.⁵⁴

VI. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act, and in particular, Sections 17A(b)(3)(A) and (F) of the Act⁵⁵ and Rules 17Ad-22(e)(2) and 17Ad-25.⁵⁶

It is therefore ordered pursuant to Section 19(b)(2) of the Act that the proposed rule change (SR-ICC-2024-010) be, and hereby is, approved on an accelerated basis.⁵⁷

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.⁵⁸

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2024-29038 Filed 12-10-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-662, OMB Control No. 3235-0720]

Submission for OMB Review; Comment Request; Extension: Form 1-K

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 ("Commission") has submitted to the Office of Management and Budget this request for extension of the previously approved collection of information discussed below.

Form 1-K (17 CFR 239.91) is used to file annual reports by Tier 2 issuers under Regulation A, an exemption from registration under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*). Tier 2 issuers under Regulation A conducting offerings of up to \$50 million within a 12-month period are required to file Form 1-K. Form 1-K provides audited year-end financial statements and information about the issuer's business operation, ownership, management, liquidity, capital resources and operations on an annual basis. In addition, Part I of the Form 1-K collects information on any offerings under Regulation A that have been terminated or completed unless it has been previously reported on Form 1-Z. The purpose of the Form 1-K is to better inform the public about companies that have conducted Tier 2 offerings under Regulation A. We estimate that approximately 353 issuers file Form 1-K annually. We estimate that Form 1-K takes approximately 600 hours to prepare. We estimate that 75% of the 600 hours per response (450 hours) is prepared by the company for a total annual burden of 158,850 hours (450 hours per response × 353 responses).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information

unless it displays a currently valid control number.

Public Comment Instructions: The 30-day public comment period for this information collection request opens on December 12, 2024 and closes at the end of the day on January 13, 2025. The public may view the full information request and submit comments at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202412-3235-004 or email comments to MBX.OMB.OIRA.SEC_desk_officer@omb.eop.gov.

Dated: December 5, 2024.

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2024-29024 Filed 12-10-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-101828; File No. SR-Phlx-2024-65]

Self-Regulatory Organizations; Nasdaq PHLX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Equity 4, Rule 3304 Concerning Data Feeds Utilized

December 5, 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 25, 2024, Nasdaq PHLX, LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The 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 Equity 4, Rule 3304 (Data Feeds Utilized) to change the primary and secondary source of quotation data of certain market centers in the list of proprietary and network processor feeds that the Exchange utilizes for the handling, routing, and execution of orders as well as regulatory compliance processes related to those functions.

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

⁵⁰ 17 CFR 240.17ad-25.

⁵¹ 17 CFR 240.17ad-25.

⁵² 17 CFR 240.17ad-25.

⁵³ Securities Exchange Act Release No. 98959 (Nov. 16, 2023), 88 FR 84454 (Dec. 5, 2023) (File No. S7-21-22) (explaining that the compliance date for Rule 17Ad-25 is December 5, 2024, except that the compliance date for the independence requirements of the board and board committees in Rules 17Ad-25(b)(1), (c)(2), and (e) is December 5, 2025).

⁵⁴ 15 U.S.C. 78s(b)(2).

⁵⁵ 15 U.S.C. 78q-1(b)(3)(F).

⁵⁶ 17 CFR 240.17Ad-22(e)(2) and 17 CFR 240.17ad-25.

⁵⁷ In approving the proposed rule change, the Commission considered the proposal's impacts on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁵⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 update and amend the data feeds table in Equity 4, Rule 3304, which sets forth on a market-by-market basis the specific proprietary and network processor feeds that the Exchange utilizes for the handling, routing, and execution of orders, and for performing the regulatory compliance processes related to each of those functions. Specifically, the table would be amended to reflect that the Exchange will receive a direct feed from the Long-Term Stock Exchange ("LTSE") as its primary quotation data source and CQS/UQDF will become its secondary data source for the handling, routing and execution of orders and for performing regulatory compliance processes related to each of those functions. The change to the primary sources reflects the Exchange's effort to include an additional source and the use of secondary sources in the event the primary source is unable to provide data.

The operative date of the proposed rule change shall be November 25, 2024.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,³ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁴ 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 believes that the proposed rule change removes impediments to and perfects the mechanism of a free and open market because updating its data feeds table of market centers for which the exchange consumes quotation data through a direct feed will provide clarity to market participants. Additionally, it is necessary and consistent with the public interest and the protection of investors to update the Exchange's table of market centers in Equity 4, Rule 3304 in order to provide transparency with respect to all the direct proprietary and network processor feeds from which the Exchange obtains market data.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issue; instead, its purpose is to enhance transparency with respect to the operation of the Exchange and its use of market data feeds.

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 Act⁵ and Rule 19b-4(f)(6) thereunder.⁶ Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act⁷ and Rule 19b-4(f)(6) thereunder.⁸

⁵ 15 U.S.C. 78s(b)(3)(A)(iii).

⁶ 17 CFR 240.19b-4(f)(6).

⁷ 15 U.S.C. 78s(b)(3)(A).

⁸ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's 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

A proposed rule change filed under Rule 19b-4(f)(6)⁹ normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),¹⁰ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because the proposal does not raise any novel regulatory issues and waiver will allow the Exchange to begin receiving and using a direct feed from LTSE as soon as possible. For this reason, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.¹¹

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-2024-65 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.

of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

⁹ 17 CFR 240.19b-4(f)(6).

¹⁰ 17 CFR 240.19b-4(f)(6)(iii).

¹¹ For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

³ 15 U.S.C. 78f(b).

⁴ 15 U.S.C. 78f(b)(5).

All submissions should refer to file number SR-Phlx-2024-65. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. 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-2024-65, and should be submitted on or before December 31, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2024-29035 Filed 12-10-24; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-101822; File No. SR-Phlx-2024-67]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing of Proposed Rule Change To Amend the Exchange's Fees for Top of PHLX Options (TOPO), PHLX Orders, and TOPO Plus Orders

December 5, 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 27, 2024, Nasdaq PHLX LLC ("Phlx" 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 amend the Exchange's proprietary data fees for Top of PHLX Options ("TOPO"), PHLX Orders, and TOPO Plus Orders at Options 7, Section 10, as described further below.

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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Options 3, Section 23(a)(1) ("Top of PHLX Options ("TOPO") is a direct data feed product that includes the Exchange's best bid and offer price, with aggregate size, based on displayable order and quoting interest on Phlx and last sale information for trades executed on Phlx. The data contained in the TOPO data feed is identical to the data simultaneously sent to the processor for the OPRA and subscribers of the data feed. The data provided for each options series includes the symbols (series and underlying security), put or call indicator, expiration date, the strike price of the series, and whether the option series is available for trading on Phlx and identifies if the series is available for closing transactions only.").

⁴ See Options 3, Section 23(a)(1) ("PHLX Orders is a real-time full Limit Order book data feed that provides pricing information for orders on the PHLX Order book for displayed order types as well as market participant capacity. PHLX Orders is currently provided as part of the TOPO Plus Orders data product. PHLX Orders provides real-time information to enable users to keep track of the single and complex order book(s). The data provided for each options series includes the symbols (series and underlying security), put or call

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the Exchange's proprietary data fees for Top of PHLX Options ("TOPO"),³ PHLX Orders,⁴ and TOPO Plus Orders at Options 7, Section 10.⁵

Top of PHLX Options ("TOPO")

TOPO is a direct data feed that provides subscribers with PHLX Best Bid and Offer ("BBO")⁶ and last sale information.⁷ The data distributed on TOPO is identical to the data simultaneously sent to the Options Price Reporting Authority ("OPRA").⁸ The TOPO feed also provides administrative information to facilitate trading on the Exchange such as, for example, the list of symbols trading on a particular day.⁹ TOPO reduces the transmission and processing latencies for top of book information relative to the OPRA feed by avoiding the latencies generated by the latter in consolidating data.

indicator, expiration date, the strike price of the series, leg information on complex strategies and whether the option series is available for trading on Phlx and identifies if the series is available for closing transactions only. The feed also provides auction and exposure notifications and order imbalances on opening/reopening (size of matched contracts and size of the imbalance)".

⁵ The proposed changes were initially filed on November 16, 2023, as SR-Phlx-2023-51. On December 5, 2023, SR-Phlx-2023-51 was withdrawn and replaced with SR-Phlx-2023-57. On January 29, 2024, SR-Phlx-2023-57 was withdrawn and replaced with SR-Phlx-2024-03. On March 20, 2024, SR-Phlx-2024-03 was withdrawn and replaced with SR-Phlx-2024-15. On May 16, 2024, the Commission instituted proceedings to determine whether to approve or disapprove the proposed rule change. See Securities Exchange Act Release No. 100160 (May 16, 2024), 89 FR 45036 (May 22, 2024). On November 19, 2024, SR-Phlx-2024-15 was withdrawn and replaced with SR-Phlx-2024-60. On November 27, 2024, SR-Phlx-2024-60 was withdrawn and replaced with the instant filing.

⁶ The Best Bid and Offer includes aggregate size information based on displayable order and quoting interest on the Exchange.

⁷ See PHLX, "Top of Phlx Options," available at [https://www.nasdaqtrader.com/Micro.aspx?id=TOPO#:~:text=Top%20of%20PHLX%20Options%20\(TOPO,in%20the%20consolidated%20market%20feed](https://www.nasdaqtrader.com/Micro.aspx?id=TOPO#:~:text=Top%20of%20PHLX%20Options%20(TOPO,in%20the%20consolidated%20market%20feed).

⁸ See Options 3 (Options Trading Rules), Section 23(a)(1) (Data Feeds and Trade Information) ("The data contained in the TOPO data feed is identical to the data simultaneously sent to the processor for the OPRA and subscribers of the data feed.").

⁹ See, e.g., Nasdaq, "Top of Phlx Options Interface Specifications, Version 3.4" Section 4.3 available at <https://www.nasdaqtrader.com/content/technicalsupport/specifications/dataproducts/topofphlx.pdf> (describing the start of day options directory message, which lists all symbols eligible for the auction process).

¹² 17 CFR 200.30-3(a)(12), (59).

Monthly fees for TOPO are currently \$2,000 for Internal Distributors,¹⁰ \$2,500 for External Distributors,¹¹ \$1 for a Non-Professional Subscriber,¹² and \$40 for a Professional Subscriber.¹³ None of these fees have changed for over a decade, since January 2013.¹⁴

PHLX Orders

PHLX Orders is a real-time order book feed with pricing information for displayed orders on the PHLX order book.¹⁵ The data provided for each options series includes the symbols (series and underlying security), a put or call indicator, expiration date, and the strike price of the series. It also provides the real-time status of simple and complex orders¹⁶ on the order book, including new orders and changes to orders resting on the PHLX book for all PHLX-listed options.¹⁷ The PHLX Orders feed includes data on the opening imbalance, Price Improvement

XL (PIXL),¹⁸ and Complex Order Live Auction (COLA).¹⁹ A notification message is sent for symbols entering an auction.²⁰ PHLX Orders also furnishes an historical record of all simple and complex order message data from the PHLX Orders data feed. PHLX Orders information is not sent to OPRA.²¹

PHLX Orders is an alternative to PHLX Depth of Market. It is an optimized technical channel designed to lower technology costs, reduce processing time, and facilitate the ingestion of data while still providing customers insight beyond the top of book by viewing active buy and sell orders. PHLX Orders excludes quotations by market makers and other authorized entities that is included in PHLX Depth of Market.²²

What is the utility of an orders-only data feed? It provides customers with the opportunity to reduce bandwidth (and therefore data processing costs) by several orders of magnitude relative to the full depth of book feed, while retaining a view of market participant orders (setting aside symbols where participants have not placed orders).

The December 2023 bandwidth report shows that the PHLX Depth of Market feed transmitted a maximum of 14.3 billion messages per day during the month of December,²³ while the PHLX

Orders feed transmitted a maximum of 53.6 million messages over the same period (41.5 million messages for simple orders, and 12.1 million messages for complex orders). The Exchange's full depth of book feed requires the customer to process over 200 times more messages than the orders feed over the course of a day; replacing a depth of book feed with an orders feed allows a customer to reduce the maximum number of daily messages it receives by 99.6%.

To cite another example, the 1millisecond bandwidth peak for PHLX Depth of Market was 13.96 million messages; the comparable number of messages for orders was 1.45 million (891 thousand for simple and 561 thousand for complex orders). Replacing depth of book with orders can therefore reduce the number of messages processed at peak at the 1 millisecond bandwidth by nearly 90%.

Approximately 56% of customers who take any data feed at all from the PHLX exchange take an orders feed (either Orders only or TOPO Plus Orders) without depth of book. Another 38% of customers take both orders and depth feeds. The remaining 6% take either top of book or depth of book alone.

What type of customer takes an orders feed in lieu of depth? In general, firms that only need information on actively trading options do so. There are a great number of use cases that fit this broad description, but, for purposes of illustration, the Exchange is aware of at least two such types of customers.

The first is the market participant that does not engage in order routing. These are broker dealers that use third parties to route orders, either because the originating broker-dealer is not a member of the exchange or to save costs. Without the need for additional information to inform routing decisions, such customers often focus on active trading alone, and therefore purchase the orders feed.

A second category of customers are those that use options data to analyze trends in other markets. One example of this type of customer is the equity trader that analyzes equity-based options orders to gauge market sentiment in the underlying equity. For such customers, there is relatively little utility in the full depth feed.

¹⁰ See Options 7, Section 10 (Proprietary Data Feed Fees) (Top of PHLX Options) ("A 'distributor' of Nasdaq PHLX data is any entity that receives a feed or data file . . . directly from Nasdaq PHLX or indirectly through another entity and then distributes it either internally (within that entity) or externally (outside that entity). All distributors execute a Nasdaq PHLX distributor agreement.").

¹¹ See *id.*

¹² See *id.* ("A Non-Professional Subscriber is a natural person who is neither: (i) registered or qualified in any capacity with the Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (ii) engaged as an 'investment adviser' as that term is defined in Section 201(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that Act); nor (iii) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt. A Non-Professional Subscriber may only use the data provided for personal purposes and not for any commercial purpose.").

¹³ See *id.* ("A Professional Subscriber is any Subscriber that is not a Non-Professional Subscriber. If the Nasdaq Subscriber agreement is signed in the name of a business or commercial entity, such entity would be considered a Professional Subscriber.").

¹⁴ See Securities Exchange Act Release No. 68576 (January 3, 2013), 78 FR 1886 (January 9, 2013) (SR-Phlx-2012-145).

¹⁵ See Options 3 (Options Trading Rules), Section 23(a)(2) (Data Feeds and Trade Information).

¹⁶ See Options 3 (Options Trading Rules), Section 23(a)(2) (Data Feeds and Trade Information); Section 14(a)(i) ("Complex Order. For purposes of the electronic trading of Complex Orders, a Complex Order is an order involving the simultaneous purchase and/or sale of two or more different options series in the same underlying security, priced as a net debit or credit based on the relative prices of the individual components, for the same account, for the purpose of executing a particular investment strategy.").

¹⁷ See Nasdaq, "PHLX Orders," available at <https://www.nasdaqtrader.com/Micro.aspx?id=PHLXOrders>.

¹⁸ See Options 3 (Options Trading Rules), Section 23(a)(2); Section 13 (Price Improvement XL) ("A member may electronically submit for execution an order it represents as agent on behalf of a Public Customer, broker-dealer, or any other entity ('PIXL Order') against principal interest or against any other order (except as provided in sub-paragraph (a)(6) below) it represents as agent (an 'Initiating Order') provided it submits the PIXL Order for electronic execution into the PIXL Auction ('Auction') pursuant to this Rule.").

¹⁹ See Options 3, Section 14(e) (describing the process for the Complex Order Live Auction ("COLA")).

²⁰ Nasdaq, "PHLX Orders Interface Specification," (Version 1.92) available at <https://www.nasdaqtrader.com/content/technicalsupport/specifications/dataproducts/topoplusorders.pdf> (describing auction notification message).

²¹ See Limited Liability Company Agreement of Options Price Reporting Authority, LLC Article V, Section 5.2(c)(i) (January 1, 2010), available at https://assets.website-files.com/5ba40927ac854d8c97bc92d7/5d0bd57d87d3ccca102102d7_OPRA%20Plan%20with%20Updated%20Exhibit%20A%20-%202006-19-2019.pdf (describing last sale and best bid and offer information disseminated by OPRA).

²² See Options 3 (Options Trading Rules), Section 23(a)(3) (Data Feeds and Trade Information) ("PHLX Depth of Market is a data product that provides: (i) order and quotation information for individual quotes and orders on the order book . . .") (emphasis added); Section 4(b) (Entry and display of Quotes) (identifying the market participants authorized to submit quotes to the Exchange).

²³ See Nasdaq, "December 2023 Bandwidth Report," available at <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.nasdaqtrader.com%2Fcontent%2Ftechnicalsupport%2Fspecifications%2>

[Fdataproducts%2Fbandwidthreport.xls&wdOrigin=BROWSELINK](https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.nasdaqtrader.com%2Fcontent%2Ftechnicalsupport%2Fspecifications%2Fdataproducts%2Fbandwidthreport.xls&wdOrigin=BROWSELINK).

As noted above, there are some customers that purchase both orders and depth. Vendors are one example of this type of customer. They purchase market data solely for resale, not for trading on behalf of themselves or others. Another example is the firm that uses orders for analysis and depth for order routing. As noted above, the orders feed can be useful for assessing sentiment in equity markets, while depth is often used in order routing decisions. Firms that engage in both functions can lower overall processing requirements by using orders for analytics and depth for routing.

Customers can obtain all of the data contained in PHLX Orders from PHLX Depth of Market feed and may purchase the latter if they do not realize the cost savings offered by PHLX Orders.

PHLX Orders is a derivative product designed as a lower-cost alternative to a depth of book feed. It is not a complement to any other product offered by the Exchange or any of its competitors. Customers are free to purchase PHLX Orders or not, and can reject the feed for any reason, including the fee charged.

Current monthly fees for PHLX Orders are \$3,000 for Internal Distributors, \$3,500 for External Distributors, \$1 for a Non-Professional Subscriber, and \$40 for a Professional Subscriber. None of these fees have changes for over a decade, since January 2013.²⁴

TOPO Plus Orders

TOPO Plus is a direct market data product that offers subscribers both TOPO and PHLX Orders for a consolidated fee that is less than the combined fee of the two products.²⁵

Monthly fees for TOPO Plus Orders are currently \$4,500 for Internal Distributors, \$5,000 for External Distributors, \$1 for a Non-Professional Subscriber, and \$40 for a Professional Subscriber.

Internal Distributor fees for TOPO Plus Orders were modified in January 2018, over five years ago,²⁶ but the other TOPO Plus Orders fees have not changed since January 2013.²⁷

Usage of TOPO, PHLX Orders, and TOPO Plus Orders

Different types of market participants purchase TOPO, PHLX Orders and TOPO Plus Orders, including market makers, vendors, banks, proprietary traders, agency brokers (brokers that route trades on behalf of other market participants), hedge funds, index providers and other firms.

In characterizing market participants, we must be clear that firms use data feeds for multiple tasks. A market maker, for example, may use market data for order routing, or for risk analysis used in quoting in their assigned option series. Banks may use market data for prime brokerage services, proprietary trading, or risk management. Market data vendors do not directly use the data at all, but rather disseminate data to market participants that use the data for a multiplicity of purposes. Other firms purchase options data to assess the value of equity securities.²⁸

Characterizing firms based on what we understand to be their primary market activity, and understanding that firms play multiple roles, we estimate that approximately half of the customers that take top of book data in any form, in combination with other products or alone, are market makers, and the remaining half are market data vendors, banks, proprietary traders, agency brokers, hedge funds, index providers, and others. Roughly the same distribution applies to customers that purchase PHLX Orders, whether alone or in combination with other products. Although the distributions are roughly similar, different customers are purchasing different products in different combinations.

As explained above, firms generally purchase PHLX Orders rather than depth of book data to lower technology costs and reduce processing time, while still providing customers insight into open executable orders that could impact the BBO.

A more specific explanation of how TOPO, PHLX Orders and TOPO Plus Orders is used will vary based on use case, with many firms employing multiple use cases. Market makers, banks, hedge funds, and proprietary traders often use top of book and orders feeds for trading, order routing and analysis. Banks may use market data for prime brokerage services, proprietary

trading, or risk management. The clients of market data vendors will utilize the data for many different purposes. We do not have sufficient visibility into our customers' businesses and proprietary processes to be able to determine precise data usage by customer category.

Proposed Changes

For TOPO, the Exchange proposes to increase the monthly charge for Internal Distributors from \$2,000 to \$2,500, and the monthly charge for External Distributors from \$2,500 to \$3,000. No changes are proposed for Non-Professional and Professional Subscriber fees.

For PHLX Orders, the Exchange proposes to increase the monthly charge for Internal Distributors from \$3,000 to \$3,500, and the monthly charge for External Distributors from \$3,500 to \$4,000. No changes are proposed for Non-Professional and Professional Subscriber fees.

For TOPO Plus Orders, the Exchange proposes to increase the monthly charge for Internal Distributors from \$4,500 to \$5,500, and the monthly charge for External Distributors from \$5,000 to \$6,000. No changes are proposed for Non-Professional and Professional Subscriber fees.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,²⁹ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,³⁰ 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.

The proposal provides for the equitable allocation of reasonable dues, fees and other charges because the proposed fees are comparable to, and in some cases less than, those of similarly situated exchanges.

The proposal is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers because: (i) it is not unfair discrimination to charge external distributors more for the product because external distributors receive additional value not available to internal distributors by disseminating information externally and typically charging for the service; and (ii) the market data feeds subject to the proposed fee will be available to

²⁴ See Securities Exchange Act Release No. 68576 (January 3, 2013), 78 FR 1886 (January 9, 2013) (SR-Phlx-2012-145).

²⁵ See PHLX, TOPO Plus PHLX Orders, available at <https://www.nasdaqtrader.com/Micro.aspx?id=TOPOPlusOrders>.

²⁶ See Securities Exchange Act Release No. 82495 (January 12, 2018), 83 FR 2839 (January 19, 2018) (SR-Phlx-2018-08).

²⁷ See Securities Exchange Act Release No. 68576 (January 3, 2013), 78 FR 1886 (January 9, 2013) (SR-Phlx-2012-145).

²⁸ We do not include "High Frequency Trading Firm" as a distinct category because many market participants may engage in low latency trading strategies to some degree, but the Exchange does not have sufficient information to be able to characterize any particular firm as a high frequency trader.

²⁹ 15 U.S.C. 78f(b).

³⁰ 15 U.S.C. 78f(b)(4) and (5).

customers on a non-discriminatory basis.

Equitable Allocation of Reasonable Dues, Fees and Other Charges

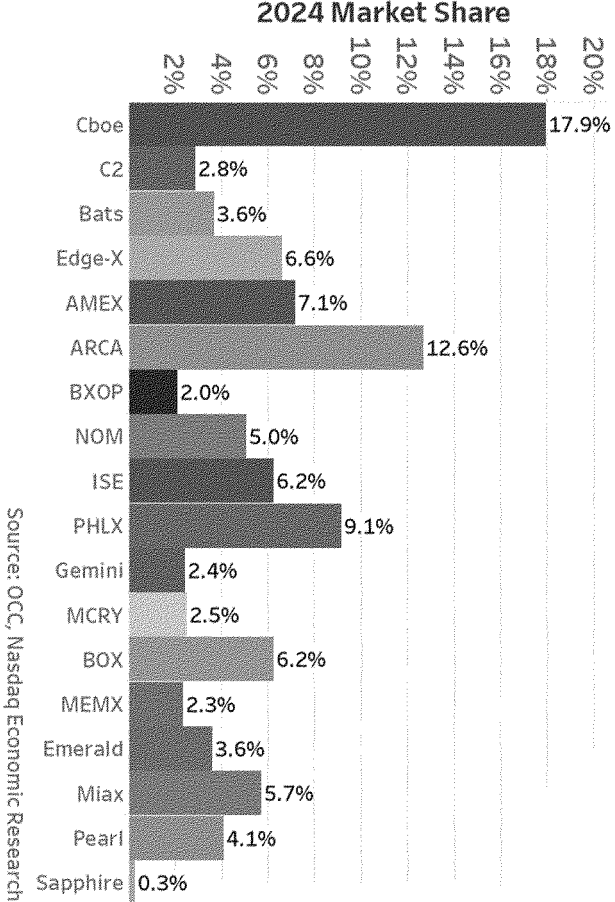
The Exchange assesses the market share for each of the eighteen options markets utilizing total options contracts

traded in 2024 through October 28, 2024, as set forth in the following graph:³¹

Figure 1

US Options Market Share

Data using total options contracts traded from start of 2024 - October 28, 2024



The proposed fees for Top of PHLX Options are comparable to those charged by Miami International

Securities Exchange, LLC ("MIAX"), MIAX Emerald (for both internal and external distribution) and Cboe

Exchange, Inc. ("Cboe") (for external distribution), as summarized in Table 1:

TABLE 1

Exchange	Market share %	Monthly fees (top of book)	
		Internal distribution	External distribution
PHLX	9.1	\$2,500	\$3,000.
MIAX	5.7	\$4,000	\$6,000
MIAX Emerald	3.6	(\$2,000 for simple orders; \$2,000 for complex orders).	(\$3,000 for simple orders; \$3,000 for complex orders).
Cboe	17.9	\$2,500	\$3,500.
		(\$1,250 for simple orders; \$1,250 for complex orders).	(\$1,750 for simple orders; \$1,750 for complex orders).
		N/A	\$8,000.
		(fee is part of a package of multiple products)	(\$5,000 for simple orders; \$3,000 for complex orders).

A more detailed discussion of the comparison follows.

MIAX

MIAX, with a market share of approximately 5.7%, provides less information in its top of book feeds than PHLX, yet charges more for those feeds than the PHLX proposal.

MIAX charges different fees for internal distribution of its simple and complex top of book feeds: \$2,000 for its Top of Market feed, and another \$2,000 for its complex Top of Market feed, for a total of \$4,000.³² PHLX TOPO includes both simple and complex orders in a single feed, and therefore the proposed fee of \$2,500 for internal distribution is much less than the \$4,000 charged by MIAX for less information.

For external distribution, MIAX charges \$3,000 for Top of Market feed, and another \$3,000 for its complex top

³¹ 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.

³² See MIAX Options Exchange Fee Schedule (October 1, 2024), available at https://www.miaxglobal.com/sites/default/files/fee_schedule-files/MIAX_Options_Fee_Schedule_10012024.pdf.

of market feed,³³ for a total of \$6,000. The proposed fees of \$3,000 for the PHLX TOPO feed, which includes both simple and complex orders, is far less than the fees charged by MIAX for less information.

MIAX Emerald

The same analysis applies to MIAX Emerald, with a market share of 3.6%. Similar to MIAX, MIAX Emerald charges different fees for simple and complex top of book feeds: \$1,250 for internal distribution of its Top of Market feed, and another \$1,250 for internal distribution of its Complex Top of Market feed, for a total of \$2,500.³⁴ This is the same amount proposed for TOPO internal distribution, for less information.

MIAX Emerald charges \$1,750 for external distribution of its Top of Market feed, and another \$1,750 for external distribution of its complex Top of Market feed, for a total of \$3,500.³⁵ MIAX Emerald therefore charges more than PHLX's proposed monthly charges of \$3,000 for external distribution of TOPO, notwithstanding the fact that MIAX Emerald provides less market information.

This supports the proposition that the proposed PHLX fees are comparable to those of other exchanges and therefore reasonable.

Cboe

Cboe has an approximately 17.9% market share, nearly twice the PHLX market share of 9.1%.³⁶

The Cboe fee for external distribution of the top of book feed is \$5,000 per month.³⁷ If a customer also wants Cboe's Complex Order Book ("COB"), the customer would pay an additional \$3,000.³⁸ These fees are comparable to the proposed PHLX fee of \$3,000 per month for external distribution of a combined simple and complex orders feed because the higher fee for Cboe reflects the higher market share of the Cboe exchange.

PHLX Orders

The proposed fees for PHLX Orders are comparable to the fees charged by MIAX, MIAX Emerald, and Nasdaq ISE, LLC ("ISE"), an affiliate of PHLX, as set forth in Table 2 below.

TABLE 2

Exchange	Market share %	Monthly fees (orders)	
		Internal distribution	External distribution
PHLX	9.1	\$3,500	\$4,000.
MIAX	5.7	\$3,000	\$3,500.
MIAX Emerald	3.6	\$3,000	\$3,500.
ISE	6.2	\$3,000	\$3,000 per month plus \$20 per month per controlled device.

MIAX

MIAX has a market share of approximately 5.7%, somewhat more than half of PHLX's market share of 9.1%.

MIAX charges \$3,000 for internal distribution of its orders feed.³⁹ PHLX, with a market share over 50 percent more than MIAX, proposes to charge \$3,500 for the same service. The PHLX fee is only about 17% more than the MIAX fee.

MIAX charges \$3,500 for external distribution of its orders feed.⁴⁰ PHLX, with a market share over 50 percent more than MIAX, proposes to charge \$4,000 for the same service. The PHLX fee is only about 14% more than the MIAX fee.

MIAX Emerald

MIAX Emerald also has a market share of 3.6%, less than half of PHLX's market share of 9.1%.

Like MIAX, MIAX Emerald charges \$3,000 for internal distribution of its orders feed.⁴¹ PHLX, with a market share over twice that of MIAX Emerald, proposes to charge \$3,500 for the same service. The PHLX fee is only about 17% more than the MIAX fee.

MIAX Emerald also charges \$3,500 for external distribution of its orders feed.⁴² PHLX, with a market share over twice that of MIAX Emerald, proposes to charge \$4,000 for the same service. The PHLX fee is only about 14% more than the MIAX Emerald fee.

ISE

ISE has a market share of approximately 6.2%, below PHLX's market share of 9.1%.

ISE charges \$3,000 for internal distribution of its Order Feed.⁴³ This is comparable to the proposed PHLX Orders feed for internal distribution of \$3,500 because PHLX has a larger share

and the ISE feed does not include information on complex orders.

For external distribution, ISE charges \$3000 per month, plus an additional \$20 per month for each controlled device, up to a maximum fee of \$5,000 per month.⁴⁴ This is comparable to the proposed PHLX fee of \$4,000 (the ISE fee may be above or below the PHLX fee, depending on the number of controlled devices) and the proposed fee is reasonable given PHLX's larger market share.

TOPO Plus Orders

The separate fees for TOPO and PHLX Orders are each reasonable because, as shown above, they are comparable to other SRO fees. The TOPO Plus Orders product offers a discount for the purchase of these two separate feeds together. A discount from fees that have already been shown to be reasonable is

³³ See id.

³⁴ See MIAX Emerald Options Schedule (December 8, 2022), available at https://www.miaxglobal.com/sites/default/files/fee_schedule-files/MIAX_Emerald_Fee_Schedule_12082022c.pdf.

³⁵ See id.

³⁶ See Nasdaq, Options Market Statistics (Last updated November 3, 2023), available at <https://www.nasdaqtrader.com/Trader.aspx?id=OptionsVolumeSummary>.

³⁷ See id.

³⁸ As explained in note 32, Cboe waives its Complex Order Book feed for internal distribution of top of book and depth, but not for external distribution of top of book.

³⁹ See MIAX Options Exchange Fee Schedule (October 1, 2024), available at https://www.miaxglobal.com/sites/default/files/fee_schedule-files/MIAX_Options_Fee_Schedule_10012024.pdf.

⁴⁰ See id.

⁴¹ See MIAX Emerald Options Schedule (December 8, 2022), available at https://www.miaxglobal.com/sites/default/files/fee_schedule-files/MIAX_Emerald_Fee_Schedule_12082022c.pdf.

www.miaxglobal.com/sites/default/files/fee_schedule-files/MIAX_Emerald_Fee_Schedule_12082022c.pdf.

⁴² See id.

⁴³ See Nasdaq ISE, LLC Rules, Options 7, Section 10(G) (Nasdaq ISE Order Feed). The ISE Order feed differs from the PHLX Orders feed in that it provides information only on simple orders, whereas the PHLX Orders feed provides information on both simple and complex orders.

⁴⁴ See id.

reasonable and consistent with the Exchange Act.

In summary, (i) the proposed fees for Top of PHLX Options are comparable to those of MIAX, MIAX Emerald and Cboe; (ii) the proposed fees for PHLX Orders are comparable to those of MIAX, MIAX Emerald, and ISE; and (iii) the proposed PHLX TOPO Plus Orders fees offer a discount from the amount the customer would pay for TOPO and Orders separately, and, because these separate fees are comparable to those charged by other exchanges, the proposed discount for TOPO Plus Orders is reasonable.

No Unfair Discrimination Between Customers, Issuers, Brokers, or Dealers

The proposal is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers because: (i) external distributors receive additional value not available to internal distributors; and (ii) these market data feeds will be available on a non-discriminatory basis.

External Distributors receive additional value not available to Internal Distributors by disseminating information externally and typically charging for the service. This additional value supports higher fees for external distribution for TOPO, PHLX Orders, and TOPO Plus Orders. Higher fees for external distribution of data are common throughout the industry, and nearly universal among exchanges. The difference in value between internal and external distribution is also reflected in the current fee schedule, which has previously been shown to be consistent with the Exchange Act.

The three market data feeds at issue here—TOPO, PHLX Orders, and TOPO Plus Orders—are used by a variety of market participants for a variety of purposes. Users include regulators, market makers, competing exchanges, media, retail, academics, portfolio managers. Market data feeds will be available to members of all of these groups 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.

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. PHLX 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 PHLX market data is available to any customer under the same fee schedule as any other customer, and any market participant that wishes to purchase PHLX market data can 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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) by order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-Phlx-2024-67 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-2024-67. 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-2024-67 and should be submitted on or before December 31, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁵

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2024-29040 Filed 12-10-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-101825; File No. SR-CboeBZX-2024-122]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule Regarding Dedicated Cores

December 5, 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 26, 2024, Cboe BZX Exchange, Inc. (the "Exchange" or "BZX") 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

⁴⁵ 17 CFR 200.30-3(a)(12).

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

Cboe BZX Exchange, Inc. (the "Exchange" or "BZX Equities") proposes to amend its Fee Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (http://markets.cboe.com/us/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 Dedicated Cores.³

By way of background, the Exchange recently began to allow Users⁴ to assign a Single Binary Order Entry ("BOE") logical order entry port⁵ to a single

dedicated Central Processing Unit (CPU Core) ("Dedicated Core"). Historically, CPU Cores had been shared by logical order entry ports (*i.e.*, multiple logical ports from multiple firms may connect to a single CPU Core). Use of Dedicated Cores however, can provide reduced latency, enhanced throughput, and improved performance since a firm using a Dedicated Core is utilizing the full processing power of a CPU Core instead of sharing that power with other firms. This offering is completely voluntary and is available to all Users that wish to purchase Dedicated Cores. Users may utilize BOE logical order entry ports on shared CPU Cores, either in lieu of, or in addition to, their use of Dedicated Core(s). As such, Users are able to operate across a mix of shared and dedicated CPU Cores which the Exchange believes provides additional risk and capacity management. Further, Dedicated Cores are not required nor necessary to participate on the Exchange and as such Users may opt not to use Dedicated Cores at all.

The Exchange proposes to assess the following monthly fees for Users that wish to use Dedicated Cores and adopt a maximum limit. First, the Exchange proposes to provide up to two Dedicated Cores to all Users who wish to use Dedicated Cores, at no additional cost. For the use of more than two Dedicated Cores, the Exchange proposes to assess the following fees: \$650 per Dedicated Core for 3–15 Dedicated Cores; \$850 per Dedicated Core for 16–30 Dedicated Cores; and \$1,050 per Dedicated Core for 31 or more Dedicated Cores. The proposed fees are progressive and the Exchange proposes to include the following example in the Fees Schedule to provide clarity as to how the fees will be applied. Particularly, the Exchange will provide the following example: if a User were to purchase 16 Dedicated Cores, it will be charged a total of \$9,300 per month ($\$0 * 2 + \$650 * 13 + \$850 * 1$). The Exchange also proposes to make clear in the Fees Schedule that the monthly fees are assessed and applied in their entirety and are not prorated. The Exchange notes the current standard fees assessed for BOE Logical Ports, whether used with Dedicated or shared CPU cores, will remain applicable and unchanged.⁶

Since the Exchange currently has a finite amount of physical space in its data centers in which its servers (and

therefore corresponding CPU Cores) are located, the Exchange also proposes to prescribe a maximum limit on the number of Dedicated Cores that Users may purchase each month. The purpose of establishing these limits is to manage the allotment of Dedicated Cores in a fair manner and to prevent the Exchange from being required to expend large amounts of resources in order to provide an unlimited number of Dedicated Cores. The Exchange previously established a limit for Members of a maximum number of 60 Dedicated Cores and Sponsoring Members a limit of a maximum number of 25 Dedicated Cores for each of their Sponsored Access relationships.⁷ The Exchange has since been able to procure additional physical space in its third-party data center as well as additional servers with CPU Cores and also has a better understanding of User demand relative to its available space and available Dedicated Cores since the initial launch of Dedicated Cores. After seeing increased User demand, the Exchange proposed to increase the cap and provided that Members will be limited to a maximum number of 80 Dedicated Cores and Sponsoring Members will be limited to a maximum number of 35 Dedicated Cores for each of their Sponsored Access relationships.⁸ The Exchange noted at that time that it would continue monitoring Dedicated Core interest by all Users and allotment availability with the goal of increasing these limits to meet Users' needs if and when the demand is there and/or the Exchange is able to accommodate additional Dedicated Cores. Since then, the Exchange has determined that it is able to accommodate an increased cap relative to current demand. As such, the Exchange proposes to increase the cap to 120 Dedicated Cores for Members, effective December 1, 2024.⁹ Sponsoring Members will continue to be limited to a maximum of 35 Dedicated Cores for each of their Sponsored Access relationships.¹⁰

⁷ See Securities Exchange Act Release No. 100395 (June 21, 2024), 89 FR 53687 (June 27, 2024) (SR-CboeBZX-2024-054).

⁸ See Securities Exchange Act Release No. 101302 (October 10, 2024), 89 FR 83727 (October 17, 2024) (SR-CboeBZX-2024-094).

⁹ The prescribed maximum quantity of Dedicated Cores for Members applies regardless of whether that Member purchases the Dedicated Cores directly from the Exchange and/or through a Service Bureau. In a Service Bureau relationship, a customer allows its MPID to be used on the ports of a technology provider, or Service Bureau. One MPID may be allowed on several different Service Bureaus.

¹⁰ The fee tier(s) applicable to Sponsoring Members are determined on a per Sponsored

³ The Exchange initially introduced pricing for Dedicated Cores on June 10, 2024 (SR-CboeBZX-2024-054). On August 1, 2024, the Exchange withdrew that filing and submitted SR-CboeBZX-2024-075. On business date September 30, 2024, the Exchange withdrew that filing and submitted SR-CboeBZX-2024-094. On November 26, 2024, the Exchange withdrew that filing and submitted this filing.

⁴ A User may be either a Member or Sponsored Participant. The term "Member" shall mean any registered broker or dealer that has been admitted to membership in the Exchange, limited liability company or other organization which is a registered broker or dealer pursuant to Section 15 of the Act, and which has been approved by the Exchange. A Sponsored Participant may be a Member or non-Member of the Exchange whose direct electronic access to the Exchange is authorized by a Sponsoring Member subject to certain conditions. See Exchange Rule 11.3.

⁵ Users may currently connect to the Exchange using a logical port available through an application programming interface ("API"), such as the Binary

Order Entry ("BOE") protocol. A BOE logical order entry port is used for order entry.

⁶ The Exchange currently assesses \$550 per port per month. Port fees will also continue to be assessed on the first two Dedicated Cores that Users receive at no additional cost. See Cboe BZX Equities Fee Schedule.

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.¹¹ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹² 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)¹³ 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)¹⁴ 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 proposal is reasonable because the Exchange is offering any User who wishes to utilize Dedicated Cores up to two Dedicated Cores at no additional cost. For example, of the Users that currently maintain Dedicated Cores, 26% maintain only 1 or 2 Dedicated Cores

and therefore pay no additional fees. The Exchange believes the proposed fees are reasonable because Dedicated Cores provide a valuable service in that it can provide reduced latency, enhanced throughput, and improved performance compared to use of a shared CPU Core since a firm using a Dedicated Core is utilizing the full processing power of a CPU Core. The Exchange also emphasizes however, that the use of Dedicated Cores is not necessary for trading and as noted above, is entirely optional. Users can also continue to access the Exchange through shared CPU Cores at no additional cost. Indeed, only 16% of the Exchange’s Members currently use Dedicated Cores and as noted above, of that 16%, only 26% take 1 or 2 Dedicated Cores at no additional cost. Depending on a firm’s specific business needs, the proposal enables Users to choose to use Dedicated Cores in lieu of, or in addition to, shared CPU Cores (or as emphasized, not use Dedicated Cores at all). If a User finds little benefit in having Dedicated Cores based on its business model and trading strategies, or determines Dedicated Cores are not cost-efficient for its needs or does not provide sufficient value to the firm, such User may continue its use of the shared CPU Cores, unchanged. The Exchange also has no plans to eliminate shared CPU Cores nor to require Users to purchase Dedicated Cores.

The Exchange has seen general interest in Dedicated Cores from a variety of market participants, with varying size and business models. Such market participants include proprietary trading firms (who tend to be more latency sensitive), as well as sell-side market participants and buy-side market participants (who tend to be less latency sensitive). For background, proprietary trading firms utilize their own capital to trade without taking outside money from clients. Due to the nature of their respective businesses, the Exchange has classified proprietary trading firms as latency sensitive, and other groups, such as buy-side hedge funds, sell-side banks and sell-side non-banks (such as agency brokers) as non-latency sensitive. Proprietary trading firms’ strategies may range from, marketing making, to relative value trading and arbitrage—these all rely on profiting from general market activity and, generally, requires faster entry and exit into trades and positions making proprietary trading firms more latency sensitive than other market segments. Buy-side hedge funds, banks and agency brokers are not as latency sensitive as strategy for hedge funds is based on

overall long-term positioning in the market and banks and agency brokers may profit from commissions of customer order flow; both are generally strategies that are not reliant on speed to the same extent proprietary trading firms are. Further, Members have various reasons for obtaining Dedicated Cores. Some Members for example, may be seeking to further reduce latency, whereas others may use Dedicated Cores as a general risk mitigation by siloing their respective activity. Of further note, only 40% of Members that are propriety trading firms (who again, generally tend to be more latency sensitive) utilize Dedicated Cores, and of that 40%, 36% are only utilizing the 1 to 2 free Dedicated Cores available to all Users. As mentioned above, some non-latency sensitive firms have chosen to also adopt Dedicated Cores. 9% of Members that are not latency sensitive utilize Dedicated Cores, and of that 9%, 13% are only utilizing the 1 to 2 free Dedicated Cores available to all Users.

The lack of universal, or even widespread, adoption by all such users therefore demonstrates that purchasing Dedicated Cores is not effectively a requirement to compete for any one type of market participant, including latency sensitive market participants. Instead, Dedicated Cores are an optional and voluntary connectivity offering, which market participants are free to choose whether or not to utilize based on whether they meet their unique business needs. Moreover, the Exchange has received overwhelming positive feedback and support for Dedicated Cores, with some Members even noting that they have moved more of their order flow to the Exchange and its affiliated equities exchanges (the “Equities Exchanges”) as they have noticed both better fills and greater consistency of order execution at the Equities Exchanges. This demonstrates that despite any incurred costs for Members that choose to purchase Dedicated Cores, it is ultimately a net win for them as they benefit from better execution. The Exchange believes it also demonstrates that Members find the proposed fees to be both reasonable and have benefited from purchasing or, at alternatively benefiting from the proposed one or two free Dedicated Cores available at no additional cost. The Exchange believes this is shown by both the level of demand for Dedicated Cores and the feedback from market participants, including as described above. The Exchange also believes it’s notable that no negative comment letters in connection with the proposed pricing have been received since the Exchange

Access relationship basis and not on the combined total of Dedicated Cores across Sponsored Users. For example, under the proposed changes, a Sponsoring Member that has three Sponsored Access relationships is entitled to a total of 105 Dedicated Cores for those 3 Sponsored Access relationships but would be assessed fees separately based on the 35 Dedicated Cores for each Sponsored User (instead of combined total of 105 Dedicated Cores). For example, a Sponsoring Member with 3 Sponsored Access relationships would pay \$30,450 per month if each Sponsored Access relationship purchased the maximum 35 Dedicated Cores. More specifically, the Sponsoring Member would be provided 2 Dedicated Cores at no additional cost for each Sponsored User under Tier 1 (total of 6 Dedicated Cores at no additional cost) and provided an additional 8 Dedicated Cores at \$650 each for each Sponsored User, 5 Dedicated Cores at \$850 each for each Sponsored User and 20 Dedicated Cores at \$1,050 each for each Sponsored User (combined total of 99 additional Dedicated Cores).

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(5).

¹³ *Id.*

¹⁴ 15 U.S.C. 78f(b)(4).

first filed proposed fees for Dedicated Cores back on June 10, 2024. Additionally, as noted earlier, Members can (and many have) decide that utilizing even a free Dedicated Core is not needed for their business. Ultimately, this is a business decision that each Member must make and is best suited to determine and will ultimately depend on the priorities and strategies of that Member's respective business needs.

The Exchange also believes that the proposed Dedicated Core 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 Dedicated Cores will be subject to the same proposed tiered fee schedule. Moreover, all Users are entitled to up to 2 Dedicated Cores at no additional cost and, as previously discussed, 26% of all Users that take Dedicated Cores (including both latency sensitive and non-latency sensitive Users) take only 1 or 2 Dedicated Cores at no additional cost. The Exchange believes the proposed ascending fee structure is also reasonable, equitable and not unfairly discriminatory as it is designed so that firms that use a higher allotment of the Exchange's finite number of Dedicated Cores pay higher rates, rather than placing that burden on market participants that have more modest needs who will have the flexibility of obtaining Dedicated Cores at lower price points in the lower tiers. As such, the proposed fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the ascending fee structure reflects the (finite) resources consumed by the various needs of market participants—that is, the lowest Dedicated Core consuming Users pay the least, and highest Dedicated Core consuming Users pay the most. Other exchanges similarly assess higher fees to those that consume more Exchange resources, including the Exchange on its options platform.¹⁵ Moreover, those consuming more Dedicated Cores do so if they find a benefit in having higher quantities of Dedicated Cores based on their respective business needs. The proposed tier structure is also designed to encourage firms to manage their needs in a fair manner and to prevent the Exchange from being required to expend large amounts of resources in order to provide an additional number of Dedicated Cores. Moreover, as

discussed above and in more detail below, the Exchange cannot currently offer an unlimited number of Dedicated Cores due in part to physical space constraints in the third-party data center. The Exchange believes the proposed ascending fee structure is therefore another appropriate means, in conjunction with an established cap, to manage this finite resource and ensure the resource is apportioned more fairly.

The Exchange believes it is reasonable to limit the number of Dedicated Cores Users can purchase because the Exchange has a finite amount of space in its third-party data centers to accommodate CPU cores, including Dedicated Cores. The Exchange must also take into account timing and cost considerations in procuring additional Dedicated Cores and related hardware such as servers, switches, optics and cables, as well as the readiness of the Exchange's data center to accommodate additional Dedicated Cores in the Exchange's respective Order Handler Cabinets.¹⁶ Moreover, procuring data center space has grown to be more challenging than it was five years ago with the increased demand for data center space. For example, the U.S. colocation data center market has doubled in size in just four years. In addition to the Exchange's rollout of Dedicated Cores, the Exchange is mindful of its other business areas and the need to continue to be mindful of its existing, external restraints in procuring additional space in this area. The Exchange has, and will continue to, monitor market participant demand and space availability and endeavor to adjust the limit if and when the Exchange is able to acquire additional space and power within the third-party data centers and/or additional CPU Cores to accommodate additional Dedicated Cores.¹⁷ The Exchange monitors its capacity and data center space and thus is in the best place to determine these limits and modify them as appropriate in response to changes to this capacity and space, as well as market demand. For example, the Exchange's affiliate Cboe EDGA Exchange, Inc. has increased the prescribed maximum limit three times since the launch of Dedicated Cores on its exchange on February 26, 2024 as a result of evaluating the demand relative to Dedicated Cores availability.¹⁸ The

proposed increased limits continue to apply uniformly to similarly situated market participants (*i.e.*, all Members are subject to the same limit and all Sponsored Participants are subject to the same limit, respectively). The Exchange believes it's not unfairly discriminatory to provide for different limits for different types of Users. For example, the Exchange believes it's not unfairly discriminatory to provide for an initial lower limit to be allocated for Sponsored Participants because unlike Members, Sponsored Participants are able to access the Exchange without paying a Membership Fee. Members also have more regulatory obligations and risk that Sponsored Participants do not. For example, while Sponsored Participants must agree to comply with the Rules of the Exchange, it is the Sponsoring Member of that Sponsored Participant that remains ultimately responsible for all orders entered on or through the Exchange by that Sponsored Participant. The industry also has a history of applying fees differently to Members as compared to Sponsored Participants.¹⁹ Lastly, the Exchange believes its proposed maximum limits, and distinction between Members and Sponsored Users, is another appropriate means to help the Exchange manage its allotment of Dedicated Cores and better ensure this finite resource is apportioned fairly.

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 intramarket competition that is not necessary in furtherance of the purposes of the Act because the proposed tiered fee structure will apply equally to all similarly situated Users that choose to use Dedicated Cores. As discussed above, Dedicated Cores are optional and Users may choose to utilize Dedicated Cores, or not, based on their views of the additional benefits and added value provided by utilizing a Dedicated Core. The Exchange believes the proposed fees will be assessed proportionately to the potential value or benefit received by Users with a greater number of Dedicated Cores and notes that Users may determine at any time to cease using Dedicated Cores. As

CboeEDGA-2024-014) Securities Exchange Act Release No. 100300 (June 10, 2024), 89 FR 50653 (June 14, 2024) (SR-CboeEDGA-2024-020); and Securities Exchange Act Release No. 100736 (August 21, 2024), 89 FR 67696 (August 15, 2024) (SR-CboeEDGA-2024-032).

¹⁹ See *e.g.*, Securities Exchange Act Release No. 68342 (December 3, 2012), 77 FR 73096 (December 7, 2012) (SR-CBOE-2012-114) and Securities Exchange Act Release No. 66082 (January 3, 2012), 77 FR 1101 (January 9, 2012) (SR-C2-2011-041).

¹⁵ See *e.g.*, Cboe U.S. Options Fee Schedule, BZX Options, Options Logical Port Fees, Ports with Bulk Quoting Capabilities.

¹⁶ The Exchange notes that it cannot currently convert shared CPU cores into Dedicated Cores.

¹⁷ The Exchange notes that approximately 5% of Users that have Dedicated Cores currently are at or near the maximum limits. The average number of Dedicated Cores used for the Exchange is 21.

¹⁸ See Securities Exchange Act Release No. 99983 (April 17, 2024), 89 FR 30418 (April 23, 2024) (SR-

discussed, Users can also continue to access the Exchange through shared CPU Cores at no additional cost. Finally, all Users will be entitled to two Dedicated Cores at no additional cost.

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 15 other equities 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.”²⁰ 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’”²¹ 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 Act²² and paragraph (f) of Rule 19b-4²³ 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-2024-122 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-2024-122. 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-2024-122 and should be submitted on or before January 2, 2025.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁴

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2024-29043 Filed 12-10-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-660, OMB Control No. 3235-0722]

**Submission for OMB Review;
Comment Request; Extension: Form 1-U**

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 (“Commission”) has submitted to the Office of Management and Budget this request for extension of the previously approved collection of information discussed below.

Form 1-U (17 CFR 239.93) is used to file current event reports by Tier 2 issuers under Regulation A, an exemption from registration under the Securities Act of 1933 (15 U.S.C 77a *et seq.*). Form 1-U provides information to the public within four business days of fundamental changes in the nature of the issuer's business and other

²⁰ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

²¹ *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)).

²² 15 U.S.C. 78s(b)(3)(A).

²³ 17 CFR 240.19b-4(f).

²⁴ 17 CFR 200.30-3(a)(12).

significant events. We estimate that approximately 1,502 issuers file Form 1-U annually. We estimate that Form 1-U takes approximately 5.0 hours to prepare. We estimate that 85% of the 5.0 hours per response is prepared by the company for a total annual burden of 6,384 hours (4.25 hours per response × 1,502 responses).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Public Comment Instructions: The 30-day public comment period for this information collection request opens on December 11, 2024 and closes at the end of the day on January 10, 2025. The public may view the full information request and submit comments at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202412-3235-005 or email comments to MBX.OMB.OIRA.SEC_desk_officer@omb.eop.gov.

Dated: December 5, 2024.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024-29023 Filed 12-10-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-101821; File No. SR-NASDAQ-2024-074]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change To Amend Equity 4, Rule 4759 Concerning Data Feeds Utilized

December 5, 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 25, 2024, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Equity 4, Rule 4759 (Data Feeds

Utilized) to change the primary and secondary source of quotation data of certain market centers in the list of proprietary and network processor feeds that the Exchange utilizes for the handling, routing, and execution of orders as well as regulatory compliance processes related to those functions.

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 update and amend the data feeds table in Equity 4, Rule 4759, which sets forth on a market-by-market basis the specific proprietary and network processor feeds that the Exchange utilizes for the handling, routing, and execution of orders, and for performing the regulatory compliance processes related to each of those functions. Specifically, the table would be amended to reflect that the Exchange will receive a direct feed from the Long-Term Stock Exchange (“LTSE”) as its primary quotation data source and CQS/UQDF will become its secondary data source for the handling, routing and execution of orders and for performing regulatory compliance processes related to each of those functions. The change to the primary sources reflects the Exchange’s effort to include an additional source and the use of secondary sources in the event the primary source is unable to provide data.

The operative date of the proposed rule change shall be November 25, 2024.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b)

of the Act,³ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁴ 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 believes that the proposed rule change removes impediments to and perfects the mechanism of a free and open market because updating its data feeds table of market centers for which the exchange consumes quotation data through a direct feed will provide clarity to market participants. Additionally, it is necessary and consistent with the public interest and the protection of investors to update the Exchange’s table of market centers in Equity 4, Rule 4759 in order to provide transparency with respect to all the direct proprietary and network processor feeds from which the Exchange obtains market data.

B. Self-Regulatory Organization’s Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issue; instead, its purpose is to enhance transparency with respect to the operation of the Exchange and its use of market data feeds.

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 Act⁵ and Rule 19b-4(f)(6) thereunder.⁶ Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of

³ 15 U.S.C. 78f(b).

⁴ 15 U.S.C. 78f(b)(5).

⁵ 15 U.S.C. 78s(b)(3)(A)(iii).

⁶ 17 CFR 240.19b-4(f)(6).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act⁷ and Rule 19b-4(f)(6) thereunder.⁸

A proposed rule change filed under Rule 19b-4(f)(6)⁹ normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),¹⁰ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because the proposal does not raise any novel regulatory issues and waiver will allow the Exchange to begin receiving and using a direct feed from LTSE as soon as possible. For this reason, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.¹¹

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-2024-074 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-2024-074. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. 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-2024-074, and should be submitted on or before December 31, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024-29039 Filed 12-10-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-101824; File No. SR-CboeEDGX-2024-080]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule Regarding Dedicated Cores

December 5, 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 26, 2024, Cboe EDGX Exchange, Inc. (the "Exchange" or "EDGX") 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

Cboe EDGX Exchange, Inc (the "Exchange" or "EDGX") proposes to amend its Fee Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (http://markets.cboe.com/us/options/regulation/rule_filings/edgx/), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

⁷ 15 U.S.C. 78s(b)(3)(A).

⁸ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

⁹ 17 CFR 240.19b-4(f)(6).

¹⁰ 17 CFR 240.19b-4(f)(6)(iii).

¹¹ For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹² 17 CFR 200.30-3(a)(12), (59).

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 Dedicated Cores.³

By way of background, the Exchange recently began allowing Users⁴ to assign a Single Binary Order Entry ("BOE") logical order entry port⁵ to a single dedicated Central Processing Unit (CPU Core) ("Dedicated Core"). Historically, CPU Cores had been shared by logical order entry ports (*i.e.*, multiple logical ports from multiple firms may connect to a single CPU Core). Use of Dedicated Cores however, can provide reduced latency, enhanced throughput, and improved performance since a firm using a Dedicated Core is utilizing the full processing power of a CPU Core instead of sharing that power with other firms. This offering is completely voluntary and is available to all Users that wish to purchase Dedicated Cores. Users may utilize BOE logical order entry ports on shared CPU Cores, either in lieu of, or in addition to, their use of Dedicated Core(s). As such, Users are able to operate across a mix of shared and dedicated CPU Cores which the Exchange believes provides additional risk and capacity management. Further, Dedicated Cores are not required nor necessary to participate on the Exchange and as such Users may opt not to use Dedicated Cores at all.

The Exchange proposes to assess the following monthly fees for Users that wish to use Dedicated Cores and adopt a maximum limit. First, the Exchange proposes to provide up to two Dedicated Cores to all Users who wish to use Dedicated Cores, at no additional cost.

³ The Exchange initially adopted pricing for Dedicated Cores on July 1, 2024 (SR-CboeEDGX-2024-043). On August 1, 2024, the Exchange withdrew that filing and submitted SR-CboeEDGX-2024-051. On business date September 30, 2024, the Exchange withdrew that filing and submitted SR-CboeEDGX-2024-061. On November 26, 2024, the Exchange withdrew that filing and submitted this filing.

⁴ A User may be either a Member or Sponsored Participant. The term "Member" shall mean any registered broker or dealer that has been admitted to membership in the Exchange, limited liability company or other organization which is a registered broker or dealer pursuant to Section 15 of the Act, and which has been approved by the Exchange. A Sponsored Participant may be a Member or non-Member of the Exchange whose direct electronic access to the Exchange is authorized by a Sponsoring Member subject to certain conditions. See Exchange Rule 11.3.

⁵ Users may currently connect to the Exchange using a logical port available through an application programming interface ("API"), such as the Binary Order Entry ("BOE") protocol. A BOE logical order entry port is used for order entry.

For the use of more than two Dedicated Cores, the Exchange proposes to assess the following fees: \$650 per Dedicated Core for 3–15 Dedicated Cores; \$850 per Dedicated Core for 16–30 Dedicated Cores; and \$1,050 per Dedicated Core for 31 or more Dedicated Cores. The proposed fees are progressive and the Exchange proposes to include the following example in the Fees Schedule to provide clarity as to how the fees will be applied. Particularly, the Exchange will provide the following example: if a User were to purchase 16 Dedicated Cores, it will be charged a total of \$9,300 per month ($\$0 * 2 + \$650 * 13 + \$850 * 1$). The Exchange also proposes to make clear in the Fees Schedule that the monthly fees are assessed and applied in their entirety and are not prorated. The Exchange notes the current standard fees assessed for BOE Logical Ports, whether used with Dedicated or shared CPU cores, will remain applicable and unchanged.⁶

Since the Exchange currently has a finite amount of physical space in its data centers in which its servers (and therefore corresponding CPU Cores) are located, the Exchange also proposes to prescribe a maximum limit on the number of Dedicated Cores that Users may purchase each month. The purpose of establishing these limits is to manage the allotment of Dedicated Cores in a fair manner and to prevent the Exchange from being required to expend large amounts of resources in order to provide an unlimited number of Dedicated Cores. The Exchange previously established a limit for Members of a maximum number of 60 Dedicated Cores and Sponsoring Members a limit of a maximum number of 25 Dedicated Cores for each of their Sponsored Access relationships.⁷ The Exchange has since been able to procure additional space in its third-party data center, as well as procure additional servers with CPU Cores and the Exchange has a better understanding of User demand relative to its available space since the initial launch of Dedicated Cores. After seeing increased User demand, the Exchange proposed to increase the cap and provided that Members will be limited to a maximum number of 80 Dedicated Cores and Sponsoring Members will be limited to a maximum number of 35 Dedicated Cores for each of their Sponsored

⁶ The Exchange currently assesses \$550 per port per month. Port fees will also continue to be assessed on the first two Dedicated Cores that Users receive at no additional cost. See Cboe EDGX Equities Fee Schedule.

⁷ See Securities Exchange Act Release No. 100471 (July 9, 2024) 89 FR 57454 (July 15, 2024) (SR-CboeEDGX-2024-043).

Access relationships.⁸ The Exchange noted at that time that it would continue monitoring Dedicated Core interest by all Users and allotment availability with the goal of increasing these limits to meet Users' needs if and when the demand is there and/or the Exchange is able to accommodate additional Dedicated Cores. Since then, the Exchange has determined that it is able to accommodate an increased cap relative to current demand. As such, the Exchange proposes to increase the cap to 120 Dedicated Cores for Members, effective December 1, 2024.⁹ Sponsoring Members will continue to be limited to a maximum of 35 Dedicated Cores for each of their Sponsored Access relationships.¹⁰

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.¹¹ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹² 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,

⁸ See Securities Exchange Act Release No. 101305 (October 10, 2024) 89 FR 83720 (October 17, 2024) (SR-CboeEDGX-2024-061).

⁹ The prescribed maximum quantity of Dedicated Cores for Members applies regardless of whether that Member purchases the Dedicated Cores directly from the Exchange and/or through a Service Bureau. In a Service Bureau relationship, a customer allows its MPID to be used on the ports of a technology provider, or Service Bureau. One MPID may be allowed on several different Service Bureaus.

¹⁰ The fee tier(s) applicable to Sponsoring Members are determined on a per Sponsored Access relationship basis and not on the combined total of Dedicated Cores across Sponsored Users. For example, under the proposed changes, a Sponsoring Member that has three Sponsored Access relationships is entitled to a total of 105 Dedicated Cores for those 3 Sponsored Access relationships but would be assessed fees separately based on the 35 Dedicated Cores for each Sponsored User (instead of combined total of 105 Dedicated Cores). For example, a Sponsoring Member with 3 Sponsored Access relationships would pay \$30,450 per month if each Sponsored Access relationship purchased the maximum 35 Dedicated Cores. More specifically, the Sponsoring Member would be provided 2 Dedicated Cores at no additional cost for each Sponsored User under Tier 1 (total of 6 Dedicated Cores at no additional cost) and provided an additional 8 Dedicated Cores at \$650 each for each Sponsored User, 5 Dedicated Cores at \$850 each for each Sponsored User and 20 Dedicated Cores at \$1,050 each for each Sponsored User (combined total of 99 additional Dedicated Cores).

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(5).

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)¹³ 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)¹⁴ 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 proposal is reasonable because the Exchange is offering any User who wishes to utilize Dedicated Cores up to two Dedicated Cores at no additional cost. For example, of the Users that currently maintain Dedicated Cores, 33% maintain only 1 or 2 Dedicated Cores and therefore pay no additional fees. The Exchange believes the proposed fees are reasonable because Dedicated Cores provide a valuable service in that it can provide reduced latency, enhanced throughput, and improved performance compared to use of a shared CPU Core since a firm using a Dedicated Core is utilizing the full processing power of a CPU Core. The Exchange also emphasizes however, that the use of Dedicated Cores is not necessary for trading and as noted above, is entirely optional. Users can also continue to access the Exchange through shared CPU Cores at no additional cost. Indeed, 18% of the Exchange's Members currently use Dedicated Cores, and as noted above, of those who do, 33% take only 1 or 2 Dedicated Cores at no additional cost. Depending on a firm's specific business needs, the proposal enables Users to choose to use Dedicated Cores in lieu of, or in addition to, shared CPU Cores (or as emphasized, not use Dedicated Cores at all). If a User finds little benefit in having Dedicated Cores based on its business model and trading strategies, or determines Dedicated Cores are not cost-efficient for its needs or does not provide sufficient value to the firm, such User may continue its use of the shared CPU Cores, unchanged. The Exchange also has no plans to eliminate shared CPU Cores nor to require Users to purchase Dedicated Cores.

The Exchange has seen general interest in Dedicated Cores from a variety of market participants, with varying size and business models. Such market participants include proprietary trading firms (who tend to be more latency sensitive), as well as sell-side market participants and buy-side market participants (who tend to be less latency sensitive). For background, proprietary trading firms utilize their own capital to trade without taking outside money from clients. Due to the nature of their respective businesses, the Exchange has classified proprietary trading firms as latency sensitive, and other groups, such as buy-side hedge funds, sell-side banks and sell-side non-banks (such as agency brokers) as non-latency sensitive. Proprietary trading firms' strategies may range from, marketing making, to relative value trading and arbitrage—these all rely on profiting from general market activity and, generally, requires faster entry and exit into trades and positions making proprietary trading firms more latency sensitive than other market segments. Buy-side hedge funds, banks and agency brokers are not as latency sensitive as strategy for hedge funds is based on overall long-term positioning in the market and banks and agency brokers may profit from commissions of customer order flow; both are generally strategies that are not reliant on speed to the same extent proprietary trading firms are. Further, Members have various reasons for obtaining Dedicated Cores. Some Members for example, may be seeking to further reduce latency, whereas others may use Dedicated Cores as a general risk mitigation by siloing their respective activity. Of further note, only 46% of Members that are propriety trading firms (who again, generally tend to be more latency sensitive) utilize Dedicated Cores, and of that 46%, 33% are only utilizing the 1 to 2 free Dedicated Cores available to all Users. As mentioned above, some non-latency sensitive firms have chosen to also adopt Dedicated Cores. 12% of Members that are not latency sensitive utilize Dedicated Cores, and of that 12%, 33% are only utilizing the 1 to 2 free Dedicated Cores available to all Users.

The lack of universal, or even widespread, adoption by all such users therefore demonstrates that purchasing Dedicated Cores is not effectively a requirement to compete for any one type of market participant, including latency sensitive market participants. Instead, Dedicated Cores are an optional and voluntary connectivity offering, which market participants are free to choose whether or not to utilize based on

whether they meet their unique business needs. Moreover, the Exchange has received overwhelming positive feedback and support for Dedicated Cores, with some Members even noting that they have moved more of their order flow to the Exchange and its affiliated equities exchanges (the "Equities Exchanges") as they have noticed both better fills and greater consistency of order execution at the Equities Exchanges. This demonstrates that despite any incurred costs for Members that choose to purchase Dedicated Cores, it is ultimately a net win for them as they benefit from better execution. The Exchange believes it also demonstrates that Members find the proposed fees to be both reasonable and have benefited from purchasing or, at alternatively benefiting from the proposed one or two free Dedicated Cores available at no additional cost. The Exchange believes this is shown by both the level of demand for Dedicated Cores and the feedback from market participants, including as described above. The Exchange also believes it's notable that no negative comment letters in connection with the proposed pricing have been received since the Exchange first filed proposed fees for Dedicated Cores back on July 1, 2024. Additionally, as noted earlier, Members can (and many have) decide that utilizing even a free Dedicated Core is not needed for their business. Ultimately, this is a business decision that each Member must make and is best suited to determine and will ultimately depend on the priorities and strategies of that Member's respective business needs.

The Exchange also believes that the proposed Dedicated Core 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 Dedicated Cores will be subject to the same proposed tiered fee schedule. Moreover, all Users are entitled to up to 2 Dedicated Cores at no additional cost and as previously discussed, 33% of all Users that take Dedicated Cores (including both latency sensitive and non-latency sensitive Users) take only 1 or 2 Dedicated Cores at no additional cost. The Exchange believes the proposed ascending fee structure is also reasonable, equitable and not unfairly discriminatory as it is designed so that firms that use a higher allotment of the Exchange's finite number of Dedicated Cores pay higher rates, rather than placing that burden on market participants that have more modest needs who will have the

¹³ *Id.*

¹⁴ 15 U.S.C. 78f(b)(4).

flexibility of obtaining Dedicated Cores at lower price points in the lower tiers. As such, the proposed fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the ascending fee structure reflects the (finite) resources consumed by the various needs of market participants—that is, the lowest Dedicated Core consuming Users pay the least, and highest Dedicated Core consuming Users pay the most. Other exchanges similarly assess higher fees to those that consume more Exchange resources.¹⁵ Moreover, those consuming more Dedicated Cores do so if they find a benefit in having higher quantities of Dedicated Cores based on their respective business needs. The proposed tier structure is also designed to encourage firms to manage their needs in a fair manner and to prevent the Exchange from being required to expend large amounts of resources in order to provide an additional number of Dedicated Cores. Moreover, as discussed above and in more detail below, the Exchange cannot currently offer an unlimited number of Dedicated Cores due in part to physical space constraints in the third-party data center. The Exchange believes the proposed ascending fee structure is therefore another appropriate means, in conjunction with an established cap, to manage this finite resource and ensure the resource is apportioned more fairly.

The Exchange believes it is reasonable to limit the number of Dedicated Cores Users can purchase because the Exchange has a finite amount of space in its third-party data centers to accommodate CPU cores, including Dedicated Cores. The Exchange must also take into account timing and cost considerations in procuring additional Dedicated Cores and related hardware such as servers, switches, optics and cables, as well as the readiness of the Exchange's data center to accommodate additional Dedicated Cores in the Exchange's respective Order Handler Cabinets.¹⁶ Moreover, procuring data center space has grown to be more challenging than it was five years ago with the increased demand for data center space. For example, the U.S. colocation data center market has doubled in size in just four years. In addition to the Exchange's rollout of Dedicated Cores, the Exchange is mindful of its other business areas and

the need to continue to be mindful of its existing, external restraints in procuring additional space in this area. The Exchange has, and will continue to, monitor market participant demand and space availability and endeavor to adjust the limit if and when the Exchange is able to acquire additional space and power within the third-party data centers and/or CPU Cores to accommodate additional Dedicated Cores.¹⁷ The Exchange monitors its capacity and data center space and thus is in the best place to determine these limits and modify them as appropriate in response to changes to this capacity and space, as well as market demand. For example, the Exchange's affiliate Cboe EDGA Exchange, Inc. has increased the prescribed maximum limit three times since the launch of Dedicated Cores on its exchange on February 26, 2024 as a result of evaluating the demand relative to Dedicated Cores availability.¹⁸ The proposed increased limits continue to apply uniformly to similarly situated market participants (*i.e.*, all Members are subject to the same limit and all Sponsored Participants are subject to the same limit, respectively). The Exchange believes it's not unfairly discriminatory to provide for different limits for different types of Users. For example, the Exchange believes it's not unfairly discriminatory to provide for an initial lower limit to be allocated for Sponsored Participants because unlike Members, Sponsored Participants are able to access the Exchange without paying a Membership Fee. Members also have more regulatory obligations and risk that Sponsored Participants do not. For example, while Sponsored Participants must agree to comply with the Rules of the Exchange, it is the Sponsoring Member of that Sponsored Participant that remains ultimately responsible for all orders entered on or through the Exchange by that Sponsored Participant. The industry also has a history of applying fees differently to Members as compared to Sponsored Participants.¹⁹ Lastly, the Exchange

believes its proposed maximum limits, and distinction between Members and Sponsored Users, is another appropriate means to help the Exchange manage its allotment of Dedicated Cores and better ensure this finite resource is apportioned fairly.

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 intramarket competition that is not necessary in furtherance of the purposes of the Act because the proposed tiered fee structure will apply equally to all similarly situated Users that choose to use Dedicated Cores. As discussed above, Dedicated Cores are optional and Users may choose to utilize Dedicated Cores, or not, based on their views of the additional benefits and added value provided by utilizing a Dedicated Core. The Exchange believes the proposed fees will be assessed proportionately to the potential value or benefit received by Users with a greater number of Dedicated Cores and notes that Users may determine at any time to cease using Dedicated Cores. As discussed, Users can also continue to access the Exchange through shared CPU Cores at no additional cost. Finally, all Users will be entitled to two Dedicated Cores at no additional cost.

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 15 other equities 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

¹⁷ The Exchange does not expect any Users that take Dedicated Cores to be at or near the maximum limits and the average number of Dedicated Cores used for the Exchange is 17.

¹⁸ See Securities Exchange Act Release No. 99983 (April 17, 2024), 89 FR 30418 (April 23, 2024) (SR-CboeEDGA-2024-014); Securities Exchange Act Release No. 100300 (June 10, 2024), 89 FR 50653 (June 14, 2024) (SR-CboeEDGA-2024-020); and Securities Exchange Act Release No. 100736 (August 21, 2024), 89 FR 67696 (August 15, 2024) (SR-CboeEDGA-2024-032).

¹⁹ See *e.g.*, Securities Exchange Act Release No. 68342 (December 3, 2012), 77 FR 73096 (December 7, 2012) (SR-CBOE-2012-114) and Securities Exchange Act Release No. 66082 (January 3, 2012), 77 FR 1101 (January 9, 2012) (SR-C2-2011-041).

¹⁵ See *e.g.*, Cboe U.S. Options Fee Schedule, BZX Options, Options Logical Port Fees, Ports with Bulk Quoting Capabilities.

¹⁶ The Exchange notes that it cannot currently convert shared CPU cores into Dedicated Cores.

investors and listed companies.”²⁰ 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’. . . .”²¹ 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 Act²² and paragraph (f) of Rule 19b-4²³ 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-CboeEDGX-2024-080 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-CboeEDGX-2024-080. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission’s internet website (<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-CboeEDGX-2024-080 and should be submitted on or before January 2, 2025.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁴

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024-29042 Filed 12-10-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-101823; File No. SR-CboeEDGA-2024-048]

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule Regarding Dedicated Cores

December 5, 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 26, 2024, Cboe EDGA Exchange, Inc. (the “Exchange” or “EDGA”) 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

Cboe EDGA Exchange, Inc. (the “Exchange” or “EDGA Equities”) proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange’s website (http://markets.cboe.com/us/equities/regulation/rule_filings/edga/), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

²⁰ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

²¹ *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)).

²² 15 U.S.C. 78s(b)(3)(A).

²³ 17 CFR 240.19b-4(f).

²⁴ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule to adopt fees for Dedicated Cores.³

By way of background, the Exchange recently began to allow Users⁴ to assign a Single Binary Order Entry ("BOE") logical order entry port⁵ to a single dedicated Central Processing Unit (CPU Core) ("Dedicated Core"). Historically, CPU Cores had been shared by logical order entry ports (*i.e.*, multiple logical ports from multiple firms may connect to a single CPU Core). Use of Dedicated Cores however, can provide reduced latency, enhanced throughput, and improved performance since a firm using a Dedicated Core is utilizing the full processing power of a CPU Core instead of sharing that power with other firms. This offering is completely voluntary and is available to all Users that wish to purchase Dedicated Cores. Users may utilize BOE logical order entry ports on shared CPU Cores, either in lieu of, or in addition to, their use of Dedicated Core(s). As such, Users are able to operate across a mix of shared and dedicated CPU Cores which the Exchange believes provides additional risk and capacity management. Further, Dedicated Cores are not required nor necessary to participate on the Exchange

and as such Users may opt not to use Dedicated Cores at all.

The Exchange proposes to assess the following monthly fees for Users that wish to use Dedicated Cores and adopt a maximum limit. First, the Exchange proposes to provide up to two Dedicated Cores to all Users who wish to use Dedicated Cores, at no additional cost. For the use of more than two Dedicated Cores, the Exchange proposes to assess the following fees: \$650 per Dedicated Core for 3–10 Dedicated Cores; \$850 per Dedicated Core for 11–15 Dedicated Cores; and \$1,050 per Dedicated Core for 16 or more Dedicated Cores. The proposed fees are progressive and the Exchange proposes to include the following example in the Fees Schedule to provide clarity as to how the fees will be applied. Particularly, the Exchange will provide the following example: if a User were to purchase 11 Dedicated Cores, it will be charged a total of \$6,050 per month ($\$0 * 2 + \$650 * 8 + \$850 * 1$). The Exchange also proposes to make clear in the Fees Schedule that the monthly fees are assessed and applied in their entirety and are not prorated. The Exchange notes the current standard fees assessed for BOE Logical Ports, whether used with Dedicated or shared CPU cores, will remain applicable and unchanged.⁶

Since the Exchange currently has a finite amount of physical space in its data centers in which its servers (and therefore corresponding CPU Cores) are located, the Exchange also proposes to prescribe a maximum limit on the number of Dedicated Cores that Users may purchase each month. The purpose of establishing these limits is to manage the allotment of Dedicated Cores in a fair manner and to prevent the Exchange from being required to expend large amounts of resources in order to provide an unlimited number of Dedicated Cores. The Exchange previously established a limit for Members of a maximum number of 60 Dedicated Cores and Sponsoring Members a limit of a maximum number of 25 Dedicated Cores for each of their Sponsored Access relationships.⁷ The Exchange has since been able to procure additional servers with CPU Cores and also has a better understanding of User demand relative to its available space and available Dedicated Cores since the initial launch of Dedicated Cores. After

seeing increased User demand, the Exchange proposed to increase that cap and provided that Members will be limited to a maximum number of 80 Dedicated Cores and Sponsoring Members will be limited to a maximum number of 35 Dedicated Cores for each of their Sponsored Access relationships.⁸ The Exchange noted at that time that it would continue monitoring Dedicated Core interest by all Users and allotment availability with the goal of increasing these limits to meet Users' needs if and when the demand is there and/or the Exchange is able to accommodate additional Dedicated Cores. Since then, the Exchange has determined that it is able to accommodate an increased cap relative to current demand. As such, the Exchange proposes to increase the cap to 120 Dedicated Cores for Members, effective December 1, 2024.⁹ Sponsoring Members will continue to be limited to a maximum of 35 Dedicated Cores for each of their Sponsored Access relationships.¹⁰

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.¹¹ Specifically, the Exchange believes the proposed rule change is consistent with the Section

⁸ See Securities Exchange Act Release No. 101304 (October 10, 2024), 89 FR 83748 (October 17, 2024) (SR-CboeEDGA-2024-039).

⁹ The prescribed maximum quantity of Dedicated Cores for Members applies regardless of whether that Member purchases the Dedicated Cores directly from the Exchange and/or through a Service Bureau. In a Service Bureau relationship, a customer allows its MPID to be used on the ports of a technology provider, or Service Bureau. One MPID may be allowed on several different Service Bureaus.

¹⁰ The fee tier(s) applicable to Sponsoring Members are determined on a per Sponsored Access relationship basis and not on the combined total of Dedicated Cores across Sponsored Users. For example, under the proposed changes, a Sponsoring Member that has three Sponsored Access relationships is entitled to a total of 105 Dedicated Cores for those 3 Sponsored Access relationships but would be assessed fees separately based on the 35 Dedicated Cores for each Sponsored User (instead of combined total of 105 Dedicated Cores). For example, a Sponsoring Member with 3 Sponsored Access relationships would pay \$30,450 per month if each Sponsored Access relationship purchased the maximum 35 Dedicated Cores. More specifically, the Sponsoring Member would be provided 2 Dedicated Cores at no additional cost for each Sponsored User under Tier 1 (total of 6 Dedicated Cores at no additional cost) and provided an additional 8 Dedicated Cores at \$650 each for each Sponsored User, 5 Dedicated Cores at \$850 each for each Sponsored User and 20 Dedicated Cores at \$1,050 each for each Sponsored User (combined total of 99 additional Dedicated Cores).

¹¹ 15 U.S.C. 78f(b).

³ The Exchange initially introduced Dedicated Cores and corresponding pricing on March 1, 2024 (SR-CboeEDGA-2024-008). On March 20, 2024, the Exchange refiled the proposed fees (SR-CboeEDGA-2024-009). The Exchange amended the Dedicated Cores fees on April 1, 2024 (SR-CboeEDGA-2024-012). On April 12, 2024, the Exchange withdrew that filing and submitted SR-CboeEDGA-2024-014. On May 13, 2024, the Exchange withdrew SR-CboeEDGA-2024-009. On June 3, 2024, the Exchange also withdrew SR-CboeEDGA-014 and SR-CboeEDGA-2024-020. On August 1, the Exchange withdrew that filing and submitted SR-CboeEDGA-2024-032. On business date September 30, 2024, the Exchange withdrew that filing and submitted SR-CboeEDGA-2024-039. On November 26, 2024, the Exchange withdrew that filing and submitted this filing.

⁴ A User may be either a Member or Sponsored Participant. The term "Member" shall mean any registered broker or dealer that has been admitted to membership in the Exchange, limited liability company or other organization which is a registered broker or dealer pursuant to Section 15 of the Act, and which has been approved by the Exchange. A Sponsored Participant may be a Member or non-Member of the Exchange whose direct electronic access to the Exchange is authorized by a Sponsoring Member subject to certain conditions. See Exchange Rule 11.3.

⁵ Users may currently connect to the Exchange using a logical port available through an application programming interface ("API"), such as the Binary Order Entry ("BOE") protocol. A BOE logical order entry port is used for order entry.

⁶ The Exchange currently assesses \$550 per port per month. Port fees will also continue to be assessed on the first two Dedicated Cores that Users receive at no additional cost. See Cboe EDGA Equities Fee Schedule.

⁷ See Securities Exchange Act Release No. 100300 (June 10, 2024), 89 FR 50653 (June 14, 2024) (SR-CboeEDGA-2024-020).

6(b)(5)¹² 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)¹³ 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)¹⁴ 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 proposal is reasonable because the Exchange is offering any User who wishes to utilize Dedicated Cores up to two Dedicated Cores at no additional cost. For example, of the Users that currently maintain Dedicated Cores, 32% maintain only 1 or 2 Dedicated Cores and therefore pay no additional fees. The Exchange believes the proposed fees are reasonable because Dedicated Cores provide a valuable service in that it can provide reduced latency, enhanced throughput, and improved performance compared to use of a shared CPU Core since a firm using a Dedicated Core is utilizing the full processing power of a CPU Core. The Exchange also emphasizes however, that the use of Dedicated Cores is not necessary for trading and as noted above, is entirely optional. Users can also continue to access the Exchange through shared CPU Cores at no additional cost. Indeed, only 21% of the Exchange's Members currently use Dedicated Cores and as noted above, of those 21%, 32% take only 1 or 2 Dedicated Cores at no additional cost. Depending on a firm's specific business needs, the proposal enables Users to choose to use Dedicated Cores in lieu of, or in addition to, shared CPU Cores (or as emphasized, not use Dedicated Cores at all). If a User finds little benefit in having Dedicated Cores based on its business model and trading strategies,

or determines Dedicated Cores are not cost-efficient for its needs or does not provide sufficient value to the firm, such User may continue its use of the shared CPU Cores, unchanged. The Exchange also has no plans to eliminate shared CPU Cores nor to require Users to purchase Dedicated Cores.

The Exchange has seen general interest in Dedicated Cores from a variety of market participants, with varying size and business models. Such market participants include proprietary trading firms (who tend to be more latency sensitive), as well as sell-side market participants and buy-side market participants (who tend to be less latency sensitive). For background, proprietary trading firms utilize their own capital to trade without taking outside money from clients. Due to the nature of their respective businesses, the Exchange has classified proprietary trading firms as latency sensitive, and other groups, such as buy-side hedge funds, sell-side banks and sell-side non-banks (such as agency brokers) as non-latency sensitive. Proprietary trading firms' strategies may range from, marketing making, to relative value trading and arbitrage—these all rely on profiting from general market activity and, generally, requires faster entry and exit into trades and positions making proprietary trading firms more latency sensitive than other market segments. Buy-side hedge funds, banks and agency brokers are not as latency sensitive as strategy for hedge funds is based on overall long-term positioning in the market and banks and agency brokers may profit from commissions of customer order flow; both are generally strategies that are not reliant on speed to the same extent proprietary trading firms are. Further, Members have various reasons for obtaining Dedicated Cores. Some Members for example, may be seeking to further reduce latency, whereas others may use Dedicated Cores as a general risk mitigation by siloing their respective activity. Of further note, only 47% of Members that are propriety trading firms (who again, generally tend to be more latency sensitive) utilize Dedicated Cores, and of that 47%, 33% are only utilizing the 1 to 2 free Dedicated Cores available to all Users. As mentioned above, some non-latency sensitive firms have chosen to also adopt Dedicated Cores. 15% of Members that are not latency sensitive utilize Dedicated Cores, and of that 15%, 33% are only utilizing the 1 to 2 free Dedicated Cores available to all Users.

The lack of universal, or even widespread, adoption by all such users therefore demonstrates that purchasing Dedicated Cores is not effectively a

requirement to compete for any one type of market participant, including latency sensitive market participants. Instead, Dedicated Cores are an optional and voluntary connectivity offering, which market participants are free to choose whether or not to utilize based on whether they meet their unique business needs. Moreover, the Exchange has received overwhelming positive feedback and support for Dedicated Cores, with some Members even noting that they have moved more of their order flow to the Exchange and its affiliated equities exchanges (the "Equities Exchanges") as they have noticed both better fills and greater consistency of order execution at the Equities Exchanges. This demonstrates that despite any incurred costs for Members that choose to purchase Dedicated Cores, it is ultimately a net win for them as they benefit from better execution. The Exchange believes it also demonstrates that Members find the proposed fees to be both reasonable and have benefited from purchasing or, at alternatively benefiting from the proposed one or two free Dedicated Cores available at no additional cost. The Exchange believes this is shown by both the level of demand for Dedicated Cores and the feedback from market participants, including as described above. The Exchange also believes it's notable that no negative comment letters in connection with the proposed pricing have been received since the Exchange first filed proposed fees for Dedicated Cores back on March 1, 2024.

Additionally, as noted earlier, Members can (and many have) decide that utilizing even a free Dedicated Core is not needed for their business. Ultimately, this is a business decision that each Member must make and is best suited to determine and will ultimately depend on the priorities and strategies of that Member's respective business needs.

The Exchange also believes that the proposed Dedicated Core 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 Dedicated Cores will be subject to the same proposed tiered fee schedule. Moreover, all Users are entitled to up to 2 Dedicated Cores at no additional cost and as previously discussed, 32% of all Users that take Dedicated Cores (including both latency sensitive and non-latency sensitive Users) take only 1 or 2 Dedicated Cores at no additional cost. The Exchange believes the proposed ascending fee structure is also reasonable, equitable

¹² 15 U.S.C. 78f(b)(5).

¹³ *Id.*

¹⁴ 15 U.S.C. 78f(b)(4).

and not unfairly discriminatory as it is designed so that firms that use a higher allotment of the Exchange's finite number of Dedicated Cores pay higher rates, rather than placing that burden on market participants that have more modest needs who will have the flexibility of obtaining Dedicated Cores at lower price points in the lower tiers. As such, the proposed fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the ascending fee structure reflects the (finite) resources consumed by the various needs of market participants—that is, the lowest Dedicated Core consuming Users pay the least, and highest Dedicated Core consuming Users pay the most. Other exchanges similarly assess higher fees to those that consume more Exchange resources.¹⁵ Moreover, those consuming more Dedicated Cores do so if they find a benefit in having higher quantities of Dedicated Cores based on their respective business needs. The proposed tier structure is also designed to encourage firms to manage their needs in a fair manner and to prevent the Exchange from being required to expend large amounts of resources in order to provide an additional number of Dedicated Cores. Moreover, as discussed above and in more detail below, the Exchange cannot currently offer an unlimited number of Dedicated Cores due in part to physical space constraints in the third-party data center. The Exchange believes the proposed ascending fee structure is therefore another appropriate means, in conjunction with an established cap, to manage this finite resource and ensure the resource is apportioned more fairly.

The Exchange believes it is reasonable to limit the number of Dedicated Cores Users can purchase because the Exchange has a finite amount of space in its third-party data centers to accommodate CPU cores, including Dedicated Cores. The Exchange must also take into account timing and cost considerations in procuring additional Dedicated Cores and related hardware such as servers, switches, optics and cables, as well as the readiness of the Exchange's data center to accommodate additional Dedicated Cores in the Exchange's respective Order Handler Cabinets.¹⁶ Moreover, procuring data center space has grown to be more challenging than it was five years ago

with the increased demand for data center space. For example, the U.S. colocation data center market has doubled in size in just four years. In addition to the Exchange's rollout of Dedicated Cores, the Exchange is mindful of its other business areas and the need to continue to be mindful of its existing, external restraints in procuring additional space in this area. The Exchange has, and will continue to, monitor market participant demand and space availability and endeavor to adjust the limit if and when the Exchange is able to acquire additional space and power within the third-party data centers and/or additional CPU Cores to accommodate additional Dedicated Cores.¹⁷ The Exchange monitors its capacity and data center space and thus is in the best place to determine these limits and modify them as appropriate in response to changes to this capacity and space, as well as market demand. Indeed, since the launch of Dedicated Cores on February 26, 2024, the Exchange has already increased the prescribed maximum limit three times not including the increase proposed herein, as a result of evaluating the demand relative to Dedicated Cores availability and procuring additional physical space and CPU Cores.¹⁸ The proposed increased limits continue to apply uniformly to similarly situated market participants (*i.e.*, all Members are subject to the same limit and all Sponsored Participants are subject to the same limit, respectively). The Exchange believes it's not unfairly discriminatory to provide for different limits for different types of Users. For example, the Exchange believes it's not unfairly discriminatory to provide for an initial lower limit to be allocated for Sponsored Participants because unlike Members, Sponsored Participants are able to access the Exchange without paying a Membership Fee. Members also have more regulatory obligations and risk that Sponsored Participants do not. For example, while Sponsored Participants must agree to comply with the Rules of the Exchange, it is the Sponsoring Member of that Sponsored Participant that remains ultimately responsible for all orders entered on or through the Exchange by that Sponsored

Participant. The industry also has a history of applying fees differently to Members as compared to Sponsored Participants.¹⁹ Lastly, the Exchange believes its proposed maximum limits, and distinction between Members and Sponsored Users, is another appropriate means to help the Exchange manage its allotment of Dedicated Cores and better ensure this finite resource is apportioned fairly.

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 intramarket competition that is not necessary in furtherance of the purposes of the Act because the proposed tiered fee structure will apply equally to all similarly situated Users that choose to use Dedicated Cores. As discussed above, Dedicated Cores are optional and Users may choose to utilize Dedicated Cores, or not, based on their views of the additional benefits and added value provided by utilizing a Dedicated Core. The Exchange believes the proposed fee will be assessed proportionately to the potential value or benefit received by Users with a greater number of Dedicated Cores and notes that Users may determine at any time to cease using Dedicated Cores. As discussed, Users can also continue to access the Exchange through shared CPU Cores at no additional cost. Finally, all Users will be entitled to two Dedicated Cores at no additional cost.

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 15 other equities 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

¹⁷ The Exchange does not expect any Users that take Dedicated Cores to be at or near the maximum limits and the average number of Dedicated Cores used for the Exchange is 11.

¹⁸ See Securities Exchange Act Release No. 99983 (April 17, 2024), 89 FR 30418 (April 23, 2024) (SR-CboeEDGA-2024-014); Securities Exchange Act Release No. 100300 (June 10, 2024), 89 FR 50653 (June 14, 2024) (SR-CboeEDGA-2024-020) and Securities Exchange Act Release No. 100736 (August 15, 2024), 89 FR 67696 (August 21, 2024) (SR-CboeEDGA-2024-032).

¹⁵ See *e.g.*, Cboe U.S. Options Fees Schedule, BZX Options, Options Logical Port Fees, Ports with Bulk Quoting Capabilities.

¹⁶ The Exchange notes that it cannot currently convert shared CPU cores into Dedicated Cores.

¹⁹ See *e.g.*, Securities Exchange Act Release No. 68342 (December 3, 2012), 77 FR 73096 (December 7, 2012) (SR-CBOE-2012-114) and Securities Exchange Act Release No. 66082 (January 3, 2012), 77 FR 1101 (January 9, 2012) (SR-C2-2011-041).

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.”²⁰ 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’”²¹ 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 Act²² and paragraph (f) of Rule 19b-4²³ 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.

²⁰ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

²¹ *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)).

²² 15 U.S.C. 78s(b)(3)(A).

²³ 17 CFR 240.19b-4(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–CboeEDGA–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–CboeEDGA–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 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–CboeEDGA–2024–048 and should be submitted on or before December 31, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁴

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–29041 Filed 12–10–24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–659, OMB Control No. 3235–0723]

Submission for OMB Review; Comment Request; Extension: Form 1–Z

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 (“Commission”) has submitted to the Office of Management and Budget this request for extension of the previously approved collection of information discussed below.

Form 1–Z (17 CFR 239.94) is used to report terminated or completed offerings or to suspend the duty to file ongoing reports under Regulation A, an exemption from registration under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*). The purpose of the Form 1–Z is to collect empirical data for the Commission on offerings conducted under Regulation A that have terminated or completed, to indicate to the Commission that issuers that have conducted Tier 2 offering are suspending their duty to file reports under Regulation A and to provide such information to the investing public. We estimate that approximately 51 issuers file Form 1–Z annually. We estimate that Form 1–Z takes approximately 1.5 hours to prepare. We estimate that 100% of the 1.5 hours per response is prepared by the company for a total annual burden of 77 hours (1.5 hours per response × 51 responses).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Public Comment Instructions: The 30-day public comment period for this information collection request opens on December 12, 2024 and closes at the end of the day on January 13, 2025. The public may view the full information

²⁴ 17 CFR 200.30–3(a)(12).

request and submit comments at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202412-3235-006 or email comments to MBX.OMB.OIRA.SEC_desk_officer@omb.eop.gov.

Dated: December 5, 2024.

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2024-29025 Filed 12-10-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-101827; File No. SR-CboeBYX-2024-047]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule Regarding Dedicated Cores

December 5, 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 December 4, 2024, Cboe BYX Exchange, Inc. (the “Exchange” or “BYX”) 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

Cboe BYX Exchange, Inc. (the “Exchange” or “BYX Equities”) proposes to amend its Fee Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange’s website (http://markets.cboe.com/us/equities/regulation/rule_filings/BYX/), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the

proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule to adopt fees for Dedicated Cores.³

By way of background, the Exchange recently began to allow Users⁴ to assign a Single Binary Order Entry (“BOE”) logical order entry port⁵ to a single dedicated Central Processing Unit (CPU Core) (“Dedicated Core”). Historically, CPU Cores had been shared by logical order entry ports (*i.e.*, multiple logical ports from multiple firms may connect to a single CPU Core). Use of Dedicated Cores however, can provide reduced latency, enhanced throughput, and improved performance since a firm using a Dedicated Core is utilizing the full processing power of a CPU Core instead of sharing that power with other firms. This offering is completely voluntary and is available to all Users that wish to purchase Dedicated Cores. Users may utilize BOE logical order entry ports on shared CPU Cores, either in lieu of, or in addition to, their use of Dedicated Core(s). As such, Users are able to operate across a mix of shared and dedicated CPU Cores which the

Exchange believes provides additional risk and capacity management. Further, Dedicated Cores are not required nor necessary to participate on the Exchange and as such Users may opt not to use Dedicated Cores at all.

The Exchange proposes to assess the following monthly fees for Users that wish to use Dedicated Cores and adopt a maximum limit. First, the Exchange proposes to provide up to two Dedicated Cores to all Users who wish to use Dedicated Cores, at no additional cost. For the use of more than two Dedicated Cores, the Exchange proposes to assess the following fees: \$650 per Dedicated Core for 3–10 Dedicated Cores; \$850 per Dedicated Core for 11–15 Dedicated Cores; and \$1,050 per Dedicated Core for 16 or more Dedicated Cores. The proposed fees are progressive and the Exchange proposes to include the following example in the Fees Schedule to provide clarity as to how the fees will be applied. Particularly, the Exchange will provide the following example: if a User were to purchase 11 Dedicated Cores, it will be charged a total of \$6,050 per month ($\$0 * 2 + \$650 * 8 + \$850 * 1$). The Exchange also proposes to make clear in the Fees Schedule that the monthly fees are assessed and applied in their entirety and are not prorated. The Exchange notes the current standard fees assessed for BOE Logical Ports, whether used with Dedicated or shared CPU cores, will remain applicable and unchanged.⁶

Since the Exchange currently has a finite amount of physical space in its data centers in which its servers (and therefore corresponding CPU Cores) are located, the Exchange also proposes to prescribe a maximum limit on the number of Dedicated Cores that Users may purchase each month. The purpose of establishing these limits is to manage the allotment of Dedicated Cores in a fair manner and to prevent the Exchange from being required to expend large amounts of resources in order to provide an unlimited number of Dedicated Cores. The Exchange previously established a limit for Members of a maximum number of 60 Dedicated Cores and Sponsoring Members a limit of a maximum number of 25 Dedicated Cores for each of their Sponsored Access relationships.⁷ The Exchange has since been able to procure additional servers with CPU Cores and

³ The Exchange initially adopted pricing for Dedicated Cores on May 6, 2024 (SR-CboeBYX-2024-014). On July 1, 2024, the Exchange withdrew that filing and submitted SR-CboeBYX-2024-024. On August 1, 2024, the Exchange withdrew that filing and submitted SR-CboeBYX-2024-028. On business date September 30, 2024, the Exchange withdrew that filing and submitted SR-CboeBYX-2024-036. On November 26, 2024, the Exchange withdrew that filing and submitted SR-CboeBYX-2024-043 and subsequently withdrew that filing and submitted SR-CboeBYX-2024-044. On November 27, 2024, the Exchange withdrew that filing and submitted SR-CboeBYX-2024-045. On December 4, 2024, the Exchange withdrew that filing and submitted this filing.

⁴ A User may be either a Member or Sponsored Participant. The term “Member” shall mean any registered broker or dealer that has been admitted to membership in the Exchange, limited liability company or other organization which is a registered broker or dealer pursuant to Section 15 of the Act, and which has been approved by the Exchange. A Sponsored Participant may be a Member or non-Member of the Exchange whose direct electronic access to the Exchange is authorized by a Sponsoring Member subject to certain conditions. See Exchange Rule 11.3.

⁵ Users may currently connect to the Exchange using a logical port available through an application programming interface (“API”), such as the Binary Order Entry (“BOE”) protocol. A BOE logical order entry port is used for order entry.

⁶ The Exchange currently assesses \$550 per port per month. Port fees will also continue to be assessed on the first two Dedicated Cores that Users receive at no additional cost. See Cboe BYX Equities Fee Schedule.

⁷ See Securities Exchange Act Release No. 100476 (July 9, 2024), 89 FR 57482 (July 15, 2024) (SR-CboeBYX-2024-024).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

also has a better understanding of User demand relative to its available space since the initial launch of Dedicated Cores. After seeing increased User demand, the Exchange proposed to increase that cap and provided that Members will be limited to a maximum number of 80 Dedicated Cores and Sponsoring Members will be limited to a maximum number of 35 Dedicated Cores for each of their Sponsored Access relationships.⁸ The Exchange noted at that time that it would continue monitoring Dedicated Core interest by all Users and allotment availability with the goal of increasing these limits to meet Users' needs if and when the demand is there and/or the Exchange is able to accommodate additional Dedicated Cores. Since then, the Exchange has determined that it is able to accommodate an increased cap relative to current demand. As such, the Exchange proposes to increase the cap to 120 Dedicated Cores for Members, effective December 1, 2024.⁹ Sponsoring Members will continue to be limited to a maximum of 35 Dedicated Cores for each of their Sponsored Access relationships.¹⁰

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.¹¹ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹² 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)¹³ 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)¹⁴ 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 proposal is reasonable because the Exchange is offering any User who wishes to utilize Dedicated Cores up to two Dedicated Cores at no additional cost. For example, of the Users that currently maintain Dedicated Cores, 32% maintain only 1 or 2 Dedicated Cores and therefore pay no additional fees. The Exchange believes the proposed fees are reasonable because Dedicated Cores provide a valuable service in that it can provide reduced latency, enhanced throughput, and improved performance compared to use of a shared CPU Core since a firm using a Dedicated Core is utilizing the full processing power of a CPU Core. The Exchange also emphasizes however, that the use of Dedicated Cores is not necessary for trading and as noted above, is entirely optional. Users can also continue to access the Exchange through shared CPU Cores at no additional cost. Indeed, only 19% of the Exchange's Members currently use Dedicated Cores and as noted above, of those who do, only 32% take only 1 or 2 Dedicated Cores at no additional cost. Depending on a firm's specific business needs, the proposal enables Users to choose to use Dedicated Cores in lieu of, or in addition to, shared CPU Cores (or

as emphasized, not use Dedicated Cores at all). If a User finds little benefit in having Dedicated Cores based on its business model and trading strategies, or determines Dedicated Cores are not cost-efficient for its needs or does not provide sufficient value to the firm, such User may continue its use of the shared CPU Cores, unchanged. The Exchange also has no plans to eliminate shared CPU Cores nor to require Users to purchase Dedicated Cores.

The Exchange has seen general interest in Dedicated Cores from a variety of market participants, with varying size and business models. Such market participants include proprietary trading firms (who tend to be more latency sensitive), as well as sell-side market participants and buy-side market participants (who tend to be less latency sensitive). For background, proprietary trading firms utilize their own capital to trade without taking outside money from clients. Due to the nature of their respective businesses, the Exchange has classified proprietary trading firms as latency sensitive, and other groups, such as buy-side hedge funds, sell-side banks and sell-side non-banks (such as agency brokers) as non-latency sensitive. Proprietary trading firms' strategies may range from, marketing making, to relative value trading and arbitrage—these all rely on profiting from general market activity and, generally, requires faster entry and exit into trades and positions making proprietary trading firms more latency sensitive than other market segments. Buy-side hedge funds, banks and agency brokers are not as latency sensitive as strategy for hedge funds is based on overall long-term positioning in the market and banks and agency brokers may profit from commissions of customer order flow; both are generally strategies that are not reliant on speed to the same extent proprietary trading firms are. Further, Members have various reasons for obtaining Dedicated Cores. Some Members for example, may be seeking to further reduce latency, whereas others may use Dedicated Cores as a general risk mitigation by siloing their respective activity. Of further note, only 44% of Members that are propriety trading firms (who again, generally tend to be more latency sensitive) utilize Dedicated Cores, and of that 44%, 25% are only utilizing the 1 to 2 free Dedicated Cores available to all Users. As mentioned above, some non-latency sensitive firms have chosen to also adopt Dedicated Cores. 15% of Members that are not latency sensitive utilize Dedicated Cores, and of that 15%, 38%

⁸ See Securities Exchange Act Release No. 101303 (October 10, 2024), 89 FR 83740 (October 17, 2024) (SR-ChoeBYX-2024-036).

⁹ The prescribed maximum quantity of Dedicated Cores for Members applies regardless of whether that Member purchases the Dedicated Cores directly from the Exchange and/or through a Service Bureau. In a Service Bureau relationship, a customer allows its MPID to be used on the ports of a technology provider, or Service Bureau. One MPID may be allowed on several different Service Bureaus.

¹⁰ The fee tier(s) applicable to Sponsoring Members are determined on a per Sponsored Access relationship basis and not on the combined total of Dedicated Cores across Sponsored Users. For example, under the proposed changes, a Sponsoring Member that has three Sponsored Access relationships is entitled to a total of 105 Dedicated Cores for those 3 Sponsored Access relationships but would be assessed fees separately based on the 35 Dedicated Cores for each Sponsored User (instead of combined total of 105 Dedicated Cores). For example, a Sponsoring Member with 3 Sponsored Access relationships would pay \$30,450 per month if each Sponsored Access relationship purchased the maximum 35 Dedicated Cores. More specifically, the Sponsoring Member would be provided 2 Dedicated Cores at no additional cost for each Sponsored User under Tier 1 (total of 6 Dedicated Cores at no additional cost) and provided an additional 8 Dedicated Cores at \$650 each for each Sponsored User, 5 Dedicated Cores at \$850 each for each Sponsored User and 20 Dedicated Cores at \$1,050 each for each Sponsored User (combined total of 99 additional Dedicated Cores).

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(5).

¹³ *Id.*

¹⁴ 15 U.S.C. 78f(b)(4).

are only utilizing the 1 to 2 free Dedicated Cores available to all Users.

The lack of universal, or even widespread, adoption by all such users therefore demonstrates that purchasing Dedicated Cores is not effectively a requirement to compete for any one type of market participant, including latency sensitive market participants. Instead, Dedicated Cores are an optional and voluntary connectivity offering, which market participants are free to choose whether or not to utilize based on whether they meet their unique business needs. Moreover, the Exchange has received overwhelming positive feedback and support for Dedicated Cores, with some Members even noting that they have moved more of their order flow to the Exchange and its affiliated equities exchanges (the "Equities Exchanges") as they have noticed both better fills and greater consistency of order execution at the Equities Exchanges. This demonstrates that despite any incurred costs for Members that choose to purchase Dedicated Cores, it is ultimately a net win for them as they benefit from better execution. The Exchange believes it also demonstrates that Members find the proposed fees to be both reasonable and have benefited from purchasing or, at alternatively benefiting from the proposed one or two free Dedicated Cores available at no additional cost. The Exchange believes this is shown by both the level of demand for Dedicated Cores and the feedback from market participants, including as described above. The Exchange also believes it's notable that no negative comment letters in connection with the proposed pricing have been received since the Exchange first filed proposed fees for Dedicated Cores back on May 6, 2024. Additionally, as noted earlier, Members can (and many have) decide that utilizing even a free Dedicated Core is not needed for their business. Ultimately, this is a business decision that each Member must make and is best suited to determine and will ultimately depend on the priorities and strategies of that Member's respective business needs.

The Exchange also believes that the proposed Dedicated Core 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 Dedicated Cores will be subject to the same proposed tiered fee schedule. Moreover, all Users are entitled to up to 2 Dedicated Cores at no additional cost and as previously discussed, 32% of all Users that take Dedicated Cores (including both latency

sensitive and non-latency sensitive Users) take only 1 or 2 Dedicated Cores at no additional cost. The Exchange believes the proposed ascending fee structure is also reasonable, equitable and not unfairly discriminatory as it is designed so that firms that use a higher allotment of the Exchange's finite number of Dedicated Cores pay higher rates, rather than placing that burden on market participants that have more modest needs who will have the flexibility of obtaining Dedicated Cores at lower price points in the lower tiers. As such, the proposed fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the ascending fee structure reflects the (finite) resources consumed by the various needs of market participants—that is, the lowest Dedicated Core consuming Users pay the least, and highest Dedicated Core consuming Users pay the most. Other exchanges similarly assess higher fees to those that consume more Exchange resources.¹⁵ Moreover, those consuming more Dedicated Cores do so if they find a benefit in having higher quantities of Dedicated Cores based on their respective business needs. The proposed tier structure is also designed to encourage firms to manage their needs in a fair manner and to prevent the Exchange from being required to expend large amounts of resources in order to provide an additional number of Dedicated Cores. Moreover, as discussed above and in more detail below, the Exchange cannot currently offer an unlimited number of Dedicated Cores due in part to physical space constraints in the third-party data center. The Exchange believes the proposed ascending fee structure is therefore another appropriate means, in conjunction with an established cap, to manage this finite resource and ensure the resource is apportioned more fairly.

The Exchange believes it is reasonable to limit the number of Dedicated Cores Users can purchase because the Exchange has a finite amount of space in its third-party data centers to accommodate CPU cores, including Dedicated Cores. The Exchange must also take into account timing and cost considerations in procuring additional Dedicated Cores and related hardware such as servers, switches, optics and cables, as well as the readiness of the Exchange's data center to accommodate additional Dedicated Cores in the Exchange's respective Order Handler

Cabinets.¹⁶ Moreover, procuring data center space has grown to be more challenging than it was five years ago with the increased demand for data center space. For example, the U.S. colocation data center market has doubled in size in just four years. In addition to the Exchange's rollout of Dedicated Cores, the Exchange is mindful of its other business areas and the need to continue to be mindful of its existing, external restraints in procuring additional space in this area. The Exchange has, and will continue to, monitor market participant demand and space availability and endeavor to adjust the limit if and when the Exchange is able to acquire additional space and power within the third-party data centers and/or additional CPU Cores to accommodate additional Dedicated Cores.¹⁷ The Exchange monitors its capacity and data center space and thus is in the best place to determine these limits and modify them as appropriate in response to changes to this capacity and space, as well as market demand. Indeed, the Exchange has already increased the prescribed maximum since the launch of Dedicated Cores on May 6, 2024 as a result of evaluating the demand relative to Dedicated Cores availability and proposes to increase the prescribed maximum again due to the Exchange's continued ability to support current demand relative to current availability.¹⁸ As another example, the Exchange's affiliate Cboe EDGA Exchange, Inc. has increased the prescribed maximum limit three times since the launch of Dedicated Cores on its exchange on February 26, 2024 as a result of evaluating the demand relative to Dedicated Cores availability.¹⁹ The proposed increased limits continue to apply uniformly to similarly situated market participants (*i.e.*, all Members are subject to the same limit and all Sponsored Participants are subject to the same limit, respectively). The Exchange believes it's not unfairly discriminatory to provide for different limits for different types of Users. For

¹⁶ The Exchange notes that it cannot currently convert shared CPU cores into Dedicated Cores.

¹⁷ The Exchange does not expect any Users that take Dedicated Cores to be at or near the maximum limits and the average number of Dedicated Cores used for the Exchange is 10.

¹⁸ See Securities Exchange Act Release No. 100476 (July 9, 2024), 89 FR 57482 (July 15, 2024) (SR-CboeBYX-2024-024).

¹⁹ See Securities Exchange Act Release No. 99983 (April 17, 2024), 89 FR 30418 (April 23, 2024) (SR-CboeEDGA-2024-014) Securities Exchange Act Release No. 100300 (June 10, 2024), 89 FR 50653 (June 14, 2024) (SR-CboeEDGA-2024-020); and Securities Exchange Act Release No. 100736 (August 21, 2024), 89 FR 67696 (August 15, 2024) (SR-CboeEDGA-2024-032).

¹⁵ See *e.g.*, Cboe U.S. Options Fees Schedule, BZX Options, Options Logical Port Fees, Ports with Bulk Quoting Capabilities.

example, the Exchange believes it's not unfairly discriminatory to provide for an initial lower limit to be allocated for Sponsored Participants because unlike Members, Sponsored Participants are able to access the Exchange without paying a Membership Fee. Members also have more regulatory obligations and risk that Sponsored Participants do not. For example, while Sponsored Participants must agree to comply with the Rules of the Exchange, it is the Sponsoring Member of that Sponsored Participant that remains ultimately responsible for all orders entered on or through the Exchange by that Sponsored Participant. The industry also has a history of applying fees differently to Members as compared to Sponsored Participants.²⁰ Lastly, the Exchange believes its proposed maximum limits, and distinction between Members and Sponsored Users, is another appropriate means to help the Exchange manage its allotment of Dedicated Cores and better ensure this finite resource is apportioned fairly.

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 intramarket competition that is not necessary in furtherance of the purposes of the Act because the proposed tiered fee structure will apply equally to all similarly situated Users that choose to use Dedicated Cores. As discussed above, Dedicated Cores are optional and Users may choose to utilize Dedicated Cores, or not, based on their views of the additional benefits and added value provided by utilizing a Dedicated Core. The Exchange believes the proposed fee will be assessed proportionately to the potential value or benefit received by Users with a greater number of Dedicated Cores and notes that Users may determine at any time to cease using Dedicated Cores. As discussed, Users can also continue to access the Exchange through shared CPU Cores at no additional cost. Finally, all Users will be entitled to two Dedicated Cores at no additional cost.

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 15 other equities 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."²¹ 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' . . .".²² 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 Act²³ and paragraph (f) of Rule 19b-4²⁴ 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-CboeBYX-2024-047 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-CboeBYX-2024-047. 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

²⁰ See e.g., Securities Exchange Act Release No. 68342 (December 3, 2012), 77 FR 73096 (December 7, 2012) (SR-CBOE-2012-114) and Securities Exchange Act Release No. 66082 (January 3, 2012), 77 FR 1101 (January 9, 2012) (SR-C2-2011-041).

²¹ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

²² *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)).

²³ 15 U.S.C. 78s(b)(3)(A).

²⁴ 17 CFR 240.19b-4(f).

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–CboeBYX–2024–047 and should be submitted on or before December 31, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁵

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2024–29045 Filed 12–10–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–620, OMB Control No. 3235–0675]

Submission for OMB Review; Comment Request; Extension: Rule 15Ga–2 and Form ABS–15G

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 (“Commission”) has submitted to the Office of Management and Budget this request for extension of the previously approved collection of information discussed below.

Rule 15Ga–2 and Form ABS–15G (17 CFR 249.1400) is used for reports of information required under Rule 15Ga–1 and Rule 15Ga–2 (17 CFR 240.15Ga–1) (17 CFR 240.15Ga–2) of the Exchange Act of 1934 (“Exchange Act”). Exchange Act Rule 15Ga–1 requires asset-backed securitizers to provide disclosure regarding fulfilled an unfulfilled repurchase requests with respect to asset-backed securities. The purpose of the information collected on Form ABS–15G is to implement the disclosure requirements of Section 943 of the Dodd-Frank Wall Street Reform and Consumer Protection Act to provide information regarding the use of representations and warranties in the asset-backed securities markets.

Form ABS–15G is a collection of information required by Rules 15Ga–1

and 15Ga–2 under the Exchange Act. For just Rule 15Ga–1, Form ABS–15G takes approximately 27.2234 hours per response and is filed by approximately 1,142 respondents. We estimate that 75% of the 27.2234 hours per response (20.4176 hours) is prepared by the filer for a total annual reporting burden of 23,317 hours (20.4176 hours per response × 1,142 responses).

For just Rule 15Ga–2, Form ABS–15G takes approximately 2.1279 hours per response and is filed by approximately 864 respondents. We estimate that 100% of the 2.1279 hours per response (2.1279 hours) is prepared by the filer for a total annual reporting burden of 1,839 hours (2.1279 hours per response × 864 responses).

Rule 15Ga–1 and Rule 15Ga–2 combined filing on Form ABS–15G we estimate that approximately 2006 securitizers will file Form ABS–15G annually at estimated (16.7205 hours) burden hours per response. In addition, we estimate that 75% of the 16.7205 hours per response (12.5403 hours) is carried internally by the securitizers for a total annual reporting burden of 25,156 hours (12.5403 hours per response × 2006 responses).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Public Comment Instructions: The 30-day public comment period for this information collection request opens on December 12, 2024 and closes at the end of the day on January 13, 2025. The public may view the full information request and submit comments at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202411-3235-012 or email comments to MBX.OMB.OIRA.SEC_desk_officer@omb.eop.gov.

Dated: December 6, 2024.

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2024–29120 Filed 12–10–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–101819; File No. SR–ICC–2024–011]

Self-Regulatory Organizations; ICE Clear Credit LLC; Order Granting Accelerated Approval of Proposed Rule Change Relating to the ICC Operational Risk Management Framework

December 5, 2024.

I. Introduction

On November 13, 2024, ICE Clear Credit LLC (“ICC”) filed with the Securities and Exchange Commission (the “Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”) ¹ and Rule 19b–4 thereunder,² a proposed rule change (hereafter, “Proposed Rule Change”) to revise the Operational Risk Management Framework (“ORMF”). The Proposed Rule Change was published for comment in the **Federal Register** on November 19, 2024.³ The Commission has not received comments regarding the Proposed Rule Change. For the reasons discussed below, the Commission is approving the Proposed Rule Change on an accelerated basis.

II. Description of the Proposed Rule Change

ICC is registered with the Commission as a clearing agency for the purpose of clearing Credit Default Swap (“CDS”) contracts.⁴ In its role as a CDS clearing agency, ICC faces operational risks stemming from the breakdown of systems and processes that that would impair ICC’s ability to complete settlements or ICC’s internal business operations. The ORMF outlines ICC’s risk assessment and oversight program, which aims to address such operational risks, including by reducing operational incidents, encouraging process and control improvement, bringing transparency to operational performance standard monitoring, and fulfilling regulatory obligations. The ORMF also explains how ICC vets and manages service agreements with providers covering various aspects of ICC’s operations. According to ICC, one of the purposes of the Proposed Rule Change

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Filing of Proposed Rule Change Relating to the ICC Operational Risk Management Framework; Securities Exchange Act Release No. 34–101603 (Nov. 13, 2024), 89 FR 91443 (Nov. 19, 2024) (SR–ICC–2024–011) (“Notice”).

⁴ Capitalized terms not otherwise defined herein have the meanings assigned to them in ICC Rules and the ORMF, as applicable.

²⁵ 17 CFR 200.30–3(a)(12).

is to align the ORMF with the requirements of Rule 17Ad-25(i) under the Act,⁵ primarily by adding to the ORMF details about ICC's relationships with service providers.⁶ Further changes in the ORMF would be included to more clearly describe ICC's risk mitigation process and technology control functions, among other revisions.

A. Management of Risks From Service Providers for Core Services

The Proposed Rule Change would amend the ORMF primarily by adding new Section II.B., titled "Management of Risks from Relationships with Service Providers for Core Services," which would describe ICC's vetting and management processes regarding any service provider for critical services ("SPCS").⁷ The new section would require ICC's senior management to:

(1) Evaluate and document the risks related to an agreement with a SPCS, including under changes to circumstances and potential disruptions, and whether the risks can be managed in a manner consistent with the ORMF;

(2) Submit to the ICC Board of Managers ("Board") for review and approval any agreement that would establish a relationship with a SPCS, along with the above-mentioned risk evaluation;

(3) Be responsible for establishing the policies and procedures that govern relationships and manage risks related to such agreements with a SPCS (while the Board would be required to be responsible for reviewing and approving such policies and procedures); and

(4) Perform ongoing monitoring of the relationship, and report to the Board for its evaluation of any action taken by senior management to remedy significant deterioration in performance or address changing risks or material issues identified through such monitoring; or if the risks or issues cannot be remedied, to assess and document weaknesses or deficiencies in the relationship with the service provider for submission to the Board.

The Proposed Rule Change would introduce a two-pronged assessment

approach when identifying and managing ICC's relationships with a SPCS, differentiating between internal and external service providers.

Under the first prong, ICC would conduct an assessment of internal service providers. Currently, ICC engages only one internal service provider: ICC's parent company, Intercontinental Exchange, Inc. ("ICE").⁸ ICE is a SPCS because, pursuant to written service agreements, it provides core services to ICC that directly support the delivery of clearance and settlement functionality or other purposes material to ICC's business as a registered clearing agency. ICE provides business services such as staffing, finance, and accounting pursuant to a Master Services Agreement between ICC and ICE, and provides clearing and settlement-specific services to ICC pursuant to a Clearing Settlement Services Agreement ("CSSA"). The CSSA specifies that ICE provides clearing and settlement services pursuant to certain of ICE's "Key Policies."⁹ Each Key Policy sets forth its purpose and is applicable to all ICE and ICC employees impacted by such policy. Further, the CSSA provides for a governance structure (set forth in more detail in ICE's Technology Planning and Governance Policy) whereby the Key Policies may only be amended by ICE's Operational Oversight Committee ("OOC") which includes representatives of both ICE and ICC. The OOC acts as the forum to discuss changes and improvements to the services provided to ICC by ICE. Further, changes to any Key Policy may not take effect until they have been approved by the OOC and any material proposed changes to the Key Policies are subject to a veto by ICC.

Under the second prong, ICC would conduct an assessment of external service providers, utilizing ICC's External Service Provider Assessment process. This process would be outlined in Section II.C. of the ORMF and in ICE's Third Party Risk Management ("TPRM") program, which is applicable to ICC as a subsidiary of ICE. Further,

with respect to ICC's Financial Service Providers¹⁰ that are identified as SPCSs, ICC utilizes its Counterparty Monitoring Procedures. ICC's External Service Provider Assessment process is supplemental to ICE's TPRM program, which applies to external vendors and suppliers, service providers, and contractors/consultants of ICE and its subsidiaries, including ICC. The TPRM program establishes a comprehensive and structured approach for assessing, managing, monitoring, and governance of third-party risks at ICE and its subsidiaries, including ICC. It requires an assessment of operations and resiliency through, among other things, completion of initial on-boarding assessments of the third party's viability and capability to meet expected deliverables, business objectives, and compliance with contractual obligations, followed by ongoing monitoring.

The Proposed Rule Change would update vocabulary around and clarify the description of ICC's external service provider assessments in newly renumbered Section II.C of the ORMF. As proposed, this section would no longer refer to "critical vendors,"¹¹ but would instead use the term "external SPCS" to align the ORMF with Rule 17Ad-25 under the Exchange Act, which uses and defines the term "service provider for core services."¹² Currently, Section II.C provides that external service providers are reviewed and evaluated for re-approval based on ICC's current risk ranking system, which is based on "tiers." Under the Proposed Rule Change, Section II.C. would no longer describe the re-approval process for such external service providers with a "risk ranking" system based on "tiers" but would instead use a system of "risk ratings." Despite the terminology change, the basic review methodology would not. Under the Proposed Rule Change, ICC would still assign the risk rating based on a schedule of risk assessments divided into low, moderate, and high risks, that considers the risk direction for strategic, reputational, compliance, legal and operational risk

⁵ See generally Securities Exchange Act Release No. 98959 (Nov. 16, 2023), 88 FR 84454 (Dec. 5, 2023) (File No. S7-21-22) ("Clearing Agency Governance and Conflicts of Interest").

⁶ See Notice, 89 FR at 91443.

⁷ A service provider for core services means any person that, through a written services provider agreement for services provided to or on behalf of the registered clearing agency, on an ongoing basis, directly supports the delivery of clearance or settlement functionality or any other purposes material to the business of the registered clearing agency. 17 CFR 240.17Ad-25(a). ICC's ORMF has adopted the same terminology and meaning of SPCS as Rule 17Ad-25(a).

⁸ See Notice, 89 FR at 91444.

⁹ ICE's Key Policies include the following, which may be updated from time to time: 1. Technology Planning and Governance Policy; 2. Capacity Planning Policy; 3. Change Management Policy; 4. Corporate Business Continuity Policy; 5. Corporate Information Security Policy; 6. Corporate Information Technology Policy; 7. Corporate Physical Security Policy; 8. Disaster Recovery Policy; 9. Enterprise Risk Management Policy; 10. Incident Management Policy; 11. Information Technology Asset Management Policy; 12. Infrastructure Observability Policy; 13. Software Development Lifecycle Policy; 14. Third Party Risk Management Policy.

¹⁰ Financial service providers ("FSPs") are not covered by the TPRM program. FSPs, as defined in ICC's Counterparty Monitoring Procedures, are the entities to which ICC has actual or potential credit exposure, e.g., settlement banks, custodians, depositories, reverse repurchase agreement ("repo") counterparties, committed repo counterparties, and committed foreign exchange ("FX") counterparties.

¹¹ Currently the ORMF defines a "critical vendor" as any third party service which is deemed essential to complete ICC's core processes. Core processes means acceptance of new trades, management of positions, production of risk and banking reports, and the movement of funds.

¹² See 17 CFR 240.17Ad-25(a).

presented by the external service provider, in the same way that ICC currently assigns risk rankings.

Thus, when assessing an external SPCS, ICC would continue to analyze and manage risks posed by such external service providers, including strategic, reputational, compliance, legal, and operational risk, in the same manner as under the current ORMF. Similarly, ICC would use existing concepts when performing assessments of an external SPCS. As noted above, ICC is replacing the term “critical vendor” with the term “external SPCS.” ICC also is replacing the term “core processes” with the term “CDS core clearing services.” Currently, a critical vendor is any third party service provider which is deemed essential to complete ICC’s core processes, which include acceptance of new trades, management of positions, production of risk and banking reports, and the movement of funds. The definition of external SPCS would include external service providers for core services, including CDS core clearing services, which would continue to include acceptance of new trades, management of positions, production of risk and banking reports, and the movement of funds.

Similarly, risk assessments are and would continue to be completed as part of the initial onboarding process, as well as periodically. Section II.C. would clarify that ICC’s assessment of an external SPCS would be in addition to ICE’s TPRM program, which applies to any external vendor or supplier, service provider, and contractors and consultants utilized by ICE or its subsidiaries, including ICC. Although ICC’s Business Continuity Planning and Disaster Recovery programs Oversight Committee (“BDOC”) will continue to be the body performing these assessments, proposed Section II.C. would eliminate the current bullet point list of items that may be included in the risk assessments¹³ and replace it with the requirement to “evaluate and document the risks related to an agreement with the external SPCS, including under changes to

circumstances and potential disruptions, and whether the risks can be managed in a manner consistent with the ORMF,” thus mirroring the language found in Rule 17Ad–25(i)(1) under the Act.¹⁴ Although the BDOC will continue to review and recommend approval of the inventory of ICC external SPCSs and to assign risk ratings to the risk assessments in order to determine the frequency of ongoing risk assessment reviews, Section II.C. would be updated to state that the risk ratings will take into consideration ICC’s plan to complete core processing if the service is unavailable. Additionally, Section II.C. would state explicitly that the BDOC reviews and recommends that the ICC Compliance Committee (“Compliance Committee”) approve the inventory of ICC external SPCS.¹⁵

B. Further Changes to the ORMF

In addition to the above-described changes, which primarily address consistency with Rule 17Ad–25(i) under the Act,¹⁶ the Proposed Rule Change would:

- amend the ‘Introduction’ section of the ORMF to provide uniform abbreviations to existing defined terms, which ICC believes will enhance the clarity and readability of the ORMF;¹⁷
- amend terms within the ‘Operational Risk Lifecycle’ chart of Section I of the ORMF to ensure that it accurately reflects the description of the operational life cycle narrative and correct typographical errors; and
- revise Section II., ‘Operational Risk Focus Areas,’ to update ICC’s reference to certain functions performed by ICE, remove references to such functions being “outsourced,” and instead note that the functions are described in the ORMF and performed pursuant to services agreements between ICC and ICE.

The Proposed Rule Change would amend Section II.A., ‘Business Continuity Planning and Disaster Recovery,’ to more clearly describe the steps in the collaboration process with respect to the business impact analysis (“BIA”) process. The proposed changes would reorder and restate the steps for completing BIA surveys used in creating test plans. Currently, the ORMF states that ICC ensures that it can recover from

a wide-scale disruption and collaborates with each department to complete BIA surveys—specifically to ensure that each critical business unit:

- Defines the Mission Critical Tasks (“MCT”) to be performed;
- Creates test plans to ensure recovery staff are properly trained;
- Performs periodic tests to validate recovery staff’s ability to perform MCT; and
- Reports the results of testing to document successes, and detail corrective actions.

As proposed, the first two bullet points would be deleted and replaced with:

- Identifies ICC business processes, as well as the associated criticality of these business process, by performing the BIA; [and]
- Creates Business Continuity Plans (BCPs) for those processes identified in the BIA.

The third and fourth bullet points would remain the same, except the third bullet point would specify that the periodic tests would be those of BCPs and that, since the MCT acronym would no longer apply, a reference would be made to mission critical tests.¹⁸

The Proposed Rule Change also would revise Section II.F. of the ORMF (previously Section II.E.), ‘Technology Control Functions,’ specifically to more accurately reflect the ICC Technology Department’s responsibilities. Section II.F. would be updated to specify that the ICC Technology Department is responsible for end-to-end design, development, testing, deployment, maintenance and day-to-day operations of all enterprise software systems needed for ICC core functions. Currently, the ORMF describes the Technology Department’s responsibilities as risk analysis and oversight of systems operations, systems development/quality assurance and capacity/performance planning. The ORMF would be revised to state that ICC’s Technology Department is responsible for end-to-end design, development, testing, deployment, maintenance, and day-to-day operations of enterprise software systems needed for ICC core functions of CDS clearing. In addition, the Proposed Rule Change would update an outdated reference to ICC’s Credit Technology Delivery Method (“CTDM”), which is a separate policy from the ORMF. Currently the ORMF references the ICC Project Delivery Policy, which is the former title of the CTDM. Those references would be updated to refer to the CTDM instead. Similarly, in connection with a

¹³ Currently, the BDOC is responsible for conducting a service provider risk assessment for each critical vendor, which includes:

- Profiling critical vendor and services performed;
- Reviewing performance activity to date, if applicable;
- Validating or enhancing the contingency plan in the event that a critical vendor cannot perform as expected;
- Ensuring an ongoing oversight program of the critical vendor;
- Assessing the varying risks posed by the critical vendor.

¹⁴ 17 CFR 240.17Ad–25(i)(1); *see also* Notice, 89 at 91444.

¹⁵ The ICC Compliance Committee is an internal ICC committee that oversees and manages ICC’s compliance program that establishes the framework for identifying, assessing, measuring, monitoring, mitigating, and reporting on compliance risks for ICC.

¹⁶ 17 CFR 240.17Ad–25(i).

¹⁷ *See* Notice, 89 at 91444.

¹⁸ *Id.*

discussion of how technology releases are assessed, the Proposed Rule Change would replace a current reference to the ICC technology director with a reference to the ICC Technology leadership team. This change would more accurately reflect that technology releases are assessed by the entire ICC Technology leadership team, not just the ICC technology director.

Next, the Proposed Rule Change would amend *Appendix 1* of the ORMF to include the titles of the relevant regulatory requirements while removing the existing summaries of such regulations. ICC indicated that the purpose of this change is to streamline the reference process to provide the reader with a more direct reference to all the applicable regulations and avoid the need to review and update summaries of applicable regulations as they are amended from time to time.¹⁹

Lastly, the Proposed Rule Change would update the 'Revision History' section of the ORMF to reflect the proposed changes described above, as well as to formalize a series of non-material updates previously made to the ORMF that were the output of the annual review of the ORMF conducted by the Compliance Committee, and that were reviewed and approved by the Board in 2021, 2022, and 2023.²⁰

III. Discussion

Section 19(b)(2)(C) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that the Proposed Rule Change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization.²¹ Under the Commission's Rules of Practice, the "burden to demonstrate that a proposed rule change is consistent with the Act and the rules and regulations issued thereunder . . . is on the self-regulatory organization ['SRO'] that proposed the rule change."²²

The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,²³ and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.²⁴ Moreover, "unquestioning reliance" on an SRO's representations in a proposed rule change is not sufficient to justify Commission approval of a proposed rule change.²⁵

After carefully considering the Proposed Rule Change, the Commission finds that the Proposed Rule Change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to ICC. More specifically, for the reasons discussed below, the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act²⁶ and Rules 17Ad-25(i),²⁷ 17Ad-22(e)(17)(i),²⁸ and 17Ad-22(e)(2)(i) and (v)²⁹ thereunder.

A. Consistency With Section 17A(b)(3)(F) of the Act

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of ICC be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions.³⁰ Based on a review of the record, and for the reasons discussed below, the proposed changes to the ORMF are consistent with the promotion of the prompt and accurate clearance and settlement of transactions at ICC.

Newly added Section II.B. of the ORMF—addressing ICC's management of risks from relationships with SPCS—and updated and renumbered Section II.C. of the ORMF—titled 'External Service Provider Assessments'—help facilitate ICC's ability to manage its relationships with SPCS and the inherent risks these relationships encompass. For instance, as discussed above, the Proposed Rule Change would

add Section II.B. to the ORMF, which would specify the requirements and procedures for ICC to manage the risks arising from ICC's relationships with SPCS. Such requirements and procedures would include, among other things, evaluating and documenting risks associated with a SPCS, submitting a risk evaluation to the ICC Board related to a relationship with a SPCS, establishing policies and procedures governing the relationship and risk-management of a SPCS relationship, and performing ongoing monitoring of a SPCS relationship for purposes of identifying and remediating changing risks.³¹ Together, Sections II.B. and II.C. of the ORMF also would provide greater clarity around the approval and maintenance of ICC's relationships with SPCS that are contractually obligated not only to supply services material to running ICC's business, such as staffing, finance, and accounting, but also to support ICC's clearance and settlement functionality. By promoting ICC's ability to manage relationships with SPCS, both internal and external, the Proposed Rule Change is thereby designed to promote ICC's capabilities in promptly and accurately clearing and settling securities transactions, and, to the extent applicable, derivative agreements, contracts, and transactions.

For the reasons stated above, the Commission finds that the Proposed Rule Change is consistent with Section 17A(b)(3)(F) of the Act.³²

B. Consistency With Rule 17Ad-25(i) Under the Act

Rule 17Ad-25(i) requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to (1) require senior management to evaluate and document the risks related to an agreement with a service provider for core services, including under changes to circumstances and potential disruptions, and whether the risks can be managed in a manner consistent with the clearing agency's risk management framework; (2) require senior management to submit to the board of directors for review and approval any agreement that would establish a relationship with a service provider for core services, along with such risk evaluation; (3) require senior management to be responsible for establishing the policies and procedures that govern relationships and manage

¹⁹ *Id.*

²⁰ For example, updates approved by the Board in 2021 included language in Section I.A. 'Risk Assessment,' clarifying that the Compliance Committee reviews risk assessments during their quarterly meetings. The 2021 updates also included minor clarifications to Section I.B. to clarify that one of the current responsibilities of the ICE Enterprise Risk Management ("ERM") function is to observe and review the incident management mitigation process and, if necessary, challenge corrective action plan decisions and priority levels. See Notice, 89 at 91444–45. ICC indicated that these changes were intended to clarify the description of current practices and the readability of the ORMF, and as such, do not change current practices. *Id.* For further examples, see Notice, 89 at 91444–45.

²¹ 15 U.S.C. 78s(b)(2)(C).

²² Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

²³ *Id.*

²⁴ *Id.*

²⁵ *Susquehanna Int'l Group, LLP v. Securities and Exchange Commission*, 866 F.3d 442, 447 (D.C. Cir. 2017) ("Susquehanna").

²⁶ 15 U.S.C. 78q-1(b)(3)(F).

²⁷ 17 CFR 240.17Ad-25(i).

²⁸ 17 CFR 240.17Ad-22(e)(17)(i).

²⁹ 17 CFR 240.17Ad-22(e)(2)(i), (v).

³⁰ 15 U.S.C. 78q-1(b)(3)(F).

³¹ The requirements outlined in Section II.B. directly reflect language in Rule 17Ad-25(i), which was approved by the Commission in 2023. See n. 5, *supra*.

³² *Id.*

risks related to such agreements with service providers for core services and require the board of directors to be responsible for reviewing and approving such policies and procedures; and (4) require senior management to perform ongoing monitoring of the relationship, and report to the board of directors for its evaluation of any action taken by senior management to remedy significant deterioration in performance or address changing risks or material issues identified through such monitoring; or if the risks or issues cannot be remedied, require senior management to assess and document weaknesses or deficiencies in the relationship with the service provider for submission to the board of directors.³³ In adopting Rule 17Ad–25(i), the Commission stated that the final rule would more clearly delineate the roles of senior management and the board so as not to require the board to undertake responsibilities reserved for senior management.³⁴

As described above, the Proposed Rule Change would help ensure that the ORMF codifies and implements policies and procedures designed to ensure that ICC appropriately manages relevant risks that arise from ICC's relationships with SPCS, including by increasing ORMF users' awareness of those risks, and ensuring that ICC identifies, assesses, measures, monitors, mitigates, and reports those risks. The ORMF also delineates the responsibilities between senior management and the Board regarding these risks. Specifically, the ORMF specifies that senior management provides the Board with information pertaining to relationships with SPCS, any relevant risk evaluations, and management's efforts to monitor, assess, document, and remedy risks associated with these relationships.

For these reasons, the Commission finds the Proposed Rule Change is consistent with Rule 17Ad–25(i).³⁵

C. Consistency With Rule 17Ad–22(e)(17)(i) Under the Act

Rule 17Ad–22(e)(17)(i) requires each covered clearing agency to establish, implement, maintain and enforce written policies and procedures reasonably designed to manage its operational risks by identifying the plausible sources of operational risk, both internal and external, and mitigating their impact through the use

of appropriate systems, policies, procedures, and controls.³⁶

As described above, the Proposed Rule Change would update the ORMF to provide additional and current details regarding ICC's management of SPCS and assure that both ICC's relationships with SPCS and the risks associated with those relationships are continuously being monitored. The processes specified in the ORMF are intended to enhance ICC's ability to identify relevant internal and external sources of operational risk. As such, the Proposed Rule Change will define processes and controls that will facilitate ICC's ability to mitigate the impact of such risks through the use of appropriate systems, policies, procedures, and controls, consistent with the requirements of Rule 17Ad–22(e)(17)(i).³⁷

For the reasons stated above, the Commission finds the Proposed Rule Change is consistent with Rule 17Ad–22(e)(17)(i).³⁸

D. Consistency With Rule 17Ad–22(e)(2)(i) and (v) Under the Act

Rule 17Ad–22(e)(2)(i) and (v) requires each covered clearing agency to establish, implement, maintain and enforce written policies and procedures reasonably designed to provide for governance arrangements that are clear and transparent, and specify clear and direct lines of responsibility.³⁹

As described above, by adding new Section II.B. to the ORMF, the Proposed Rule Change would codify the responsibilities of ICC's management and the Board when managing risks arising from ICC's relationships with SPCS. The proposed changes also would update the ORMF to clarify the description of the Compliance Committee and ERM responsibilities, and the general updates described in Section II.B. above, would help ensure that the ORMF is accurate and current. Taken together, these revisions to the ORMF will help ICC maintain clear and transparent governance arrangements and specify clear and direct lines of responsibility, which in turn will help improve the accuracy and transparency of ICC's governance arrangements and improve the clarity of the lines of responsibility.

For these reasons, the Commission finds the Proposed Rule Change is consistent with Rule 17Ad–22(e)(2)(i) and (v).⁴⁰

³⁶ 17 CFR 240.17Ad–22(e)(17)(i).

³⁷ *Id.*

³⁸ *Id.*

³⁹ 17 CFR 240.17Ad–22(e)(2)(i), (v).

⁴⁰ *Id.*

IV. Accelerated Approval of the Proposed Rule Change

Under Section 19(b)(2) of the Act,⁴¹ the Commission may approve a proposed rule change prior to the 30th day after the date of publication of notice of filing of the proposed rule change in the **Federal Register** if the Commission finds good cause for doing so.

The Commission finds good cause, pursuant to Section 19(b)(2) of the Exchange Act,⁴² to approve the Proposed Rule Change prior to the 30th day after the date of publication of notice of filing of the Proposed Rule Change in the **Federal Register**. Rule 17Ad–25(i) requires, among other things, that covered clearing agencies establish, implement, maintain, and enforce written policies and procedures reasonably designed to require that senior management (i) evaluate and document the risks related to an agreement with a SPCS; (ii) submit to the board of directors for review and approval any agreement that would establish a relationship with a SPCS (iii) be responsible for establishing the policies and procedures that govern relationships and manage risks related to such agreements with SPCS; and (iv) perform ongoing monitoring of the relationship, and report to the board of directors for its evaluation of any action taken by senior management to remedy significant deterioration in performance or address changing risks or material issues identified through such monitoring.⁴³ The proposed rule change would establish ICC's process for vetting and managing its relationships with SPCS, with specific processes for internal and external SPCS, consistent with Rule 17Ad–25(i).⁴⁴ Based on the foregoing, and as discussed above, the Proposed Rule Change is consistent with the requirements of Rule 17Ad–25(i) under the Act.⁴⁵

The compliance date for Rule 17Ad–25(i) generally is December 5, 2024.⁴⁶ Approving the Proposed Rule Change on an accelerated basis will allow ICC to establish its process for vetting and managing its relationships with SPCS by this compliance date. Accordingly, the Commission finds good cause to

⁴¹ 15 U.S.C. 78s(b)(2).

⁴² 15 U.S.C. 78s(b)(2).

⁴³ 17 CFR 240.17Ad–25(i).

⁴⁴ 17 CFR 240.17Ad–25(i).

⁴⁵ *Id.*

⁴⁶ Clearing Agency Governance and Conflicts of Interest, 88 FR at 84454 (explaining that the compliance date for Rule 17Ad–25 is December 5, 2024, except that the compliance date for the independence requirements of the board and board committees in Rules 17Ad–25(b)(1), (c)(2), and (e) is December 5, 2025).

³³ 17 CFR 240.17Ad–25(i).

³⁴ See Clearing Agency Governance and Conflicts of Interest, 88 FR at 84477.

³⁵ *Id.*

approve the Proposed Rule Change on an accelerated basis prior to the 30th day after the date of publication of notice of filing of the Proposed Rule Change in the **Federal Register**, pursuant to Section 19(b)(2) of the Exchange Act.⁴⁷

V. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act, and in particular, with the requirements of Section 17A(b)(3)(F) of the Act⁴⁸ and Rules 17Ad-25(i),⁴⁹ 17Ad-22(e)(17)(i),⁵⁰ and 17Ad-22(e)(2)(i) and (v)⁵¹ thereunder.

It is therefore ordered pursuant to Section 19(b)(2) of the Act⁵² that the Proposed Rule Change (SR-ICC-2024-011), be, and hereby is, approved, on an accelerated basis.⁵³

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁴

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024-29037 Filed 12-10-24; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-101826; File No. SR-BX-2024-053]

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Equity 4, Rule 4759 Concerning Data Feeds Utilized

December 5, 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 25, 2024, Nasdaq BX, Inc. (“BX” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit

comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Equity 4, Rule 4759 (Data Feeds Utilized) to change the primary and secondary source of quotation data of certain market centers in the list of proprietary and network processor feeds that the Exchange utilizes for the handling, routing, and execution of orders as well as regulatory compliance processes related to those functions.

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 update and amend the data feeds table in Equity 4, Rule 4759, which sets forth on a market-by-market basis the specific proprietary and network processor feeds that the Exchange utilizes for the handling, routing, and execution of orders, and for performing the regulatory compliance processes related to each of those functions. Specifically, the table would be amended to reflect that the Exchange will receive a direct feed from the Long-Term Stock Exchange (“LTSE”) as its primary quotation data source and CQS/UQDF will become its secondary data source for the handling, routing and execution of orders and for performing regulatory compliance processes related to each of those functions. The change to the primary sources reflects the Exchange’s effort to include an additional source and the use of secondary sources in the event the

primary source is unable to provide data.

The operative date of the proposed rule change shall be November 25, 2024.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,³ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁴ 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 believes that the proposed rule change removes impediments to and perfects the mechanism of a free and open market because updating its data feeds table of market centers for which the exchange consumes quotation data through a direct feed will provide clarity to market participants. Additionally, it is necessary and consistent with the public interest and the protection of investors to update the Exchange’s table of market centers in Equity 4, Rule 4759 in order to provide transparency with respect to all the direct proprietary and network processor feeds from which the Exchange obtains market data.

B. Self-Regulatory Organization’s Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issue; instead, its purpose is to enhance transparency with respect to the operation of the Exchange and its use of market data feeds.

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 Act⁵ and Rule 19b-4(f)(6) thereunder.⁶ Because the proposed rule change does not: (i)

³ 15 U.S.C. 78f(b).

⁴ 15 U.S.C. 78f(b)(5).

⁵ 15 U.S.C. 78s(b)(3)(A)(iii).

⁶ 17 CFR 240.19b-4(f)(6).

⁴⁷ 15 U.S.C. 78s(b)(2).

⁴⁸ 15 U.S.C. 78q-1(b)(3)(F).

⁴⁹ 17 CFR 240.17Ad-25(i).

⁵⁰ 17 CFR 240.17Ad-22(e)(17)(i).

⁵¹ 17 CFR 240.17Ad-22(e)(2)(i), (v).

⁵² 15 U.S.C. 78s(b)(2).

⁵³ In approving the proposed rule change, the Commission considered the proposal’s impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁵⁴ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act⁷ and Rule 19b-4(f)(6) thereunder.⁸

A proposed rule change filed under Rule 19b-4(f)(6)⁹ normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),¹⁰ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because the proposal does not raise any novel regulatory issues and waiver will allow the Exchange to begin receiving and using a direct feed from LTSE as soon as possible. For this reason, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.¹¹

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-2024-053 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-2024-053. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. 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-2024-053, and should be submitted on or before January 2, 2025.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024-29044 Filed 12-10-24; 8:45 am]

BILLING CODE 8011-01-P

DEPARTMENT OF STATE

[Public Notice 12601]

60-Day Notice of Proposed Information Collection: Application/License for Permanent/Temporary Export or Temporary Import of Classified Defense Articles and Related Classified Technical Data

ACTION: Notice of request for public comment.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. In accordance with the Paperwork Reduction Act of 1995, we are requesting comments on this collection from all interested individuals and organizations. The purpose of this notice is to allow 60 days for public comment preceding submission of the collection to OMB.

DATES: The Department will accept comments from the public up to *February 10, 2025*.

ADDRESSES:

You may submit comments by any of the following methods:

- **Web:** Persons with access to the internet may comment on this notice by going to www.Regulations.gov. You can search for the document by entering "Docket Number: DOS-2024-0046" in the Search field. Then click the "Comment Now" button and complete the comment form.

- **Email:** DDTCPublicComments@state.gov.

- **Regular Mail:** Send written comments to: Andrea Battista, SA-1, 12th Floor, Directorate of Defense Trade Controls, Bureau of Political Military Affairs, U.S. Department of State, Washington, DC 20522-0112.

You must include the DS form number (if applicable), information collection title, and the OMB control number in any correspondence.

FOR FURTHER INFORMATION CONTACT:

Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents,

⁷ 15 U.S.C. 78s(b)(3)(A).

⁸ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

⁹ 17 CFR 240.19b-4(f)(6).

¹⁰ 17 CFR 240.19b-4(f)(6)(iii).

¹¹ For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹² 17 CFR 200.30-3(a)(12), (59).

to Andrea Battista, SA-1, 12th Floor, Directorate of Defense Trade Controls, Bureau of Political Military Affairs, U.S. Department of State, Washington, DC 20522-0112, via phone at 202-992-0973, or via email at battistaal@state.gov.

SUPPLEMENTARY INFORMATION:

• *Title of Information Collection:* Application/License for Permanent/Temporary Export or Temporary Import of Classified Defense Articles and Related Classified Technical Data.

• *OMB Control Number:* 1405-0022.

• *Type of Request:* Renewal of a Currently Approved Collection.

• *Originating Office:* Bureau of Political-Military Affairs, Directorate of Defense Trade Controls, PM/DDTC.

• *Form Number:* DSP-85.

• *Respondents:* Business, Nonprofit Organizations, and Individuals.

• *Estimated Number of Respondents:* 74.

• *Estimated Number of Responses:* 74.

• *Average Time per Response:* 30 minutes.

• *Total Estimated Burden Time:* 37 hours.

• *Frequency:* On occasion.

• *Obligation to Respond:* Required to Obtain or Retain a Benefit.

We are soliciting public comments to permit the Department to:

• Evaluate whether the proposed information collection is necessary for the proper functions of the Department.

• Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.

• Enhance the quality, utility, and clarity of the information to be collected.

• Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

In accordance with part 123 of the ITAR, any person who intends to permanently export, temporarily export, or temporarily import classified defense articles, including classified technical data must first obtain DDTC authorization. The "Application/License for Permanent/Temporary

Export or Temporary Import of Classified Defense Articles and Related Classified Technical Data" (Form DSP-85) is used to obtain permission for the permanent export, temporary export, or temporary import of classified defense articles, including classified technical data, covered by the U.S. Munitions List (USML). This form is an application that, when completed and approved by the Bureau of Political Military Affairs, Directorate of Defense Trade Controls (PM/DDTC), Department of State, constitutes the official record and authorization for all classified commercial defense trade transactions, pursuant to the Arms Export Control Act and the International Traffic in Arms Regulations.

Methodology: This information collection may be sent to the Directorate of Defense Trade Controls via the following methods: electronically or mail.

Michael Vaccaro,

Deputy Assistant Secretary, Bureau of Political and Military Affairs, Department of State.

[FR Doc. 2024-29052 Filed 12-10-24; 8:45 am]

BILLING CODE 4710-25-P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Determination of Trade Surplus in Certain Sugar and Syrup Goods and Sugar-Containing Products of Chile, Morocco, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Peru, Colombia, and Panama

AGENCY: Office of the United States Trade Representative (USTR).

ACTION: Notice.

SUMMARY: In accordance with the Harmonized Tariff Schedule of the United States (HTSUS), USTR is providing notice of its determination of the trade surplus in certain sugar and syrup goods and sugar-containing products of Chile, Morocco, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Peru, Colombia, and Panama. The level of a country's trade surplus in these goods relates to the quantity of sugar and syrup goods and sugar-containing products for which the United States grants preferential tariff treatment under the United States-Chile Free Trade Agreement (Chile FTA), the United States-Morocco Free Trade Agreement (Morocco FTA), the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR FTA), the United States-Peru Trade

Promotion Agreement (Peru TPA), the United States-Colombia Trade Promotion Agreement (Colombia TPA), and the United States-Panama Trade Promotion Agreement (Panama TPA).

DATES: This notice is applicable on January 1, 2025.

FOR FURTHER INFORMATION CONTACT: Erin H. Nicholson, Office of Agricultural Affairs, 202.395.9419 or Erin.H.Nicholson@ustr.eop.gov.

SUPPLEMENTARY INFORMATION:

I. Chile FTA

Pursuant to section 201 of the Chile FTA Implementation Act (Pub. L. 108-77; 19 U.S.C. 3805 note), Presidential Proclamation No. 7746 of December 30, 2003 (68 FR 75789) implemented the Chile FTA on behalf of the United States and modified the HTSUS to reflect the tariff treatment provided for in the Chile FTA.

Note 3(a) to subchapter XXII of HTSUS chapter 98 requires USTR annually to publish a determination of the amount of Chile's trade surplus, by volume, with all sources for goods in Harmonized System (HS) subheadings 1701.12, 1701.13, 1701.14, 1701.91, 1701.99, 1702.20, 1702.30, 1702.40, 1702.60, 1702.90, 1806.10, 2101.12, 2101.20, and 2106.90, except that Chile's imports of goods classified under HS subheadings 1702.40 and 1702.60 that qualify for preferential tariff treatment under the Chile FTA are not included in the calculation of Chile's trade surplus.

Note 3(b) to subchapter XXII of HTSUS chapter 98 provides duty-free treatment for certain sugar and syrup goods and sugar-containing products of Chile entered under subheading 9822.02.01 in any calendar year (CY) (beginning in CY2016) in the quantity of goods equal to the amount of Chile's trade surplus in subdivision (a) of the note. During CY2023, the most recent year for which data is available, Chile's imports of the sugar and syrup goods and sugar-containing products described above exceeded its exports of those goods by 662,341 metric tons according to data published by its customs authority, the *Servicio Nacional de Aduana*. Based on this data, USTR has determined that Chile has a negative trade surplus. Therefore, in accordance with U.S. Note 3(b) to subchapter XXII of HTSUS chapter 98, goods of Chile are not eligible to enter the United States duty-free under subheading 9822.02.01 in CY2025.

II. Morocco FTA

Pursuant to section 201 of the Morocco FTA Implementation Act (Pub.

L. 108–302; 19 U.S.C. 3805 note), Presidential Proclamation No. 7971 of December 22, 2005 (70 FR 76651) implemented the Morocco FTA on behalf of the United States and modified the HTSUS to reflect the tariff treatment provided for in the Morocco FTA. Note 6(a) to subchapter XXII of HTSUS chapter 98 requires USTR annually to publish a determination of the amount of Morocco's trade surplus, by volume, with all sources for goods in HS subheadings 1701.12, 1701.13, 1701.14, 1701.91, 1701.99, 1702.40, and 1702.60, except that Morocco's imports of U.S. goods classified under HS subheadings 1702.40 and 1702.60 that qualify for preferential tariff treatment under the Morocco FTA are not included in the calculation of Morocco's trade surplus.

Note 6(b) to subchapter XXII of HTSUS chapter 98 provides duty-free treatment for certain sugar and syrup goods and sugar-containing products of Morocco entered under subheading 9822.03.01 in any CY in the quantity of goods equal to the amount of Morocco's trade surplus in subdivision (a) of the note.

During CY2023, the most recent year for which data is available, Morocco's imports of the sugar and syrup goods and sugar-containing products described above exceeded its exports of those goods by 1,086,639 metric tons according to data published by its customs authority, the *Office des Changes*. Based on this data, USTR has determined that Morocco has a negative trade surplus. Therefore, in accordance with U.S. Note 6(b) to subchapter XXII of HTSUS chapter 98, goods of Morocco are not eligible to enter the United States duty-free under subheading 9822.03.01 in CY 2025.

III. CAFTA-DR FTA

Pursuant to section 201 of the CAFTA-DR FTA Implementation Act (Pub. L. 109–53; 19 U.S.C. 4031), Presidential Proclamation No. 7987 of February 28, 2006 (71 FR 10827), Presidential Proclamation No. 7991 of March 24, 2006 (71 FR 16009), Presidential Proclamation No. 7996 of March 31, 2006 (71 FR 16971), Presidential Proclamation No. 8034 of June 30, 2006 (71 FR 38509), Presidential Proclamation No. 8111 of February 28, 2007 (72 FR 10025), Presidential Proclamation No. 8331 of December 23, 2008 (73 FR 79585), and Presidential Proclamation No. 8536 of June 12, 2010 (75 FR 34311), implemented the CAFTA-DR FTA on behalf of the United States and modified the HTSUS to reflect the tariff treatment provided for in the CAFTA-DR FTA.

Note 25(b)(i) to subchapter XXII of HTSUS chapter 98 requires USTR annually to publish a determination of the amount of each CAFTA-DR country's trade surplus, by volume, with all sources for goods in HS subheadings 1701.12, 1701.13, 1701.14, 1701.91, 1701.99, 1702.40, and 1702.60, except that each CAFTA-DR country's exports to the United States of goods classified under HS subheadings 1701.12, 1701.13, 1701.14, 1701.91, and 1701.99 and its imports of goods classified under HS subheadings 1702.40 and 1702.60 that qualify for preferential tariff treatment under the CAFTA-DR FTA are not included in the calculation of that country's trade surplus.

U.S. Note 25(b)(ii) to subchapter XXII of HTSUS chapter 98 provides duty-free treatment for certain sugar and syrup goods and sugar-containing products of each CAFTA-DR country entered under subheading 9822.05.20 in an amount equal to the lesser of that country's trade surplus or the specific quantity set out in that note for that country and that calendar year. In each successive year after CY2021, the aggregate quantity for each country increases, from the aggregate quantity permitted in the prior calendar year, by the quantity set out in that note.

Costa Rica

During CY2023, the most recent year for which data is available, Costa Rica's exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 30,086 metric tons according to data published by the *Costa Rican Customs Department, Ministry of Finance*. Based on this data, USTR has determined that Costa Rica's trade surplus is 30,086 metric tons. The specific quantity set out in U.S. Note 25(b)(ii) to subchapter XXII of HTSUS chapter 98 for Costa Rica for CY2025 is 15,180 metric tons. Therefore, in accordance with that note, the aggregate quantity of goods of Costa Rica that may be entered duty-free under subheading 9822.05.20 in CY2025 is 15,180 metric tons (*i.e.*, the amount that is the lesser of Costa Rica's trade surplus and the specific quantity set out in that note for Costa Rica for CY2025).

Dominican Republic

During CY2023, the most recent year for which data is available, the Dominican Republic's imports of the sugar and syrup goods and sugar-containing products described above exceeded its exports of those goods by 97,159 metric tons according to data published by the *General Directorate of Customs (DGA)*. Based on this data,

USTR has determined that the Dominican Republic has a negative trade surplus. Therefore, in accordance with U.S. Note 25(b)(ii) to subchapter XXII of HTSUS chapter 98, goods of the Dominican Republic are not eligible to enter the United States duty-free under subheading 9822.05.20 in CY2025.

El Salvador

During CY2023, the most recent year for which data is available, El Salvador's exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 369,856 metric tons according to data published by the *Central Bank of El Salvador*. Based on this data, USTR has determined that El Salvador's trade surplus is 369,856 metric tons. The specific quantity set out in U.S. Note 25(b)(ii) to subchapter XXII of HTSUS chapter 98 for El Salvador for CY2025 is 39,440 metric tons. Therefore, in accordance with that note, the aggregate quantity of goods of El Salvador that may be entered duty-free under subheading 9822.05.20 in CY2025 is 39,440 metric tons (*i.e.*, the amount that is the lesser of El Salvador's trade surplus and the specific quantity set out in that note for El Salvador for CY 2025).

Guatemala

During CY2023, the most recent year for which data is available, Guatemala's exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 983,553 metric tons according to data published by the *Guatemalan Sugar Association (ASAZGUA) and Bank of Guatemala*. Based on this data, USTR has determined that Guatemala's trade surplus is 983,553 metric tons. The specific quantity set out in U.S. Note 25(b)(ii) to subchapter XXII of HTSUS chapter 98 for Guatemala for CY2025 is 54,520 metric tons. Therefore, in accordance with that note, the aggregate quantity of goods of Guatemala that may be entered duty-free under subheading 9822.05.20 in CY 2025 is 54,520 metric tons (*i.e.*, the amount that is the lesser of Guatemala's trade surplus and the specific quantity set out in that note for Guatemala for CY2025).

Honduras

During CY2023, the most recent year for which data is available, Honduras' exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 158,791 metric tons according to data published by the *Central Bank of Honduras*. Based on

this data, USTR has determined that Honduras' trade surplus is 158,791 metric tons. The specific quantity set out in U.S. Note 25(b)(ii) to subchapter XXII of HTSUS chapter 98 for Honduras for CY2025 is 11,040 metric tons. Therefore, in accordance with that note, the aggregate quantity of goods of Honduras that may be entered duty-free under subheading 9822.05.20 in CY2025 is 11,040 metric tons (*i.e.*, the amount that is the lesser of Honduras' trade surplus and the specific quantity set out in that note for Honduras for CY2025).

Nicaragua

During CY2023, the most recent year for which data is available, Nicaragua's exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 349,119 metric tons according to data published by the *National Committee of Sugar Producers (CNPA)*. Based on this data, USTR has determined that Nicaragua's trade surplus is 349,119 metric tons. The specific quantity set out in U.S. Note 25(b)(ii) to subchapter XXII of HTSUS chapter 98 for Nicaragua for CY2025 is 30,360 metric tons. Therefore, in accordance with that note, the aggregate quantity of goods of Nicaragua that may be entered duty-free under subheading 9822.05.20 in CY2025 is 30,360 metric tons (*i.e.*, the amount that is the lesser of Nicaragua's trade surplus and the specific quantity set out in that note for Nicaragua for CY2025).

IV. Peru TPA

Pursuant to section 201 of the Peru TPA Implementation Act (Pub. L. 110–138; 19 U.S.C. 3805 note), Presidential Proclamation No. 8341 of January 16, 2009 (74 FR 4105) implemented the Peru TPA on behalf of the United States and modified the HTSUS to reflect the tariff treatment provided for in the Peru TPA.

Note 28(c) to subchapter XXII of HTSUS chapter 98 requires USTR annually to publish a determination of the amount of Peru's trade surplus, by volume, with all sources for goods in HS subheadings 1701.12, 1701.13, 1701.14, 1701.91, 1701.99, 1702.40, and 1702.60, except that Peru's imports of U.S. goods classified under HS subheadings 1702.40 and 1702.60 that are originating goods under the Peru TPA and Peru's exports to the United States of goods classified under HS subheadings 1701.12, 1701.13, 1701.14, 1701.91, and 1701.99 are not included in the calculation of Peru's trade surplus.

Note 28(d) to subchapter XXII of HTSUS chapter 98 provides duty-free treatment for certain sugar goods of Peru

entered under subheading 9822.06.10 in an amount equal to the lesser of Peru's trade surplus or the specific quantity set out in that note for that calendar year.

During CY2023, the most recent year for which data is available, Peru's imports of the sugar and syrup goods and sugar-containing products described above exceeded its exports of those goods by 249,090 metric tons according to data published by the *National Superintendence of Customs and Tax Administration (SUNAT)*. Based on this data, USTR has determined that Peru has a negative trade surplus. Therefore, in accordance with U.S. Note 28(d) to subchapter XXII of HTSUS chapter 98, goods of Peru are not eligible to enter the United States duty-free under subheading 9822.06.10 in CY2025.

V. Colombia TPA

Pursuant to section 201 of the Colombia TPA Implementation Act (Pub. L. 112–42; 19 U.S.C. 3805 note), Presidential Proclamation No. 8818 of May 14, 2012 (77 FR 29519) implemented the Colombia TPA on behalf of the United States and modified the HTSUS to reflect the tariff treatment provided for in the Colombia TPA.

Note 32(b) to subchapter XXII of HTSUS chapter 98 requires USTR to publish annually a determination of the amount of Colombia's trade surplus, by volume, with all sources for goods in HS subheadings 1701.12, 1701.13, 1701.14, 1701.91, 1701.99, 1702.40 and 1702.60, except that Colombia's imports of U.S. goods classified under subheadings 1702.40 and 1702.60 that are originating goods under the Colombia TPA and Colombia's exports to the United States of goods classified under subheadings 1701.12, 1701.13, 1701.14, 1701.91 and 1701.99 are not included in the calculation of Colombia's trade surplus.

Note 32(c)(i) to subchapter XXII of HTSUS chapter 98 provides duty-free treatment for certain sugar goods of Colombia entered under subheading 9822.08.01 in an amount equal to the lesser of Colombia's trade surplus or the specific quantity set out in that note for that calendar year.

During CY2023, the most recent year for which data is available, Colombia's exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 219,080 metric tons according to data published by the *Colombian National Tax and Customs Directorate (DIAN)*. Based on this data, USTR has determined that Colombia's trade surplus is 219,080 metric tons. The specific quantity set out in U.S. Note 32(c)(i) to subchapter XXII of

HTSUS chapter 98 for Colombia for CY2025 is 59,750 metric tons. Therefore, in accordance with that note, the aggregate quantity of goods of Colombia that may be entered duty-free under subheading 9822.08.01 in CY2025 is 59,750 metric tons (*i.e.*, the amount that is the lesser of Colombia's trade surplus and the specific quantity set out in that note for Colombia for CY2025).

VI. Panama TPA

Pursuant to section 201 of the Panama TPA Implementation Act (Pub. L. 112–43; 19 U.S.C. 3805 note), Presidential Proclamation No. 8894 of October 29, 2012 (77 FR 66505) implemented the Panama TPA on behalf of the United States and modified the HTSUS to reflect the tariff treatment provided for in the Panama TPA.

Note 35(a) to subchapter XXII of HTSUS chapter 98 requires USTR annually to publish a determination of the amount of Panama's trade surplus, by volume, with all sources for goods in HS subheadings 1701.12, 1701.13, 1701.14, 1701.91, 1701.99, 1702.40 and 1702.60, except that Panama's imports of U.S. goods classified under subheadings 1702.40 and 1702.60 that are originating goods under the Panama TPA and Panama's exports to the United States of goods classified under subheadings 1701.12, 1701.13, 1701.14, 1701.91 and 1701.99 are not included in the calculation of Panama's trade surplus.

Note 35(c) to subchapter XXII of HTSUS chapter 98 provides duty-free treatment for certain sugar goods of Panama entered under subheading 9822.09.17 in an amount equal to the lesser of Panama's trade surplus or the specific quantity set out in that note for that calendar year.

During CY2023, the most recent year for which data is available, Panama's exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 2,071 metric tons according to data published by the *National Institute of Statistics and Census, Office of the General Comptroller of Panama; and the Ministry of Commerce and Industry of Panama*. Based on this data, USTR has determined that Panama's trade surplus is 2,071 metric tons. The specific quantity set out in U.S. Note 35(c) to subchapter XXII of HTS chapter 98 for Panama for CY2025 is 570 metric tons. Therefore, in accordance with that Note, the aggregate quantity of goods of Panama that may be entered duty-free under subheading 9822.09.17 in CY2025 is 570 metric tons (*i.e.*, the amount that is the lesser of Panama's trade surplus

and the specific quantity set out in that Note for Panama for CY2025).

Douglas McKalip,

Chief Agricultural Negotiator, Office of the United States Trade Representative.

[FR Doc. 2024–29071 Filed 12–10–24; 8:45 am]

BILLING CODE 3390–F4–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

2025 Tariff Rate Quota Quantity Limitations Under the U.S.-Australia Free Trade Agreement

AGENCY: Office of the United States Trade Representative (USTR).

ACTION: Notice.

SUMMARY: In accordance with the U.S.-Australia Free Trade Agreement entered into by the United States and the Commonwealth of Australia, USTR is providing notice of tariff-rate quota quantity limitations of certain tariff subheadings for calendar year 2025.

DATES: The changes made by this notice are applicable on January 1, 2025.

FOR FURTHER INFORMATION CONTACT:

Sarah Fasano, Office of Agricultural Affairs, 202.395.6127 or Sarah.E.Fasano@ustr.eop.gov.

SUPPLEMENTARY INFORMATION: Pursuant to section 201 of the United States-Australia Free Trade Agreement Implementation Act (Pub. L. 108–286; 118 Stat. 919) (19 U.S.C. 3805 note), Presidential Proclamation No. 7857 of December 20, 2004, and subchapter XXII of chapter 98 of the Harmonized Tariff Schedule of the United States (HTSUS), the attached Annex provides the quantitative limitations in calendar year 2025 of originating goods of Australia entering the United States under certain subheadings.

Annex

Effective with respect to originating goods of Australia, entered under the terms of general note 28 to the HTSUS and under subchapter XXII of chapter 98, on or after January 1, 2025, and through the close of December 31, 2025:

1. For purposes of subdivision (a) of U.S. note 8 to subchapter XXII of chapter 98 of the HTSUS and in accordance with paragraph 4(b) of Section C of Annex 3–A to Chapter 3 of the United States-Australia Free Trade Agreement (Price-Based Safeguard for Beef), the aggregate quantity of originating goods of Australia is 71,268 metric tons for calendar year 2025.

2. For purposes of U.S. note 9 to subchapter XXII of chapter 98 of the HTSUS, the aggregate quantity of

originating goods of Australia entered under subheading 9822.04.05 shall not exceed 24,054,000 liters for calendar year 2025.

3. For purposes of U.S. note 10 to subchapter XXII of chapter 98 of the HTSUS, the aggregate quantity of originating goods of Australia entered under subheading 9822.04.10 shall not exceed 2,709 metric tons for calendar year 2025.

4. For purposes of U.S. note 11 to subchapter XXII of chapter 98 of the HTSUS, the aggregate quantity of originating goods of Australia entered under subheading 9822.04.15 shall not exceed 181 metric tons for calendar year 2025.

5. For purposes of U.S. note 12 to subchapter XXII of chapter 98 of the HTSUS, the aggregate quantity of originating goods of Australia entered under subheading 9822.04.20 shall not exceed 8,764 metric tons for calendar year 2025.

6. For purposes of U.S. note 13 to subchapter XXII of chapter 98 of the HTSUS, the aggregate quantity of originating goods of Australia entered under subheading 9822.04.25 shall not exceed 4,811 metric tons for calendar year 2025.

7. For purposes of U.S. note 14 to subchapter XXII of chapter 98 of the HTSUS, the aggregate quantity of originating goods of Australia entered under subheading 9822.04.30 shall not exceed 9,621 metric tons for calendar year 2025.

8. For purposes of U.S. note 15 to subchapter XXII of chapter 98 of the HTSUS, the aggregate quantity of originating goods of Australia entered under subheading 9822.04.35 shall not exceed 9,287 metric tons for calendar year 2025.

9. For purposes of U.S. note 16 to subchapter XXII of chapter 98 of the HTSUS, the aggregate quantity of originating goods of Australia entered under subheading 9822.04.40 shall not exceed 5,307 metric tons for calendar year 2025.

10. For purposes of U.S. note 17 to subchapter XXII of chapter 98 of the HTSUS, the aggregate quantity of originating goods of Australia entered under subheading 9822.04.45 shall not exceed 1,355,423 metric tons for calendar year 2025.

11. For purposes of U.S. note 18 to subchapter XXII of chapter 98 of the HTSUS, the aggregate quantity of originating goods of Australia entered under subheading 9822.04.50 shall not exceed 903 metric tons for calendar year 2025.

12. For purposes of U.S. note 19 to subchapter XXII of chapter 98 of the

HTSUS, the aggregate quantity of originating goods of Australia entered under subheading 9822.04.65 shall not exceed 1,327 metric tons for calendar year 2025.

Douglas McKalip,

Chief Agricultural Negotiator, Office of the United States Trade Representative.

[FR Doc. 2024–29070 Filed 12–10–24; 8:45 am]

BILLING CODE 3390–F4–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2024–1191]

Agency Information Collection

Activities: Requests for Comments; Clearance of a New Approval of Information Collection: International Traveler Information Card

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

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval for a new information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on May 1, 2024, and no comments were received. The collection involves obtaining information from FAA employees and contractors who will travel overseas on official business. The information to be collected will be used in the event an FAA employee and/or contractor is isolated overseas and requires lifesaving assistance. This information is necessary to comply with Federal law, which require Federal agencies to have personnel information on file in case of an isolating event overseas.

DATES: Written comments should be submitted by January 10, 2025.

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:

Michael S. Raby, Division Manager, FAA Office of Investigations and

Professional Responsibility (AXI-500) by email at: michael.raby@faa.gov; phone: (202) 604-2419.

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information.

OMB Control Number: 2120-XXXX.

Title: International Traveler Information Card.

Form Numbers: There are no FAA forms associated with this information collection.

Type of Review: New information collection.

Background: The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on May 1, 2024 (89 FR 35298). The International Traveler Information Card (ITIC) is an electronic form that FAA employees and contractors will complete prior to international travel on official business. The purpose of the form is to collect pertinent data to be used in the event a FAA employee and/or contractor are isolated overseas and require lifesaving assistance. This data will assist in the government's ability to properly identify individuals and provide, if necessary, medical support and personal items to FAA employees and contractors should they be isolated overseas.

The authority for this collection resides in Presidential Policy Directive (PPD)/PPD-30, 22 U.S.C. 4802 and 22 U.S.C. 3927. The duty of an agency with employees in foreign countries is to ensure they fully comply with all applicable directives of the Chief of Mission. In order to protect FAA personnel on official duty abroad, the ITIC documents the Personally Identifiable Information (PII) of FAA employees and contractors to help aid in their authentication and recovery. The ITIC requests the following PII: Name, Date of Birth, Gender, Height, Weight, Hair and Eye Color, Clothing and Shoe Size, Race/Ethnic Group, Blood Type, Scars/Marks/Tattoos, Known Medical Conditions, Current Medical Prescriptions, Allergies, Contact Information, Specialized Training, Language(s) Spoken, as well as information about their Emergency Contact. The traveler will also create a

Duress Word and Personal Authenticator Statements to aid in the identification.

This information will not be available to the public, and will be managed in accordance with applicable Records Management and Privacy Act policies. Only two International Travel Security Program Managers and the Senior Watch Officer of the Washington Operations Center can retrieve ITICs to aid employees and/or contractors during an isolating event, as determined by the Chief of Mission. The Chief of Mission, relying on situational factors, will make the ultimate decision on who this information is shared with, such as, but not limited to, the Department of Defense, in the event of a personnel recovery event.

Respondents: The FAA estimates that there will be 35 respondents based on the average number of contractors who travelled internationally on official business in fiscal years 2023-2024.

Frequency: As needed.

Estimated Average Burden per

Response: 0.5 hours.

Estimated Total Annual Burden: 17.5 hours for all responses.

Issued in Washington, DC, on November 8, 2024.

Michelle Salter,

Executive Director, FAA, Office of Investigations and Professional Responsibility.

[FR Doc. 2024-26852 Filed 12-10-24; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No: FAA-2025-2674]

Deadline for Notification of Intent To Use the Airport Improvement Program (AIP) Primary, Cargo, Nonprimary Entitlement Funds, and Discretionary Funds Available to Date for Fiscal Year 2025

AGENCY: Federal Aviation Administration (FAA), DOT

ACTION: Federal Register Notice.

SUMMARY: This action announces April 1, 2025, as the deadline for each airport sponsor to notify the FAA if it will use its Fiscal Year (FY) 2025 entitlement funds (referred to as apportionments) to accomplish Airport Improvement Program (AIP) eligible projects. Each sponsor has previously identified to the FAA such projects through the Airports Capital Improvement Plan (ACIP) process. This action also announces April 28, 2025, as the deadline for an airport sponsor to submit a final grant

application, based on bids, for grants that will be funded with FY 2025 entitlement funds only.

FOR FURTHER INFORMATION CONTACT: David F. Cushing, Manager, Airports Financial Assistance Division, APP-500, at (202) 267-8827.

SUPPLEMENTARY INFORMATION: Title 49 U.S.C. 47105(f) provides that the sponsor of an airport for which entitlement funds are apportioned shall notify the Secretary, by such time and in a form as prescribed by the Secretary, of the airport sponsor's intent to submit a grant application for its available entitlement funds. Therefore, the FAA is hereby notifying such airport sponsors of the steps required to ensure that the FAA has sufficient time to carry over and convert remaining entitlement funds.

The AIP grant program is authorized by Public Law 118-63, the "Federal Aviation Administration Reauthorization Act, 2024," enacted on May 16, 2024, which permits the FAA to make grants for planning and airport development and airport noise compatibility under the AIP through September 30, 2028. As of this notice, the funds allocated to the FAA to fund the AIP grant program are appropriated through December 20, 2024, by Public Law 118-83, the "Continuing Appropriations and Extensions Act, 2025," enacted on September 26, 2024. Apportioned funds will be subject to allocation formulas prescribed by 49 U.S.C. 47114 and any other applicable legislative text.

This notice applies only to sponsors of airports that have entitlement funds appropriated for FY 2025 to use on eligible and justified projects. State aviation agencies participating in the FAA's State Block Grant Program, as prescribed by 49 U.S.C. 47128, are responsible for notifying the FAA which covered nonprimary airports in their programs will be using their entitlement funds for eligible and justified projects.

An airport sponsor intending to apply any of its available entitlement funds, including those unused, but still available in accordance with 49 U.S.C. 47117 from prior years, must notify the FAA of its intent to submit a grant application by 12:00 p.m. prevailing local time on April 1, 2025.

This notice must be in writing and stipulate the total amount the sponsor intends to use for eligible and justified projects during FY 2025, including those entitlement funds not obligated from prior years that remain available in accordance with 49 U.S.C. 47117 (also known as protected carryover). These notifications are critical to ensure

efficient planning and administration of the AIP. Absent the notification of intent to submit a grant application by the above-mentioned deadline, the FAA will carry over the available entitlement funds on May 16, 2025. These funds will not be available again to the airport sponsor until the beginning of FY 2026.

The final grant application deadline for entitlement funds only is Monday, April 28, 2025. The final grant application funding requests should be based on bids, not estimates. Dates are subject to possible adjustment based on future legislation. As of the publication of this notice, the appropriations and the authorization legislation for the FAA expire on December 20, 2024, and September 30, 2028, respectively.

Sponsors wishing to be considered for AIP discretionary funding throughout FY 2025 should submit applications as soon as possible to FAA Regional or Airport District Offices. The FAA considers all applications submitted if they meet all existing laws, Federal regulations, and FAA policy.

The FAA considers applications on a rolling basis. The final deadline to submit grant applications competing for discretionary funding, in addition to entitlement funding, is June 16, 2025, by 11:59 p.m. Eastern Daylight Time. Under 49 U.S.C. 47115, the FAA considers projects that are the most appropriate to carry out the statute at any time prior to September 30, 2025.

The FAA has determined these deadlines will expedite and facilitate the FY 2025 grant-making process.

Issued in Washington, DC on December 5, 2024.

David F. Cushing,

Manager, Airports Financial Assistance Division.

[FR Doc. 2024-29036 Filed 12-10-24; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA-2010-0044]

Trinity Railway Express's Request To Amend Its Positive Train Control Safety Plan and Positive Train Control System

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of availability and request for comments.

SUMMARY: This document provides the public with notice that, on October 30, 2024, Trinity Railway Express (TRE) submitted its Positive Train Control

Safety Plan (PTCSP), Version 2.0, dated October 30, 2024, to FRA's Secure Information Repository. TRE asks FRA to approve its updated PTCSP and certify TRE's Interoperable Electronic Train Management System (I-ETMS) as a "mixed" positive train control (PTC) system. As this RFA may involve a request for FRA's approval of proposed material modifications to an FRA-certified PTC system, FRA is publishing this notice and inviting public comment on TRE's RFA to its PTCSP.

DATES: FRA will consider comments received by February 10, 2025 before taking final action on the PTCSP. FRA may consider comments received after that date to the extent practicable and without delaying implementation of valuable or necessary modifications to a PTC system.

ADDRESSES:

Comments: Comments may be submitted by going to <https://www.regulations.gov> and following the online instructions for submitting comments.

Instructions: All submissions must include the agency name and the applicable docket number. The relevant PTC docket number for this railroad is Docket No. FRA-2010-0044. For convenience, all active PTC dockets are hyperlinked on FRA's website at <https://railroads.dot.gov/research-development/program-areas/train-control/ptc/railroads-ptc-dockets>. All comments received will be posted without change to <https://www.regulations.gov>; this includes any personal information.

FOR FURTHER INFORMATION CONTACT:

Gabe Neal, Staff Director, Signal, Train Control, and Crossings Division, telephone: 816-516-7168, email: Gabe.Neal@dot.gov.

SUPPLEMENTARY INFORMATION: In general, title 49 United States Code (U.S.C.) section 20157(h) requires FRA to certify that a host railroad's PTC system complies with title 49 Code of Federal Regulations (CFR) part 236, subpart I, before the technology may be operated in revenue service. Before making certain changes to an FRA-certified PTC system or the associated FRA-approved PTCSP, a host railroad must submit, and obtain FRA's approval of, an RFA to its PTCSP under 49 CFR 236.1021.

Under 49 CFR 236.1021(e), FRA's regulations provide that FRA will publish a notice in the **Federal Register** and invite public comment in accordance with 49 CFR part 211, if an RFA includes a request for approval of a material modification of a signal or train control system. Accordingly, this notice informs the public that, on

October 30, 2024, TRE submitted an RFA to its PTCSP for its I-ETMS PTC system which seeks FRA's approval to change the classification of its PTC system to a Mixed PTC system. In its PTCSP, TRE asserts that the I-ETMS PTC system it is implementing is a mixed PTC system as defined in title 49 Code of Federal Regulations (CFR) 236.1015(e). The PTCSP describes TRE's I-ETMS implementation and the associated I-ETMS safety processes, safety analyses, and test, validation, and verification processes used during the development of I-ETMS. The PTCSP also contains TRE's operational and support requirements and procedures. That RFA is available in Docket No. FRA-2010-0044.

Interested parties are invited to comment on TRE's RFA to its PTCSP by submitting written comments or data. During FRA's review of TRE's RFA, FRA will consider any comments or data submitted within the timeline specified in this notice and to the extent practicable, without delaying implementation of valuable or necessary modifications to a PTC system. *See* 49 CFR 236.1021; *see also* 49 CFR 236.1011(e). However, FRA may elect not to respond to any particular comment, and under 49 CFR 236.1009(d)(3), FRA maintains the authority to approve or disapprove the PTCSP at its sole discretion.

Privacy Act Notice

In accordance with 49 CFR 211.3, FRA solicits comments from the public to better inform its decisions. DOT posts these comments, without edit, including any personal information the commenter provides, to <https://www.regulations.gov>, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at <https://www.transportation.gov/privacy>. *See* <https://www.regulations.gov/privacy-notice> for the privacy notice of regulations.gov. To facilitate comment tracking, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. If you wish to provide comments containing proprietary or confidential information, please contact FRA for alternate submission instructions.

Issued in Washington, DC.

Carolyn R. Hayward-Williams,

Director, Office of Railroad Systems and Technology.

[FR Doc. 2024-29084 Filed 12-10-24; 8:45 am]

BILLING CODE 4910-06-P

DEPARTMENT OF TRANSPORTATION**Federal Railroad Administration****[Docket Number FRA–2018–0012]****TEXRail's Request To Amend Its Positive Train Control Safety Plan and Positive Train Control System**

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of availability and request for comments.

SUMMARY: This document provides the public with notice that, on October 31, 2024, TEXRail (TEX) submitted its Positive Train Control Safety Plan (PTCSP), Version 2.0, dated October 9, 2024, to FRA's Secure Information Repository. TEX asks FRA to approve its updated PTCSP and certify TEX's Interoperable Electronic Train Management System (I-ETMS) as a "mixed" positive train control (PTC) system. As this RFA may involve a request for FRA's approval of proposed material modifications to an FRA-certified PTC system, FRA is publishing this notice and inviting public comment on TEX's RFA to its PTCSP.

DATES: FRA will consider comments received by February 10, 2025 before taking final action on the PTCSP. FRA may consider comments received after that date to the extent practicable and without delaying implementation of valuable or necessary modifications to a PTC system.

ADDRESSES:

Comments: Comments may be submitted by going to <https://www.regulations.gov> and following the online instructions for submitting comments.

Instructions: All submissions must include the agency name and the applicable docket number. The relevant PTC docket number for this railroad is Docket No. FRA–2018–0012. For convenience, all active PTC dockets are hyperlinked on FRA's website at <https://railroads.dot.gov/research-development/program-areas/train-control/ptc/railroads-ptc-dockets>. All comments received will be posted without change to <https://www.regulations.gov>; this includes any personal information.

FOR FURTHER INFORMATION CONTACT:

Gabe Neal, Staff Director, Signal, Train Control, and Crossings Division, telephone: 816–516–7168, email: Gabe.Neal@dot.gov.

SUPPLEMENTARY INFORMATION: In general, title 49 United States Code (U.S.C.) section 20157(h) requires FRA to certify

that a host railroad's PTC system complies with title 49 Code of Federal Regulations (CFR) part 236, subpart I, before the technology may be operated in revenue service. Before making certain changes to an FRA-certified PTC system or the associated FRA-approved PTCSP, a host railroad must submit, and obtain FRA's approval of, an RFA to its PTCSP under 49 CFR 236.1021.

Under 49 CFR 236.1021(e), FRA's regulations provide that FRA will publish a notice in the **Federal Register** and invite public comment in accordance with 49 CFR part 211, if an RFA includes a request for approval of a material modification of a signal or train control system. Accordingly, this notice informs the public that, on October 31, 2024, TEX submitted an RFA to its PTCSP for its I-ETMS PTC system which seeks FRA's approval to change the classification of its PTC system to a Mixed PTC system. In its PTCSP, TEX asserts that the I-ETMS PTC system it is implementing is a mixed PTC system as defined in Title 49 Code of Federal Regulations (CFR) 236.1015(e). The PTCSP describes TEX's I-ETMS implementation and the associated I-ETMS safety processes, safety analyses, and test, validation, and verification processes used during the development of I-ETMS. The PTCSP also contains TEX's operational and support requirements and procedures. That RFA is available in Docket No. FRA–2018–0012. Interested parties are invited to comment on TEX's RFA to its PTCSP by submitting written comments or data. During FRA's review of TEX's RFA, FRA will consider any comments or data submitted within the timeline specified in this notice and to the extent practicable, without delaying implementation of valuable or necessary modifications to a PTC system. *See* 49 CFR 236.1021; *see also* 49 CFR 236.1011(e). However, FRA may elect not to respond to any particular comment, and under 49 CFR 236.1009(d)(3), FRA maintains the authority to approve or disapprove the PTCSP at its sole discretion.

Privacy Act Notice

In accordance with 49 CFR 211.3, FRA solicits comments from the public to better inform its decisions. DOT posts these comments, without edit, including any personal information the commenter provides, to <https://www.regulations.gov>, as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at <https://www.transportation.gov/privacy>. *See* <https://www.regulations.gov/privacy-notice> for the privacy notice of [regulations.gov](https://www.regulations.gov). To facilitate comment

tracking, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. If you wish to provide comments containing proprietary or confidential information, please contact FRA for alternate submission instructions.

Issued in Washington, DC.

Carolyn R. Hayward-Williams,

Director, Office of Railroad Systems and Technology.

[FR Doc. 2024–29083 Filed 12–10–24; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION**[Docket No. DOT–OST–2011–0177]****Notice of Submission of Proposed Information Collections to OMB; Agency Request for Reinstatement of Previously Approved Information Collections: Nondiscrimination on the Basis of Disability in Air Travel**

AGENCY: Office of the Secretary (OST), Department of Transportation (Department or DOT).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the *Paperwork Reduction Act of 1995* (44 U.S.C. Chapter 35, as amended) this notice announces the Department's intention to reinstate Office of Management and Budget (OMB) control number 2105–0571 for certain information collections. The collections involve requirements in part 382 of title 14, Code of Federal Regulations (CFR), for carriers to provide a mechanism on their websites for passengers to provide online notification of their requests for disability accommodation services and for carriers to ensure that a disclaimer is activated when a user clicks a link on a primary website to embedded third-party software or an external website. The disclaimer must inform the user that the software/website is not within the carrier's control and may not follow the same accessibility policies.

DATES: Written comments should be submitted by February 10, 2025.

ADDRESSES: You may submit comments identified by Docket No. DOT–OST–2011–0177 through one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the online instructions for submitting comments.

- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590.

- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays. The telephone number is 202–366–9329.

- *Instructions:* You must include the agency name and a docket number DOT–OST–2011–0177 at the beginning of your comment. All comments received will be posted without change to <https://www.regulations.gov>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Beth Brodsky, Office of the General Counsel, Office of the Secretary, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590, (202) 366–7592 (Voice) or beth.brodsky@dot.gov (Email). You may also contact John C. Wood, Office of the General Counsel, Office of the Secretary, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC, 20590, (202) 366–9342 (Voice), (202) 366–7152 (Fax), or john.wood@dot.gov (Email). Arrangements to receive this document in an alternative format may be made by contacting the above-named individuals.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2105–0571.

Title: Nondiscrimination on the Basis of Disability in Air Travel.

Type of Request: Reinstatement of information collections.

Background: This notice covers two information collection requirements in the Department's Air Carrier Access Act (ACAA) implementing regulation, 14 CFR part 382 (part 382), Nondiscrimination on the Basis of Disability in Air Travel. Specifically, pursuant to section 382.43(d), covered carriers must provide an online mechanism for passengers to request disability accommodation services (*e.g.*, enplaning/deplaning assistance, deaf/hard of hearing communication assistance, escort to service animal relief area, etc.) for a particular flight. Pursuant to section 382.43(e), covered carriers must also ensure that when a user activates a link on a carrier's primary website to embedded third-party software or to an external website, a disclaimer is displayed notifying the user that the application or website may not be accessible. These requirements became effective on December 12, 2015, and December 12, 2016, respectively. Covered carriers are U.S. and foreign air carriers that operate at least one aircraft having a designed seating capacity of more than 60 passengers and own or control a primary website that markets

passenger air transportation or a tour, or tour component that must be purchased with air transportation, to the general public in the United States.¹

DOT is publishing this notice to announce its intent to request reinstatement of the previously approved information collections described above under OMB Control Number 2105–0571. The Paperwork Reduction Act of 1995 (PRA) and its implementing regulations, 5 CFR part 1320, require Federal agencies to issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. 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 the 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 monetary penalty for failing to comply with a collection of information if the collection of information does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

The title, a description of the information collection and respondents, and the periodic reporting burden are set forth below for each of the information collections:

1. Requirement to make a disability accommodation service request function available on the primary website. (14 CFR 382.43(d)).

Each covered carrier must provide a mechanism on its website for passengers to request a disability accommodation service for a future flight and provide advance notice of their request. Carriers may, but need not, require passengers to include contact information on the form to follow-up and request more specific information about the passengers' accommodation needs. Carriers may also use the aggregate data from the online service requests to understand and better plan for the volume and types of service requests they receive across

¹ The Department estimates that 170 is the maximum number of entities that are covered by the requirements addressed in this notice. 170 represents the number of U.S. and foreign air carriers that submitted an annual report on disability-related complaints to the Department under 14 CFR 382.157 for the reporting cycle in Calendar Year 2023. Because the requirement to file a report under section 382.157 applies to U.S. and foreign air carriers that conduct passenger-carrying service to, from, or in the United States with at least one aircraft having a designed seating capacity of more than 60 seats, the Department assumes the number of carriers that file the annual report on disability-related complaints is similar to the number of carriers covered under the requirements described in this notice.

time periods and routes, but also are not required to do so.

While the content and design of the online service request form is up to the carriers, the Department anticipates that each covered U.S. and foreign carrier that markets scheduled air transportation to the general public in the United States would incur initial costs associated with developing and reviewing a design and implementation plan for the request form, developing, coding, and integrating the form into the website, as well as testing, debugging, and connecting the form with a backend database to store the information. The final regulatory analysis (FRA) for the final rule titled Nondiscrimination on the Basis of Disability in Air Travel: Accessibility of websites and Automated Kiosks at U.S. Airports estimated that it will take an average of 32 labor hours per carrier to develop, implement, integrate, connect, and test the online request form. Initial costs are reduced for carriers that rely on a request form developed by another entity. There are no recordkeeping or reporting requirements. However, carriers should use the service request information to facilitate appropriate, timely assistance to their passengers.

Respondents: Certificated U.S. and foreign air carriers operating to, from, and within the United States that operate at least one aircraft having a seating capacity of more than 60 passengers and own or control a primary website that markets air transportation to the general public in the United States.

Estimated Number of Respondents: 170 U.S. and foreign carriers, of which the Department expects all to have achieved compliance with the requirement in a prior year. The Department estimates that each year there will be 14 new respondent carriers.

Estimated Annual Burden on Respondents: 0 hours per carrier compliant in a prior year, unless the carrier voluntarily elects to modify or improve its form, and 32 hours per carrier creating an online request form.

Estimated Total Annual Burden: 448 hours. This estimate was calculated by multiplying the total number of labor hours per year that a carrier is estimated to spend to develop, implement, integrate, connect, and test the online request form (32) by the estimated number of new respondent carriers each year (14).

Frequency: One-time requirement.

2. Requirement to provide a disclaimer notice to users when clicking a link on a primary website to an

embedded third-party software or an external website. (14 CFR 382.43(e)).

Carriers must provide a disclaimer notice for each link on their primary website that enables a user to access software or an external website that is not in the carrier's control. The disclaimer notice must be activated the first time a user clicks the link and must notify the user that the application/website is not within the carrier's control and may not follow the same accessibility policies as the primary website. The Department anticipates that each covered U.S. and foreign carrier will incur costs associated with identifying all links on their websites that may require a disclaimer such as developing and reviewing the design and language for the disclaimer notice, as well as developing, testing, and deploying the code to the appropriate web pages.

The incremental labor hours associated with providing the required disclaimer may vary depending on the number of links on the website to which this requirement applies. The FRA estimated that it will take an average of 6 labor hours per carrier to identify the links and then develop, test, and deploy the disclaimer notice on the website. We also estimate that it will take less than 30 minutes per year for a carrier to associate the notice with any new links to external websites or third-party software added to their websites.

Respondents: Certificated U.S. and foreign air carriers operating to, from, and within the United States that operate at least one aircraft having a seating capacity of more than 60 passengers and own or control a primary website that markets air transportation to the general public in the United States.

Estimated Number of Respondents: 170 U.S. and foreign carriers, of which the Department expects all to have achieved compliance with the requirement in a prior year. The Department estimates that each year there will be 14 new respondent carriers.

Estimated Annual Burden on Respondents: 6 hours for carriers to create, test, and deploy the disclaimer. 30 minutes for carriers compliant in prior years to associate the notice with new links and third-party software.

Estimated Total Annual Burden: 169 hours. This estimate was calculated by multiplying the total number of labor hours per year that a carrier is estimated to spend to develop, test, and deploy the online request form (6) by the estimated number of new respondent carriers each year (14). To that total we added the product of the number of hours that we

estimated carriers may spend associating the notice with new weblinks (.5 hours) and the number of carriers that are expected to have achieved compliance in a prior year (170).

Frequency: One-time and recurrent requirements.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (a) whether the proposed collection of information is necessary for the Department's performance; (b) the accuracy of the estimated burden; (c) ways for the Department to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized 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 1.26, 1.27, 1.48 and 1.49; DOT Order 1351.29.

Issued in Washington, DC.

Liv Vaughn Chapman Jr.,

Deputy Assistant General Counsel, Office of Aviation Consumer Protection.

[FR Doc. 2024-29014 Filed 12-10-24; 8:45 am]

BILLING CODE 4910-9X-P

DEPARTMENT OF VETERANS AFFAIRS

Monetary Allowance for Outer Burial Receptacles

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Department of Veterans Affairs (VA) is providing notice of the monetary allowance amount payable for outer burial receptacles (OBR) for qualifying interments in a VA national cemetery or in a VA grant-funded veterans cemetery that occur during calendar year (CY) 2025. The allowance is equal to the average cost of Government-furnished graveliners less any administrative costs associated with processing and paying the allowance. The purpose of this notice is to inform interested parties of the average cost of Government-furnished graveliners, associated administrative costs, and the allowance amount payable for qualifying interments that occur in CY 2025.

DATES: This allowance amount is effective on January 1, 2025.

FOR FURTHER INFORMATION CONTACT: William Carter, Chief of Budget

Execution Division, National Cemetery Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, telephone: 202-461-9764 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: Section 2306(e) of title 38, United States Code, authorizes VA to provide an OBR for each new grave used for casketed remains in an open VA national cemetery or in a cemetery that is the subject of a grant to a State or Tribal Organization under 38 U.S.C. 2408. Section 2306(e)(4) authorizes VA to administer this benefit using a voucher system or other system of reimbursement in situations where an OBR is purchased or provided in lieu of a Government-furnished graveliner. VA administers the OBR monetary allowance in accordance with 38 CFR 38.629, which specifies when payment of the monetary allowance is authorized and how the allowance amount is determined each year and requires VA to post the amount of the allowance in the Notices section of the **Federal Register**. This notice serves the purpose of meeting that requirement for CY 2025.

The allowance for qualified interments that occur during CY 2025 is equal to the average cost of Government-furnished graveliners in fiscal year (FY) 2024, less the administrative cost incurred by VA in processing and paying the allowance in lieu of the Government-furnished graveliner.

The average cost of Government-furnished graveliners is determined by taking VA's total cost during a fiscal year for single-depth graveliners that were procured for placement at the time of interment and dividing it by the total number of such graveliners procured by VA during that fiscal year. The calculation excludes both graveliners pre-placed in gravesites as part of cemetery gravesite development projects and all double-depth graveliners. Using this method of computation, the average cost was determined to be \$439.00 for FY 2024.

The administrative cost is based on the costs incurred by VA during CY 2024 that relate to processing and paying an allowance in lieu of the Government-furnished graveliner. This cost has been determined to be \$9.00.

The allowance payable for qualifying interments occurring during CY 2025, therefore, is \$430.00.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved and signed this document on December 5, 2024, and authorized the undersigned to sign

and submit the document to the Office of the Federal Register for publication

electronically as an official document of the Department of Veterans Affairs.

Luvenia Potts,

Regulation Development Coordinator, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

[FR Doc. 2024–29110 Filed 12–10–24; 8:45 am]

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Part II

Securities and Exchange Commission

Public Company Accounting Oversight Board; Notice of Filing of Proposed Rules on Firm and Engagement Metrics and Related Amendments to PCAOB Standards; Notice

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–101724; File No. PCAOB–2024–06]

Public Company Accounting Oversight Board; Notice of Filing of Proposed Rules on Firm and Engagement Metrics and Related Amendments to PCAOB Standards

November 25, 2024.

Pursuant to Section 107(b) of the Sarbanes-Oxley Act of 2002 (the “Act”), notice is hereby given that on November 22, 2024, the Public Company Accounting Oversight Board (the “Board” or the “PCAOB”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rules described in items I and II below, which items have been prepared by the Board. The Commission is publishing this notice to solicit comments on the proposed rules from interested persons.

I. Board’s Statement of the Terms of Substance of the Proposed Rules

On November 21, 2024, the Board adopted *Firm and Engagement Metrics* and related amendments to its rules and forms (collectively, the “proposed rules”). The text of the proposed rules appears in Exhibit A to the SEC Filing Form 19b–4 and is available on the Board’s website at <https://pcaobus.org/about/rules-rulemaking/rulemaking-dockets/docket-041>, and at the Commission’s Public Reference Room.

II. Board’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rules

In its filing with the Commission, the Board included statements concerning the purpose of, and basis for, the proposed rules and discussed any comments it received on the proposed rules. The text of these statements may be examined at the places specified in Item IV below. The Board has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements. In addition, the Board is requesting that the Commission approve the proposed rules, pursuant to Section 103(a)(3)(C) of the Sarbanes-Oxley Act, for application to audits of emerging growth companies (“EGCs”), as that term is defined in Section 3(a)(80) of the Securities Exchange Act of 1934 (“Exchange Act”). The Board’s request is set forth in section D.

A. Board’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rules

(a) Purpose

The Board has adopted a set of firm- and engagement-level metrics (the “final rules” or “final metrics”) that certain registered public accounting firms (“firms” or “audit firms”) will be required to publicly report relating to their audit practices and the audits they lead. The Board believes these metrics will provide valuable additional information, context, and perspective on auditors and audit engagements, which can be used by investors, audit committees, and other stakeholders, and which will further the Board’s oversight activities. The Board believes this will advance investor protection and promote the public interest by enabling stakeholders to make better-informed decisions, promoting auditor accountability, and ultimately enhancing capital allocation and confidence in our capital markets. The new reporting requirements will apply to firms that audit at least one company that is an “accelerated filer” or “large accelerated filer” (as those terms are defined in SEC rules).¹

Lack of Consistent, Comparable Data About Audits and Auditors

Investors and audit committees cannot easily observe the services performed by auditors. This can limit investors’ ability to make informed decisions about investing their capital, ratifying the selection of auditors, and voting for members of the board of directors, including directors who serve on the audit committee, and audit committees’ ability to choose among and monitor the performance of auditors. At the same time, there is a lack of incentive for firms, acting on their own or collectively, to provide accurate, standardized, and decision-relevant information about their firms and the engagements they perform. In response to these challenges, the Board has studied ways to measure audit firm and audit engagement performance, primarily with a view to providing information useful to investors in their investment and proxy voting decisions, but also recognizing that metrics could potentially be informative to other stakeholders. In addition, the Board itself would benefit from having additional tools to use in its oversight activities, including its inspections program, standard-setting initiatives, and research activities.

The Board has observed that many of the firms that issue audit reports for more than 100 issuers annually and audit companies that account for the majority of U.S. public company market capitalization already publicly disclose certain firm-level metrics through audit quality reports, transparency reports, or similar documents. However, these disclosures generally do not contain engagement-level information, which investors have indicated would be the most useful to them, and are inconsistent across firms and year to year, with no common definitions or calculations that would allow for meaningful comparisons. Moreover, most of the disclosures are voluntary, so firms are free to revise or discontinue such reporting at any time.

In the Board’s view, the current voluntary reporting regime cannot provide consistent, comparable information that stakeholders can rely on to inform their decisions over time. And it would appear that firms’ attempts at voluntary reporting have not, in fact, satisfactorily addressed investor desire for additional information about audits and auditors. On the contrary, support from investors and investor-related groups for this rulemaking initiative has been consistent throughout its history, even as the practice of firm voluntary reporting has evolved and spread.

Metrics at Firm and Engagement Level

The final rules require reporting of metrics at both the firm and the engagement levels. Firm-level metrics relate to aspects of the firm’s audit practice (e.g., average experience at a public accounting firm of the firm’s partners) and engagement-level metrics relate to individual audit engagements (e.g., experience at a public accounting firm of the engagement partner and the engagement quality reviewer (“EQR”) and average experience of certain other engagement team members). The Board is requiring firm-level metrics because it believes information relevant to the firm will be beneficial in providing context for engagement-level metrics and in evaluating the firm’s audit practice and its related system of quality control. The Board is requiring engagement-level metrics because it believes that information will be useful in gaining a richer understanding of a particular audit and because investors have stressed the importance to them of engagement-level information to assist them in evaluating the performance of the auditor and the audit committee. Most metrics will be reported at both firm- and engagement-level. However, the final rules require reporting at only

¹ See 17 CFR 240.12b–2 (“Rule 12b–2”).

the firm level in cases where the Board believes engagement-level data would not be meaningful or would be disproportionately challenging to collect in relation to the incremental benefit.

Final Metrics

The Board adopted metrics in the following eight areas:

Partner and Manager Involvement. Hours worked by senior professionals relative to more junior staff across the firm's large accelerated and accelerated filer engagements and on the specific engagement.

Workload. Average weekly hours worked on a quarterly basis by senior professionals who incurred hours on large accelerated and accelerated filer engagements, including time attributable to engagements, administrative duties, and all other matters, both firm-wide and on the core engagement team.

Training Hours for Audit Personnel. Average annual training hours for partners, managers, and staff of the firm, combined, both firm-wide and on the core engagement team.

Experience of Audit Personnel. Average number of years worked at a public accounting firm (whether or not PCAOB-registered) by senior professionals across the firm and on the engagement.

Industry Experience. Average years of career experience of senior professionals in key industries audited by the firm at the firm level and the audited company's primary industry at the engagement level.

Retention of Audit Personnel (firm-level only). Continuity of senior professionals (through departures, reassignments, etc.) across the firm.

Allocation of Audit Hours. Percentage of hours incurred prior to and following an issuer's year end across the firm's large accelerated and accelerated filer engagements and on the specific engagement.

Restatement History (firm-level only). Restatements of financial statements and management reports on internal control over financial reporting ("ICFR") that were audited by the firm over the past three years.

Firms are permitted, but not required, to accompany the metrics with narrative disclosure to provide additional context.

The final suite of metrics focuses primarily on information about audit personnel. The Board believes these metrics will provide new insights into how engagements are staffed, including the extent of involvement of senior personnel; auditors' overall workload; retention of personnel across the firm; and levels of training, audit experience,

and industry-specific expertise. The final metrics will also provide information about the extent of audit work completed prior to the issuer's year-end, an aspect of the audit process that the Board believes is associated with improved audit outcomes, and about the firm's history of restatements, a key measure of audit outcomes.

This new information will allow users to draw inferences about audits and audit forms that are not possible today. Some may relate to specific metrics. For example, a heavy workload for a particular engagement team relative to the firm average or compared to peer firms may raise questions about the quality of the work performed. Conversely, a relatively high level of industry experience, particularly for an engagement in an industry that benefits from specific accounting and auditing expertise, would be a positive signal. Other inferences may relate to combinations of metrics. For example, the personnel-related metrics, taken together, give an overall sense of how an engagement is staffed that can be compared to firm averages and to engagements for similar issuers. It is possible that the precise numerical values of metrics may be important in some cases but, in general, the Board believes the metrics will be more useful to convey a sense of whether a particular engagement or firm appears fairly typical or is an outlier in one or more respects. This should provide a richer context for understanding the work of the auditor than the current environment of almost no publicly available information.

The Board also believes that gathering data and calculating the final metrics, given the subjects they address, will not be overly costly, time-consuming, or burdensome. Based on the Board's oversight activities, it appears that the largest firms are already tracking data in many of these areas. Many of the metrics are based on data that firms already track or will be required to track for purposes of other PCAOB requirements. For example, Partner and Manager Involvement and Allocation of Audit Hours are based on the same time reporting required for Form AP purposes. Training hours will reflect the same information that firms track to ensure proper licensing of their personnel. Restatement data, to the extent firms are not already tracking it, is required to be tracked under QC 1000. In addition to required data, many firms track the experience of their personnel, as well as industry experience, for use in marketing materials and for inclusion in requests for proposals, and some firms already track staff retention and

turnover metrics as part of their human capital management. Firms should be able to generate other data required by the final metrics, such as Workload, from their existing timekeeping systems with minimal additional effort.

Responding to Commenter Concerns

After considering commenter input, the Board has made a number of changes from the proposal. The final rules eliminate four proposed metrics areas (Audit Resources—Use of Specialists and Shared Service Centers, Audit Hours and Risk Areas, Quality Performance Ratings and Compensation, and Audit Firms' Internal Monitoring) and add one new metric area (Training Hours for Audit Personnel). In addition, only firm-level reporting will be required for one area (Retention of Audit Personnel) that was proposed to be reported at both the firm and engagement level. The Board has also made revisions to simplify and clarify some of the other metrics and exempted firms with a small issuer practice from reporting on their industry experience. In addition, the Board has expanded the optional narrative disclosure from 500 to 1,000 characters and has provided additional direction that the narrative should be concise and focused on the reported metrics, with a view to facilitating the reader's understanding of the metrics. The Board believes that these changes will address commenter concerns about challenges of data collection, potential sensitivity of data, and potential ambiguity of the metrics, and that the final suite of metrics will provide consistent, comparable information on auditors and audit engagements, giving investors, audit committees, and other stakeholders valuable new context and perspective.

The Board considered comments questioning the value of metrics, whether they will be used by investors and other stakeholders or would represent only a "check the box" compliance exercise, and whether they might contribute to information overload or have other negative consequences. Based on the other stakeholder input received, the Board does not share those views. In comments provided in the Board's rulemaking process and surveys conducted by a firm-related group, investors and investor-related groups have repeatedly indicated that the metrics will be useful. As one investor-related group noted:

Auditors say they want to be seen or evaluated as something other than a commodity business evaluated based upon price. For this to happen, auditors need to provide investors with information such that

they can value the work of the auditor—just as they evaluate and value the business and the work of management.²

The Board also notes that similar objections—that the new information would not be used or would be confusing or misleading—were raised by many of the same commenters in connection with its last two rulemakings requiring disclosure of additional information about audits and auditors: Form AP reporting of the name of the engagement partner and information about other firms participating in the audit, and auditor communication of critical audit matters (“CAMs”). In both cases, these commenter concerns appear unsubstantiated. The Form AP data set is now one of the most frequently visited areas of the PCAOB’s website.³ As for CAMs, while academic studies have shown mixed results about the impact of CAMs, in a recent investor survey conducted by a firm-related group, over 90% of the respondents indicated that CAMs play an important role in their investment decision-making.⁴ In addition, data aggregators, such as Audit Analytics, compile and make available data on CAMs, which suggests market demand for that information. The Board’s experience therefore suggests that, contrary to concerns about irrelevance and information overload, stakeholders seek out additional information about auditors and audit engagements when it is available.

Filing Requirements

Under the Board’s final rules, firm-level reporting is required of every firm that audits at least one “accelerated filer” or “large accelerated filer” under SEC rules during the reporting period. Engagement-level reporting will be required for every audit of an accelerated or large accelerated filer. The thresholds will apply to the audits, and auditors, of companies that account for the majority of U.S. public company market capitalization, and the Board believes they will capture the situations where investment and proxy voting decisions will be most likely to benefit from additional information about the audit and the auditor.

The final rules:

- Require reporting of firm-level metrics annually on a new Form FM, *Firm Metrics*, pursuant to a new Rule 2203C, *Firm Metrics*, for firms that issued an audit report with respect to at least one accelerated filer or large accelerated filer during the reporting period;
- Require reporting of engagement-level metrics for audits of accelerated filers and large accelerated filers on a revised Form AP, renamed “Audit Participants and Metrics”; and
- Allow, but not require, limited narrative disclosures on both Form FM and Form AP to provide context and explanation for the required metrics.

Background

The final rules build on other actions the Board has taken to provide stakeholders with additional information about registered firms and the audits they perform, including information about firms available through its registration and reporting forms, information about auditors and engagements on Form AP, and communication of critical audit matters and auditor tenure in the auditor’s report. The Board concurrently adopted other changes to firm reporting requirements.⁵ The Board believes the final rules will complement these efforts by providing investors, audit committees, and other stakeholders with additional information in a consistent format and compiled with sufficient rigor to assist them in making decisions. For example, the metrics could inform investors’ decision-making regarding whether to ratify the audit committee’s selection of an auditor or to vote for members of the board of directors, including directors who serve on the audit committee, as well as potentially assisting in audit committee oversight, supporting continuous improvement of firms’ quality control systems, and facilitating the Board’s own oversight and rulemaking efforts. The Board further believes that the value of these metrics will likely increase over time as firm reporting practices develop and trends become observable.

As in its proposal, the Board uses the term “firm and engagement metrics” rather than “audit quality indicators” (“AQIs”) to describe the metrics that it adopted. The Board believes this avoids the potential misimpression that any set of metrics can comprehensively measure audit quality and emphasizes the Board’s goal of promoting informed

decision-making through robust disclosure requirements. Some commenters were critical of that change in terminology, suggesting that it evidenced that the Board is no longer focused on audit quality. It is simply a clarification. Because some of the most important elements of a high-quality audit, such as application of due care and professional skepticism, cannot be measured and quantified directly, the metrics employ proxies, such as years of experience, auditor workloads, and percentage of audit hours attributable to more senior members of the engagement team, which can only partially capture these concepts. Even though these proxies cannot provide a complete picture of audit quality, the Board believes they will nevertheless convey important information about auditors and the engagements they lead that stakeholders will find relevant and useful. The Board believes that consideration of the metrics in combination, together with any additional context a firm may choose to provide, will help users interpret the data, and that the metrics, analyzed across firms and over time, will yield important, currently unavailable information that will assist investors, audit committees, and other stakeholders in their decision-making, oversight, and evaluation related to audits.

The Board developed the proposal after considering input from numerous sources, including the recommendations of the U.S. Department of Treasury’s Advisory Committee on the Auditing Profession (“ACAP”), including the October 6, 2008 *Final Report of the Advisory Committee on the Auditing Profession to the U.S. Department of the Treasury* (“ACAP Final Report”); the *Concept Release on Audit Quality Indicators*, PCAOB Rel. No. 2015–005 (July 1, 2015) (“Concept Release”), and the comments received; the voluntary practices of firms; recommendations from the PCAOB’s Investor Advisory Group (“IAG”); and the initiatives of international regulators. The Board has carefully considered this input and believes that the final amendments strike an appropriate balance between the expected benefits of the new reporting requirements and the associated costs of implementation and compliance.

Effective Dates

If the Commission approves the final rules and final metrics, both firm-level and engagement-level reporting will be required for periods beginning October 1, 2027. The Board also adopted a phased implementation period for both

² Letter from CFA Institute, August 30, 2024, at 17.

³ In 2023, there were over 333,000 unique searches performed on AuditorSearch and the Form AP data set was downloaded over 2,000 times. Information related to usage statistics can be found on the PCAOB’s website (<https://pcaobus.org/resources/auditorsearch>).

⁴ The Center for Audit (“CAQ”) Quality Critical Audit Matters Survey (July 2024) at 9.

⁵ See *Firm Reporting*, PCAOB Rel. No. 2024–013 (Nov. 21, 2024) (adopting amendments to reporting requirements for Form 2, *Annual Report Form*, and Form 3, *Special Reporting Form*).

firm- and engagement-level reporting, where firms that issue audit reports for more than 100 issuers will begin reporting in the first year that reporting is required and other firms beginning one year later.

(b) Statutory Basis

The statutory basis for the proposed rules is Title I of the Act.

B. Board's Statement on Burden on Competition

Not applicable. The Board's consideration of the economic impacts of the proposed rules is discussed in section D below.

C. Board's Statement on Comments on the Proposed Rules Received From Members, Participants or Others

The Board released the proposed rules for public comment in PCAOB Release No. 2024-002 on April 9, 2024. Previously, the Board issued a concept release for public comment in PCAOB Release No. 2015-055 on July 1, 2015. The Board received over 45 comment letters in response to the proposing release and 50 letters in response to the concept release. *See* Exhibits 2(a)(B) and 2(a)(C). The Board has carefully considered all comments received. The Board's response to the comments it received and the changes made to the rules in response to the comments received are discussed below.

Background

Project History

1. Importance and Potential Benefits of Increased Information About Audit Firms and Engagements

With the passage of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley") and the establishment of the PCAOB, Congress acknowledged and re-emphasized the auditor's important gatekeeping role.⁶ Reflecting that importance, the Board believes requiring audit firms to provide additional information about the firm and the engagements it performs will advance investor protection and promote the public interest by enabling investors to make better-informed decisions. As discussed in more detail below, the Board has also heard from investors and other stakeholders that they believe such information will be beneficial.

Sarbanes-Oxley also mandated new exchange requirements regarding the responsibilities of audit committees of listed companies, including requiring

that audit committees be charged with responsibility for the appointment, compensation, and oversight of the auditor.⁷ The Board believes that making information available to audit committees regarding both the specific audit and auditor they oversee and the audits and auditors of their peer companies will assist them in carrying out this statutory mandate.

Over the years, the Board has received significant input on the importance and potential benefits to stakeholders of additional information about audits and auditors. The key elements of that input are summarized below.

i. ACAP Recommendations

In 2007, the U.S. Treasury constituted the ACAP to consider and develop recommendations relating to the sustainability of the auditing profession.⁸ On October 6, 2008, ACAP published a report detailing recommendations intended to enhance the sustainability of a strong and vibrant public company auditing profession.⁹ One of the ACAP recommendations was that the PCAOB, in consultation with auditors, investors, public companies, audit committees, boards of directors, academics, and others, "determine the feasibility of developing key indicators of audit quality and effectiveness and requiring auditing firms to publicly disclose those indicators"¹⁰ and, assuming that development and disclosure of indicators of audit quality are feasible, that the PCAOB be required to monitor these indicators.

ii. 2013 and 2017 PCAOB Investor Advisory Group Recommendations

At its October 2013 IAG Meeting,¹¹ the IAG working group on AQIs made recommendations for the PCAOB to prescribe informative, forward-looking disclosures and indicators intended to measure the quality of audits and enhance auditor accountability. They emphasized that investors and audit committees generally care more about the quality and credibility of audit work on specific engagements—the

companies in which they have invested or were considering investing, or the company on whose board of directors they served—rather than firms' more general efforts to improve quality. Accordingly, in addition to disclosures and metrics to be reported at the firm level, they also recommended disclosures and metrics to be reported at the engagement level.

At the October 2017 IAG meeting, an IAG working group discussed three topics: (i) why audit quality and AQIs matter to investors, (ii) the PCAOB's authority and efforts to date to enact AQIs, and (iii) audit quality initiatives in other jurisdictions.¹² The 2017 working group also endorsed the 2013 AQI working group's recommendations.

The recommendations provided by the 2013 and 2017 IAG working groups are reflected in many of the metrics the Board adopted.

2. PCAOB Initiatives

This section provides further background and expands on the history of PCAOB activities related to providing additional information about audit firms and audits, including firm and engagement metrics.

i. 2015 AQI Concept Release

In July 2015, the PCAOB issued the Concept Release and sought comment on 28 potential indicators. The indicators were organized into three groups:

- Audit professionals—Measures dealing with the availability, competence, and focus of those performing the audit.
- Audit process—Measures related to an audit firm's tone at the top and leadership, incentives, independence, attention to infrastructure, and record of monitoring and remediation.
- Audit results—Financial statements, internal control, going concern, communications between auditors and audit committees, and enforcement and litigation.

The Concept Release discussed (i) the nature of the potential indicators and potential calculations, (ii) the usefulness of the indicators, (iii) suggestions for other indicators, (iv) potential users of the indicators, and (v) the approach to implementation. In response to the Concept Release, the PCAOB received 50 comment letters.

Most commenters expressed support for the general idea that AQIs may be

⁷ See Securities Exchange Act of 1934, Section 10A(m)(2), 15 U.S.C. 78j-1(m)(2).

⁸ See ACAP Final Report, at IV:1.

⁹ See ACAP's Fact Sheet: Final Report of the Advisory Committee on the Auditing Profession, available at <https://home.treasury.gov/news/press-releases/hp1158#:~:text=The%20U.S.%20Treasury%20Department%20%27s%20Advisory%20Committee%20on,into%20three%20sections%20by%20principal%20areas%20of%20focus>.

¹⁰ See ACAP Final Report, at VIII:14.

¹¹ See Oct. 2013 IAG meeting and presentations, Report from the Working Group: Audit Quality Indicators, available at IAG Meeting Archive, https://pcaobus.org/news-events/events/event-details/pcaob-investor-advisory-group-meeting_758.

¹² See Oct. 2017 IAG meeting and presentation, available at IAG Meeting Archive, https://pcaobus.org/news-events/events/event-details/pcaob-investor-advisory-group-meeting_1085.

⁶ See Section 101(a) of Sarbanes-Oxley, 15 U.S.C. 7211(a); Senate Report No. 107-205, at 5-6 (July 3, 2002).

useful.¹³ However, commenter views varied widely. Comments from firms and firm-related groups suggested that no standard group of indicators could advance a person's understanding of audit quality. These commenters suggested that AQIs should be voluntary, should be reported to audit committees through two-way discussions to provide context for the indicators, or should be required only at the firm level. Investors and investor-related groups recommended that indicators should be made public as they could be used to stimulate competition based on quality among audit firms, remedy the deficiency of information about audits, and give shareholders meaningful information to help them in voting on auditor selection. Some commenters suggested that engagement-level metrics are more useful than firm-level metrics. One commenter suggested that promoting competition around an implied variability in audit quality may not always be appropriate and in the public interest because audit quality should be nonnegotiable and a fundamental goal for all audits. Another commenter suggested that it was critical to define what AQIs do and do not represent so that they are used appropriately.

ii. PCAOB Rulemakings To Increase Audit Transparency: Identification of the Engagement Partner and Other Audit Participants on Form AP and Auditor Communication of Critical Audit Matters

In 2015, the PCAOB adopted rules requiring information on Form AP, *Auditor Reporting of Certain Audit Participants*, regarding the engagement partner and other accounting firms that participate in audits of issuers.¹⁴ The rulemaking was initially in response to the ACAP recommendation that the engagement partner should be required to sign the audit report.¹⁵ As the rulemaking evolved, it also took account of stakeholder input, including IAG recommendations to identify the engagement partner and the firms, other than the firm signing the audit report, that participate in audits.

The Board's intention was to make available information about the engagement partner and other firms that participated in the audit, saying that such information, even if not useful in every instance or meaningful to every investor, would make an overall

contribution to the information available to investors in making voting and investment decisions. The Board also asserted that increased transparency should promote increased accountability in the audit process. The Form AP reporting requirements became effective in 2017, and the data gathered via Form AP has many users; the Form AP data set is frequently searched through AuditorSearch, the PCAOB's online search tool, as well as downloaded by users performing more detailed analyses.¹⁶

In 2017, the PCAOB adopted AS 3101, *The Auditor's Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion*, which includes requirements regarding the disclosure of auditor tenure and auditor determination and communication of "critical audit matters."¹⁷ This project was also initiated in response to ACAP's recommendation that the PCAOB undertake a standard-setting initiative to consider improvements to the auditor's standard reporting model.¹⁸ The rulemaking explored potential ways to increase the transparency and relevance of the auditor's report, including by requiring expanded auditor reporting regarding the audit and the company's financial statements.¹⁹ In the adopting release, the Board noted ACAP's statement that the complexity of financial reporting supports improving the content of the auditor's report beyond the then-current pass/fail model to include a more relevant discussion about the audit of the financial statements.

After multiple rounds of Board releases and stakeholder input, the requirements took effect in 2019 and 2020.

iii. Recent PCAOB Standard-Setting and Rulemaking Activities

At the November 2022 Standards and Emerging Issues Advisory Group (SEIAG) and the October 2022 and 2023 IAG meetings, several members continued to urge the Board to take action on firm and engagement metrics. Other members stated that some firms already publish similar metrics through transparency reports and audit quality reports. Some members of the IAG and

SEIAG have requested increased information at the firm and engagement levels through easily accessible and quantified metrics, potentially with accompanying context provided by the auditors.²⁰

In response to the Board's request for comment on the draft 2022–2026 Strategic Plan, some commenters encouraged the Board to continue to consider this topic.²¹ Additionally, in a January 2023 comment letter on the PCAOB's proposed quality control standard, members of the IAG advocated for "a minimum requirement of eight indicators."²² These eight indicators were (i) staffing leverage; (ii) partner workload; (iii) manager and staff workload; (iv) audit hours and risk areas; (v) quality ratings and compensation; (vi) audit fees, effort, and client risk; (vii) audit firm's internal quality review results; and (viii) PCAOB inspection results.

a. QC 1000: Requirements

The Board adopted a new quality control standard for firms, QC 1000, *A Firm's System of Quality Control* ("QC 1000"),²³ which contains provisions that are relevant to firm reporting of firm- and engagement-level metrics. QC 1000 will become effective in December 2025.

(1) Public Communication of Firm-Level or Engagement-Level Information

QC 1000 includes a quality objective that, if a firm communicates firm-level or engagement-level information with respect to the firm's audit practice, firm personnel, or engagements, such as firm or engagement metrics, to external parties, such information is accurate and not misleading and, with respect to any such metrics that are communicated

²⁰ See Nov. 2022 SEIAG meeting, available at <https://pcaobus.org/news-events/events/event-details/pcaob-standards-and-emerging-issues-advisory-group-meeting-2022>. See Oct. 2022 IAG meeting, available at <https://pcaobus.org/news-events/events/event-details/pcaob-investor-advisory-group-meeting> and Oct. 2023 IAG meeting, available at <https://pcaobus.org/news-events/events/event-details/pcaob-investor-advisory-group-meeting-october-2023>.

²¹ See comments on 2022–2026 Strategic Plan Documents, available at <https://pcaobus.org/about/strategic-plan-budget/comments-on-pcaob-draft-strategic-plan-2022-2026>.

²² See *A Firm's System of Quality Control and Other Proposed Amendments to PCAOB Standards, Rules, and Forms*, PCAOB Rel. No. 2022–006 (Nov. 18, 2022). The comment letters received in response to the proposal are available on the Board's website in Docket 046. See comment letter from members of the IAG, available at https://assets.pcaobus.org/pcaob-dev/docs/defaultsource/rulemaking/docket046/4_iag.pdf?sfvrsn=1941e7c0_4.

²³ See *A Firm's System of Quality Control and Other Amendments to PCAOB Standards, Rules, and Forms*, PCAOB Rel. No. 2024–005 (May 13, 2024) ("QC Adopting Release").

¹³ See Nov. 2015 Standing Advisory Group (SAG) Briefing Paper available at SAG Meeting Archive, https://pcaobus.org/news-events/events/event-details/standing-advisory-group-meeting_910.

¹⁴ See PCAOB Rule 3211.

¹⁵ See ACAP Final Report, at VII:19.

¹⁶ See below.

¹⁷ See AS 3101.11–16.

¹⁸ See ACAP Final Report, at VII:13.

¹⁹ See *Concept Release on Possible Revisions to PCAOB Standards Related to Reports on Audited Financial Statements and Related Amendments to PCAOB Standards; Notice of Roundtable* (June 21, 2011), available at https://pcaobus.org/news-events/news-releases/news-release-detail/pcaob-issues-concept-release-on-auditor's-reporting-model_337.

in writing, the communication explains in reasonable detail how the metrics were determined and, if applicable, how the method of determining them changed since the metrics were last communicated.²⁴ (With respect to metrics reported on Form FM and Form AP, the form itself provides the required explanation.) The final firm and engagement metrics include reporting elements that focus on the firm's responsibility to produce and report information that is accurate and not misleading, for example, an optional narrative to accompany the metrics. This element is discussed further below.

(2) Use of Metrics in Monitoring the Firm's QC System

Under QC 1000, in determining the nature, timing, and extent of QC system-level monitoring activities, the firm is required to take into account any metrics that the firm may use in its QC system.²⁵ QC 1000 does not require the use of any specific metrics; firms have the ability both to develop metrics on their own and to use any or all of the metrics required to be reported under Rule 2203C and Rule 3211 in their QC system, but that is not required. The Board believes these metrics would provide information that could be used in the firm's system of quality control. However, not all firms may find all metrics useful in operating or monitoring their QC system, and the Board is not mandating their use in connection with monitoring a firm's QC system at this time.

b. Firm Reporting

Concurrently with this rulemaking, the Board adopted certain updates to its annual and special reporting requirements to facilitate the disclosure of more complete, standardized, and timely information regarding audit firms. Among other new requirements, the updates will (i) require firms to disclose additional information on Form 2 about their fees, leadership and governance structure, and network arrangements; (ii) require, in connection with QC 1000, a one-time update to the statement on a firm's quality control policies and procedures on a new Form QCPP; and (iii) expand the scope of special reporting to include events that pose a material risk, or represent a material change, to the firm's organization, operations, liquidity or financial resources, in such a manner that it will affect the provision of audit

services, as well as new cybersecurity reporting requirements.²⁶

c. Proposed Firm and Engagement Metrics

In April 2024, the Board proposed amendments to the PCAOB's rules and reporting forms to require the reporting of specified firm-level metrics on new Form FM, *Firm Metrics*, and specified engagement-level metrics on an amended and renamed Form AP, *Audit Participants and Metrics*. In the Board's proposal, it proposed a set of firm-level and engagement-level metrics across 11 areas to be publicly reported for the firms that serve as lead auditor for at least one accelerated filer or large accelerated filer.

The Board received over 45 comment letters on the proposal.²⁷ Commenters included investor-related groups, firms, firm-related groups, academics, and others.

Some commenters expressed concerns about the speed of rulemaking by the Board. Some commenters asked the PCAOB for more than 60 days to respond to the proposal, citing overlapping comment proposal periods, the duration of comment periods, the length and complexity of various proposals, and overlapping SEC 19b-4 filing comment periods. On the other hand, a commenter urged the Board not to delay this rulemaking because investors need a relatively standardized data set to analyze and compare over time and across companies. The Board believes that 60 days was a sufficient period for commenting on the proposal. Despite that, the Board considered comment letters that were submitted after the 60-day period closed. The Board received robust comments on the proposal, which informed the final metrics or final rules.²⁸ These comments are addressed throughout this Exhibit 1 and in the Board's adopting release (Exhibit 3).

3. Overview of Existing Requirements

Under current PCAOB rules and standards, certain information about PCAOB-registered firms is already made available to investors, audit committees, and other stakeholders. The disclosure of firm- and engagement-level metrics would supplement this information. This section discusses the key PCAOB standards and rules that require certain

firm- and engagement-level information to be provided to various stakeholders.

i. Available Information Related to Firms

PCAOB rules require firms to file Form 2 (Annual Report Form) to report basic information about the firm and its audit practice and Form 3 (Special Reporting Form) after the occurrence of certain events.²⁹ In addition, the PCAOB makes portions of inspection reports publicly available for firms that are subject to annual or triennial PCAOB inspections.

a. Form 2 and Form 3

As required by Section 102(d) of Sarbanes-Oxley and PCAOB Rule 2200, each year registered firms must file an annual report with the Board. Under PCAOB rules, firms must do so by filing Form 2. The annual reporting period runs from April 1 to March 31, and the due date for filing is June 30.³⁰ In addition to basic identifying information about the firm,³¹ firms report on Form 2 general information about their audit practices and other business relationships. Information required to be provided on Form 2 includes:

- Whether the firm issued audit reports for issuers, brokers, or dealers or played a substantial role in issuer or broker-dealer audits;³²
- Percentage of total fees billed to issuers for audit services, other accounting services, tax services, and non-audit services;³³
- For each issuer or broker-dealer for which the firm issued an audit report, the issuer's or broker-dealer's name, its Central Index Key (CIK) number and Central Registration Depository (CRD) number (if any), and the date of the audit report, as well as the total number

²⁹ PCAOB Rule 2200, *Annual Report*; PCAOB Rule 2201, *Time for Filing of Annual Report*; PCAOB Rule 2203, *Special Reports*; Instructions to Form 2, available at https://pcaobus.org/about/rules-rulemaking/rules/form_2; Instructions to Form 3, available at https://pcaobus.org/about/rules-rulemaking/rules/form_3. Information reported on Forms 2 and 3 is publicly available unless a firm requests confidential treatment.

³⁰ PCAOB Rule 2201; General Instructions 3-4 to Form 2 (registered public accounting firm that has its application for registration approved by the Board in the period between and including April 1 and June 30 of any year not required to file an annual report in that year).

³¹ Instructions to Form 2, Item 1.1.

³² *Id.*, Item 3.1. The Board's release uses the terms "issuer," "broker," and "dealer" as those terms are defined under Sections 2(a)(7) and 110(3)-(4) of Sarbanes-Oxley. 15 U.S.C. 7201(a)(7), 7220(3)-(4). See also paragraphs (b)(iii), (d)(iii), and (i)(iii) of PCAOB Rule 1001, *Definitions of Terms Employed in Rules*. Entities that are brokers or dealers or both are sometimes referred to as "broker-dealers."

³³ Instructions to Form 2, Item 3.2.

²⁶ See PCAOB Rel. No. 2024-013.

²⁷ The comment letters received on the proposal are available at <https://pcaobus.org/about/rules-rulemaking/rulemaking-dockets/docket-041/comment-letters>.

²⁸ See also below for consideration of the 2015 AQI Concept Release (including comments received) and the PCAOB IAG recommendations.

²⁴ QC 1000.53e.

²⁵ QC 1000.65c.

of firm personnel who exercised authority to sign the firm's name to an audit report for an issuer or broker-dealer during the reporting period;³⁴

- Physical address (and, if different, mailing address) of each firm office;³⁵
- Whether the firm has any memberships, affiliations, or similar arrangements involving certain activities related to audit or accounting services (including use of name in connection with audit services, marketing of audit services, and employment or lease of personnel to perform audit services), and the entities with which the firm has those relationships;³⁶

- Total number of accountants, certified public accountants, and personnel;³⁷

- Relationships with certain individuals and entities with disciplinary or other histories (if not previously identified);³⁸ and

- Acquisitions of another public accounting firm or a substantial portion of another firm's personnel.³⁹

In addition to annual reporting on Form 2, firms are required to file Form 3 within 30 days after the occurrence of certain events, such as when the firm's legal name has changed while otherwise remaining the same legal entity, the firm has withdrawn an audit report on the financial statements of an issuer or has resigned, declined to stand for re-appointment, or been dismissed from an audit engagement as principal auditor, and the issuer has failed to comply with applicable Form 8-K reporting requirements for such events.⁴⁰

b. Firm Inspection Reports

Sarbanes-Oxley authorizes the PCAOB to inspect firms for the purpose of assessing compliance with certain laws, rules, and professional standards in connection with a firm's audit work for issuers, brokers, and dealers. Firms that issue audit reports for more than 100 issuers per year are inspected annually. Firms that issue 100 or fewer audit reports per year for issuers are generally inspected at least once every three years. The Board also inspects firms that play a substantial role in audits of issuers. Many firms registered with the Board perform no audit work for issuers or broker-dealers,⁴¹ or only participate in audits below the level of

a substantial role, and the Board has not historically inspected those firms. The PCAOB provides each inspected firm with a report summarizing any deficiencies identified through the inspections process. Portions of these inspection reports are publicly available on the PCAOB's website.⁴² Recently the PCAOB introduced enhanced search tools that enable investors and others to better access and understand data from PCAOB inspection reports.⁴³

ii. Available Information Related to Issuer Engagements

a. Auditor's Communications With Audit Committees

Investors and other financial statement users are the beneficiaries of the audit. Audit committees protect the interests of investors by assisting the board of directors in fulfilling its responsibility to oversee the integrity of the company's accounting and financial reporting processes, including the audit of the company's financial statements—and in carrying out that duty, they also benefit other financial statement users. To support the audit committee in this crucial role, PCAOB standards and rules and SEC rules require auditors to provide certain firm- and engagement-level information to audit committees.⁴⁴ AS 1301, *Communications with Audit Committees*, requires various communications to facilitate the audit committee's financial reporting oversight.⁴⁵ Among other things, AS 1301 requires the auditor to communicate: (i) significant risks;⁴⁶ (ii)

⁴² See <https://pcaobus.org/oversight/inspections> for inspection reports, basics of inspections, and inspection procedures. Sarbanes-Oxley provides that no portions of an inspection report that deal with criticisms of or potential defects in the quality control systems of the firm shall be made public if those criticisms or defects are addressed by the firm, to the satisfaction of the Board, no later than 12 months after the issuance of the inspection report. See Sarbanes-Oxley Section 104(g)(2). Full (expanded) inspection reports are publicly available on the PCAOB's website when a firm fails to satisfactorily remediate within 12 months.

⁴³ See <https://pcaobus.org/news-events/news-releases/news-release-detail/pcaob-launches-new-online-tools-to-help-users-find-and-compare-inspection-report-data> for a summary of the enhancements, including six new search filters, including Part I.A deficiency rate, to help users analyze and compare more than 3,700 inspection reports.

⁴⁴ See Auditing Standard No. 16, *Communications with Audit Committees; Related Amendments to PCAOB Standards; and Transitional Amendments to AU Sec. 380*, PCAOB Rel. No. 2012-004 (Aug. 15, 2012), at 2, available at https://assets.pcaobus.org/pcaob-dev/docs/default-source/rulemaking/docket030/release_2012-004.pdf?sfvrsn=7872effb_0.

⁴⁵ Id. ("Communications with the audit committee provide auditors with a forum separate from management to discuss matters about the audit and the company's financial reporting process.")

⁴⁶ See AS 1301.09.

critical accounting policies and practices, critical accounting estimates, and significant unusual transactions;⁴⁷ (iii) the auditor's evaluation of the quality of the company's financial reporting;⁴⁸ and (iv) other matters that are significant to the oversight of the company's financial reporting process.⁴⁹ In addition, other PCAOB standards and rules and SEC rules independently require certain audit committee communications.⁵⁰

b. Auditor's Public Communications of Certain Information

AS 3101 and Rule 3211 require firms to publicly disclose certain engagement-specific information in the auditor's report and on Form AP. In addition to specifying the requirements for an unqualified opinion on the financial statements, AS 3101 requires the auditor's report to describe (i) critical audit matters, which inform investors and other financial statement users of matters arising from the audit that required especially challenging, subjective, or complex auditor judgment; and (ii) how the auditor addressed those matters. AS 3101 further requires the auditor's report to include a statement disclosing the year in which the auditor began serving consecutively as the company's auditor. Other standards require additional information to be included in the auditor's report, including AS 2415, *Consideration of an Entity's Ability to Continue as a Going Concern*, which requires an explanatory paragraph when the auditor concludes that there is substantial doubt about the entity's ability to continue as a going concern for a reasonable period of time.⁵¹

PCAOB Rule 3211 requires auditors to file Form AP, which, among other things, provides information to investors and other financial statement users about the engagement partner and other accounting firms participating in the audit of issuers. Disclosures on Form AP provide increased transparency about certain audit participants. The key provisions include annual disclosures of (a) the name of the engagement partner and (b) the name and extent of participation of other accounting firms in the audit.⁵²

⁴⁷ See AS 1301.12.

⁴⁸ See AS 1301.13.

⁴⁹ See AS 1301.24.

⁵⁰ See Appendix B of AS 1301 (listing other PCAOB standards and rules requiring audit committee communications); see also 17 CFR 210.2-07; PCAOB Rule 3526, *Communication with Audit Committees Concerning Independence*.

⁵¹ See AS 2415.12.

⁵² See Instructions to Form AP. Form AP requires different disclosures regarding other accounting

³⁴ Id., Items 4.1, 4.3.

³⁵ Id., Item 5.1.

³⁶ Id., Item 5.2.

³⁷ Id., Item 6.1.

³⁸ Id., Items 7.1, 7.2.

³⁹ Id., Item 8.1.

⁴⁰ General Instruction 3 to Form 3; Instructions to Form 3, Items 2.17, 2.1, 2.1-C, 3.1, 3.2.

⁴¹ See QC Adopting Release at 54.

The PCAOB makes the Form AP data set available on AuditorSearch, by which users can conduct live searches or download the entire data set in a searchable, machine-readable format.⁵³ Using this data, a user can determine, for example, the changes in engagement partner for any given issuer or obtain a list of all issuers for which an engagement partner is responsible. After identifying an engagement partner, a user can then compile information from other sources, including information about whether the partner is associated with restatements of financial statements, has been subject to public disciplinary proceedings, or has experience as an engagement partner for issuers of a particular size or in a particular industry. Similarly, starting from the Form AP data set, users may perform further research on the other accounting firms that participate in an audit, such as whether those firms are registered with the PCAOB, whether they have any publicly available disciplinary history, whether they have been inspected, and, if so, the results of those inspections.

4. Voluntary Firm Reporting

Since the Concept Release, many of the audit firms that issue audit reports for more than 100 issuers and audit the majority of the market capitalization for issuers have been publicly disclosing certain firm-level information discussed in the Concept Release through their audit quality reports, transparency reports, or other published reports. A firm-related group has published a framework to assist its members in these efforts.⁵⁴ Many firms may also be developing and monitoring certain firm

firms that participate in an audit depending on their level of participation. For other accounting firms with individually 5% or greater participation in the audit, the Form AP filer must disclose the legal name of the other accounting firm, the city and state (or, if outside the United States, the city and country) of that firm's headquarters, and the percentage of total audit hours (either as a single number or within a range provided on the form) attributable to each other accounting firm. For other accounting firms with individually less than 5% participation, the filer must disclose the total number of such other accounting firms and the aggregate percentage (either as a single number or within a range provided on the form) of total audit hours for all such firms.

⁵³ See AuditorSearch, available at <https://pcaobus.org/resources/auditorsearch>.

⁵⁴ CAQ, *Audit Quality Disclosure Framework (Update)* (June 2023). The framework provides that metrics "may provide those overseeing the audit and other stakeholders with information and additional transparency into the firm's systems and processes that impact audit quality. However, the CAQ believes that a combination of metrics—taken as a whole and supplemented with robust discussion—may provide those overseeing the audit and other stakeholders with information and additional transparency into the firm's systems and processes that impact audit quality." *Id.* at 4.

and engagement metrics to be used internally by the firm. In 2023, the same firm-related group published a summary analysis of the most recent audit quality reports issued by the eight firms represented on the group's governing board.⁵⁵ The report indicated that firms were reporting similar firm-level quantitative metrics related to several areas, including audit firm inspections; training; use of auditor's specialists; audit report reissuances and financial statement restatements; measures of experience, such as tenure with the firm; and personnel turnover. The report further noted that some firms disclosed qualitative as well as quantitative information, including information relating to audit methodology and execution, people and firm culture, quality management and inspections, and technology and innovation.

The Board has observed the firms that report firm-level metrics generally do not report engagement-level metrics.⁵⁶ Where firm-level metrics are reported, the firms report different metrics, calculated in different ways, and using different definitions, thereby preventing users from making comparisons across firms.

One commenter on the Concept Release stated that many firms are using the 28 AQIs identified in the Concept Release at some level to (i) manage the firm and (ii) manage the quality of audits at the office level and at the engagement level. Another commenter specifically indicated that its audit committee reviewed the engagement-level AQIs identified in the Concept Release that were provided by their auditor.

One commenter on the proposal asserted that the voluntary reporting firms already do through transparency and audit quality reports includes firm-level metrics, as well as explanations of how they are calculated, including changes in the calculation that could

⁵⁵ See CAQ *Audit Quality Reports Analysis: A Year in Review* (Mar. 2023), available at <https://www.thecaq.org/aqr-analysis-yir> ("CAQ Report"). The eight firms on the CAQ's governing board are BDO USA, LLP, Crowe LLP, Deloitte & Touche LLP, Ernst & Young LLP, Grant Thornton LLP, KPMG LLP, PricewaterhouseCoopers LLP, and RSM US LLP.

⁵⁶ In connection with the Nov. 2022 SEIAG meeting, the Board staff researched various reports issued during the prior three years by the top 20 accounting firms (by 2022 revenue) and identified nine firms that disclosed firm-level metrics. See Firm and Engagement Performance Metrics Briefing Paper and Related Attachments from Nov. 2022 SEIAG meeting, available at <https://pcaobus.org/news-events/events/event-details/pcaob-standards-and-emerging-issues-advisory-group-meeting-2022>. For each firm-level metric reported by those nine firms, the PCAOB staff included examples of how firms calculated the metric as well as the number of firms reporting that metric.

affect comparability, as well as context necessary for understanding the metrics, and would be preferable to the mandatory metrics that the Board proposed. On the other hand, an investor-related group presented an analysis of firm transparency and audit quality reports, finding that the measures used in transparency reports and audit quality reports by different firms are not consistent or comparable across firms in their computations, presentation and inclusion, and are not provided at the engagement level, which the commenter believes is the level at which they would be most useful. This commenter stated that having both firm- and engagement-level metrics enhances the metrics' usefulness because it provides broader context for understanding at both levels.

Actions in Other Jurisdictions

Some jurisdictions outside the United States have moved forward with mandatory or voluntary initiatives related to the monitoring and disclosure of metrics. In May 2022, Accountancy Europe published a factsheet about recent related initiatives in Europe and elsewhere.⁵⁷ The Accountancy Europe Report described initiatives conducted in 10 countries (including the United Kingdom (U.K.), South Africa and Canada) by various organizations, including audit oversight bodies (including the U.K.'s Financial Reporting Council (FRC), Portugal's Securities Market Commission (CMVM), South Africa's Independent Regulatory Board for Auditors (IRBA), and the Canadian Public Accountability Board (CPAB)),⁵⁸ professional organizations,⁵⁹ a group of independent experts,⁶⁰ and the CAQ. Additionally, the FRC in the U.K. issued a consultation document and a feedback statement in 2022 on publishing AQIs for the largest U.K. audit firms,⁶¹ the IRBA in South Africa

⁵⁷ See Accountancy Europe, *Factsheet, Audit Quality Indicators—A Global Overview of Initiatives* (May 2022), available at <https://www.accountancyeurope.eu/wp-content/uploads/220401-Factsheet-Audit-Quality-Indicators.pdf> ("Accountancy Europe Report").

⁵⁸ *Id.* Other oversight bodies in the Accountancy Europe Report include the Federal Audit Oversight Authority (FAOA) in Switzerland and the Accounting and Corporate Regulatory Authority (ACRA) in Singapore.

⁵⁹ *Id.* Professional organizations in the Accountancy Europe Report include the Institute of Public Auditors (IDW), Germany and The Institute of Chartered Accountants (ICAI), India.

⁶⁰ *Id.* Quartermasters, Netherlands.

⁶¹ See FRC, *Consultation Document: Firm-level Audit Quality Indicators* (June 2022), available at https://media.frc.org.uk/documents/FRC_AQI_Consultation.pdf. See FRC, *Feedback Statement: Firm-level Audit Quality Indicators Consultation* (Dec. 2022), available at <https://www.frc.org.uk/>

requested firms auditing listed companies to submit AQI-related information to the IRBA,⁶² and the CPAB launched an exploratory pilot project to solicit feedback on AQIs' usefulness in support of broader national and international discussions.⁶³ The primary users of the metrics from these initiatives were audit committees, oversight bodies, and professional organizations. Although many of the metrics in these initiatives were nonpublic, public reporting was encouraged or anticipated in the future for half of the initiatives.⁶⁴ The Accountancy Europe Report suggested that several factors should be considered when selecting, evaluating, and reporting metrics and recommended that a combination of metrics would provide "profound insight into audit quality."

In January 2023, Accountancy Europe published a position paper.⁶⁵ The position paper defined key concepts related to audit quality, presented considerations for developing AQIs, and explained what, in its view, can and cannot be achieved by reporting such indicators (for example, the paper pointed out that all metrics have limitations, that metrics are not a proxy for financial reporting quality, and that user expectations should be managed to make them aware that metrics do not provide definitive results). The paper stated as part of its conclusion that "[AQIs] should not be considered as an end in themselves but could be a useful tool to drive audit quality" and reiterated that a combination of metrics would provide insight into audit quality.

Some commenters noted that initiatives in other jurisdictions do not currently require public disclosure.

getattachment/afbf3bc4-cf15-468a-85da-af8e5af222a/Feedback-Statement_-2022.pdf ("FRC Feedback Statement").

⁶² See IRBA 2021 Survey Report Audit Quality Indicators, available at <https://www.irba.co.za/upload/IRBA%20AQI%20Report%202021.pdf> and IRBA 2022 Survey Report Audit Quality Indicators, available at <https://www.irba.co.za/upload/2022%20AQI%20Report.pdf>.

⁶³ See CPAB Audit Quality Indicators Final Report, available at https://cpab-ccrc.ca/docs/default-source/thought-leadership-publications/2018-aqi-final-report-en.pdf?sfvrsn=5af68dba12&sfvrsn=af68dba_12 ("CPAB Final Report"). See also CPAB Audit Quality Indicators: How to put them to work, available at https://cpab-ccrc.ca/docs/default-source/thought-leadership-publications/2019-aqi-put-to-work-en.pdf?sfvrsn=246de787_10.

⁶⁴ See Accountancy Europe Report (public reporting encouraged or anticipated by ACRA, CAQ, FRC, IDW, and Quatermasters).

⁶⁵ See Accountancy Europe, *Position Paper, Key Factors to Develop and Use Audit Quality Indicators* (Jan. 2023), available at https://accountancyeurope.eu/wp-content/uploads/221206-AQIs-Position-Paper_FINAL.pdf.

Others suggested that the requirements that the Board proposed were more onerous than other jurisdictions and may cause reporting of different calculations for similar metrics in different jurisdictions. One commenter provided examples in other jurisdictions including providing optional guidance, allowing engagement-level metrics to be shared confidentially with audited entities, and allowing for voluntary adoption. Another commenter expressed its belief that the Board is attempting to justify individual metrics based on certain jurisdictions' use but have not fully considered the context in how they are being used or the process that has been undertaken in those jurisdictions. An additional commenter stated that the comparability problem between jurisdictions could be solved by allowing firms to voluntarily disclose the metrics as defined. One commenter expressed the hope that audit regulators globally will seek to align requirements relating to the reporting of metrics.

While other jurisdictions have not historically required public reporting, the U.K. FRC has announced that it will begin to require public reporting in 2025.⁶⁶

The Board considered the actions taken in other jurisdictions in developing the final metrics. While substantially all the final metrics are the same as, or similar to, metrics used in some other jurisdictions, the Board acknowledges that no other jurisdiction has embraced either the full set of metrics or the public reporting requirements the Board has adopted. However, the Board's objective in understanding actions in other jurisdictions was not to conform to what they have done but rather to consider those actions in the context of the Board's own rulemaking, which is addressed further below. The Board believes that its approach to evaluating and determining which metrics should be disclosed is appropriate in light of its statutory investor-protection mission.

Discussion of the Final Rules

Overview

As noted above, the Board considered ways to measure audit firm and audit performance, primarily with a view to providing information that investors can

use in making decisions regarding their investments, such as ratifying the selection of the auditor and voting for members of the board of directors, including directors who serve on the audit committee. The Board also believes that firm and engagement metrics will benefit other stakeholders. For audit committees, metrics will provide additional context, including consistent comparative information that is not currently available, that can be used when deciding whether to select or retain a firm and when overseeing the auditor's performance. For audit firms, metrics will provide standardized information about themselves and their peers that can be used in designing, implementing, monitoring, and remediating their systems of quality control. The Board will also benefit from having additional tools to use in its inspections program and standard-setting initiatives.

This rulemaking addresses the need for information by requiring consistent, comparable disclosures that the Board believes will provide insight into aspects of the firm and the engagement team conducting the audit, including information relating to workloads, retention, allocation of audit hours, experience, and restatements.

1. Purpose of the Metrics

Investors and other stakeholders lack information that is available to company management. The federal securities laws seek to reduce this information asymmetry through various disclosure, internal control, and other requirements, including requirements for public companies to prepare and disclose financial statements accompanied by audit reports issued by an independent public accounting firm. Investors and other stakeholders also lack information available to the auditor and cannot observe the auditor's work or other aspects of a public company audit. Instead, they must rely on the audit committee, which is charged with overseeing the external auditor, and on other available public information, such as the reputation of the firm issuing the audit report or the name of the engagement partner. These difficulties in evaluating the audit and the auditor may lead to reduced accountability for auditors and an inefficient allocation of audit effort. Such allocations allow audit risk to remain insufficiently evaluated, ultimately risking suboptimal investment decisions, hampering the efficient functioning of the audit profession, and negatively affecting the

⁶⁶ See <https://www.frc.org.uk/consultations/aqis-consultation>. In June 2025, the FRC is requiring firms that audit 20 or more public interest entities to publicly report ten firm-level metrics across five areas. These areas include (i) Performance monitoring and remediation, (ii) Quality monitoring, (iii) Resource planning and people management, (iv) Information and communication, and (v) Governance and leadership.

capital markets.⁶⁷ Furthermore, while the audit committee has more information regarding the specific auditor it oversees, it lacks insight into other audit engagements and other firms; such comparable information would assist the audit committee in more effectively selecting and monitoring the auditor.

Investors and other stakeholders may seek to reduce these information disparities by gathering additional information about the firm responsible for the audit and the relevant audit engagement. As discussed above, the PCAOB has previously sought to facilitate those efforts through rules and standards requiring the disclosure of such information. From its inception, the Board's registration and reporting program has yielded important information about registered firms. Annual updates on Form 2 include information such as the issuers audited by the firm, a breakdown of fees charged to issuers, and network affiliations, and current reporting on Form 3 discloses significant events such as the withdrawal of an audit report and certain legal actions involving the firm or its professionals. The Board concurrently adopted amendments to both of those reporting forms to mandate the disclosure of standardized and timely information by firms.⁶⁸ Firms are required to disclose on Form AP the name of the engagement partner and certain audit participants.⁶⁹ The Board also made the auditor's report more relevant and informative by, among other things, requiring communication of critical audit matters and the tenure of the auditor.⁷⁰ The Board intends the firm and engagement metrics to complement these other initiatives and to add to the mix of information available to investors and other stakeholders when evaluating the auditor and the audit.⁷¹

The Board's oversight activities have revealed that there are identifiable performance differences across firms and among engagement teams within

the same firm, including variations among firms belonging to global networks. The Board considered such differences when performing regulatory functions. For example, the Division of Registration and Inspections uses, among other factors, information about the firm and the engagement to identify audit engagements for risk-based selections in the Board's inspections program.

Mandating public disclosure of firm- and engagement-level metrics will provide investors, audit committees, and other stakeholders with comparable information that is not currently available and will otherwise be difficult or impossible to obtain. These stakeholders will be able to learn about both specific engagements and specific firms and have a basis to compare them to other engagements and other firms. The firms themselves could also benefit from access to information about their peers, both in gaining new perspective on how their practices compare and in potentially gaining new opportunities for competition based on markers that users come to associate with quality. Required disclosures will facilitate development of standardized data for consistent comparison and analysis over time, which the Board believes will be more valuable than the ad hoc, individualized disclosures that some firms have made on a voluntary basis. Mandatory public disclosure will also ensure that the information will be accessible to all stakeholders, so that any decision-useful information can be readily evaluated. The Board believes this information will enable investors, audit committees, and other stakeholders to make better-informed decisions.⁷²

The Board believes the metrics will also assist the PCAOB in a variety of ways. Metrics will help to inform the Board's inspection activities, including in the selection of firms, engagements, and focus areas for review. For example, the final metrics could refine the selection models used to aid in predicting negative audit outcomes, enhancing the Board's risk-based

inspections. They could also enrich the discussions the Board has with audit committee chairs as part of the Board's inspections process. Metrics may also inform future standard-setting activities by helping the Board to identify areas where regulatory action is needed and suggesting potential approaches. In addition, the Board expects metrics to enhance the PCAOB's ability to produce impactful research and to provide valuable information sources for the public, including academic research, helping to create new insights into the audit.

The Board's discussion of the potential benefits of the final metrics in greater detail below.

2. Public Reporting of Metrics

Many commenters on the proposal addressed the fundamental question of whether there was value in mandating a set of publicly reported metrics, expressing conflicting views. Investors and investor-related groups were generally supportive. Many other commenters, primarily firms and firm-related groups criticized the proposal. These commenters either supported public reporting of some firm-level metrics but not others while generally opposing any public reporting of engagement-level metrics, or opposed all public reporting of metrics at both the firm and engagement levels.

Among the commenters that supported the metrics proposal, several stressed the benefits of increased transparency for key stakeholders and the public overall. Several commenters generally agreed with the PCAOB's rationale for the metrics, including increasing competition among audit firms, including on the basis of audit quality; promoting auditor accountability, which will lead to greater audit quality; and providing investors with decision-useful comparable information that will assist them in making decisions about audit-related matters (e.g., ratifying the appointment of the auditor or voting for reelection of Board members that serve on the audit committee). Two of these commenters asserted that investors currently lack information to make an independent and informed decision regarding ratification of the appointment of the auditor and to hold audit committee members to account in the performance of their duties. In that context, one of these commenters pointed out that most failures to ratify the appointment of the auditor occur after a financial reporting failure, and argued that metrics would provide information allowing investors to make

⁶⁷ There is a long stream of research regarding the effects that information asymmetry about product features, such as quality, and disclosure have on markets. See, e.g., George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 *The Quarterly Journal of Economics* 488 passim (1970); and Robert E. Verrecchia, *Essays on Disclosure*, 32 *Journal of Accounting and Economics* 97 (2001).

⁶⁸ See PCAOB Rel. No. 2024-013.

⁶⁹ See PCAOB Rule 3211.

⁷⁰ See AS 3101.10.b, .11-16.

⁷¹ In addition to disclosures on Form AP and in the audit report, the Board previously required information on periodic and special reports to be publicly available. See *Rules on Periodic Reporting by Registered Public Accounting Firms*, PCAOB Rel. No. 2008-004 (June 10, 2008), 28-32.

⁷² Under Section 102 of Sarbanes-Oxley, the Board may require registered public accounting firms to submit periodic and special reports containing financial or other information as is "necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. 7212(d). Section 103 of Sarbanes-Oxley tasks the Board with adopting quality control and other standards to be used by registered firms "in the preparation and issuance of audit reports . . . as may be necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. 7213(a)(1). See also 15 U.S.C. 7211(a), (c)(5), 7213(a)(2)(B). The Board believes the proposed metrics would further the public interest and would protect investors in accordance with these provisions.

an ex ante, rather than ex post, evaluation of the auditor's work.

Two commenters particularly favored engagement-level metrics. One said it would enable the compilation of engagement-level data for all public company audit engagements within a specific office to compare data for competing offices within the same geographic area. In this commenter's view, metrics such as workload would provide great value to prospective employees and would improve the talent pipeline issue because firms' workload need to be competitive in the eyes of prospective employees. Another argued that engagement-level metrics are most useful to investors, using firm-level metrics to provide context. This commenter also emphasized the importance of firm-level metrics, which will provide context in evaluating engagement-level metrics and a firm's audit practice and its related system of quality control.

Several commenters said that the benefits of metrics would likely evolve over time, for example, as users are able to aggregate multiple data points, make comparisons, and observe trends. The Board agrees and believes that analyzing the metrics over time, across engagements and across firms, in the context of known good practices and indicators of audit failure, will enable the PCAOB, as well as academics and users of the metrics, to gain a new perspective on the audit and potentially deeper insights into some of the drivers of audit quality.

Many larger firms generally supported certain firm-level metrics. These commenters generally agreed that firm-level reporting could provide stakeholders with relevant information through consistent disclosure by all firms required to report. While some of the commenters raised concerns about the usefulness, comparability, and risk of misinterpretation of certain firm-level metrics; the risk that standardization of metrics limits their adaptability to change in the business and auditing environment; and more generally concerns that the costs may outweigh the benefits, commenters agreed that the proposed firm-level metrics are generally consistent with voluntary disclosures that some firms are already making in firm transparency and audit quality reports. A discussion of the comments made with regard to particular metrics is provided below.

However, firms and firm-related groups generally opposed engagement-level metrics. Some questioned whether investors would use the metrics. Others expressed concern that publicly available metrics could contribute to

information overload. Many said that it would not be possible to provide sufficient context to enable users to understand the metrics, even with the firm-level metrics or narrative disclosures. Some commenters asserted that, because the underlying circumstances of engagement-level metrics are not homogeneous and users would not have necessary context, engagement-level metrics would not be comparable.⁷³ Others focused on the significance of qualitative factors such as professional judgment and the duty to exercise due care, including professional skepticism, saying that metrics were inappropriately "one size fits all" or not decision-useful because they do not capture these key concepts.

Many commenters expressed concern that users would not find metrics meaningful and may even misunderstand them and reach inappropriate conclusions. Absent providing substantial context and understanding how stakeholders would use the metrics, in one commenter's view, investors may make capital allocation decisions based on a misinterpretation of a metric, resulting in a new element of volatility in the capital markets. Two commenters raised a concern that the proposal does not provide a tie between assessing audit quality and the proposed metrics. Some commenters went on to say that providing metrics in isolation without context and effective two-way communication would have very minimal, or even negative, impact on audit quality. Another commenter stated that most of the data points required as part of the proposal are currently available to the PCAOB.

One commenter expressed concern that overemphasis on metrics could lead firms to focus on consistency of the metrics to avoid the implication of weak auditing or other potential misinterpretations, which in the commenter's view could lead to commoditization of the audit and reduce incentives to innovate the audit approach. On the other hand, several other commenters argued that metrics would support more robust competition based on quality, making the audit less of a commodity.

Some commenters said that the metrics seemed particularly focused on

larger firms or would be especially burdensome for smaller firms. The Board believes the final metrics call for data that will be relevant to and obtainable by firms regardless of size. The potential differential cost impacts are discussed below.

Some commenters questioned whether public reporting of metrics would undermine the authority of the audit committee. For example, one expressed concern that there would be public pressure on the audit committee to appoint auditors whose metrics were perceived to be within some acceptable range, even if the committee was satisfied with the work of the current auditor. Another commenter asserted that it is not investors' responsibility to oversee the auditor, and raised a concern that public reporting of metrics could undermine confidence in audit committees and the PCAOB, both of which have responsibilities for direct oversight of audits and audit firms and have the context to properly understand these metrics. However, an investor-related group specifically disagreed with this reasoning and asserted that this rulemaking exhibits commitment to faithfully executing the PCAOB's responsibilities and working to improve audit quality and trust in the audit market.

Several commenters opposed both firm- and engagement-level metrics. One asserted that the proposal did not provide sufficient evidence that public disclosure of the proposed metrics will have any meaningful impact on the quality of audit services. Another commenter said that the metrics were not grounded in or intended to have any nexus with audit quality, focusing instead on auditor accountability, and on that basis went beyond the PCAOB's remit. The commenter asserted that the proposed metrics would overload audit committees and investors with a large set of complex data that was not sought, needed, meaningful, or obviously usable by them, suggesting that the current voluntary approach should be maintained instead. Another expressed concern that public disclosure of the information specified in the proposals could do more harm than good, particularly in relation to an increase in litigation and reputational risk and potentially furthering the talent crisis in the profession. That commenter particularly questioned the potential value of metrics for audit committees, saying that they already have access to most of the information that would be mandated and that annual reporting would be unhelpful since evaluation of the auditor is a continuous process. One commenter who advocated delay and

⁷³ Commenters listed various types of contexts that in their view would be necessary for proper understanding of the engagement-level metrics, including variations across firms (e.g., differences in operations, structures, methodologies, and resources), the unique circumstances of each engagement (e.g., differences in risk areas, team compositions, and timelines), and the unique circumstances of each issuer (e.g., differences in policies and resources).

further study before the Board takes further action on the metrics expressed skepticism that metrics would influence shareholder votes on ratification of the appointment of the auditor or benefit most investors, because metrics are only indirectly related to audit quality and there would not be sufficient incentive for users to engage with them.

Most of the commenters who objected to public reporting of metrics recommended alternatives, including mandatory or voluntary communication with the audit committee, particularly for engagement-level metrics. Many commenters asserted that the audit committee is the appropriate party to whom engagement-level metrics should be communicated, because the audit committee has the statutory responsibility to appoint, compensate, and replace the external auditor and is sufficiently informed to understand the context of the company, the audit, and the auditor. Commenters said that audit committees could engage in dialog with the auditor, enabling them to understand the metrics in the context of the specific audit, promoting accountability in the performance of the audit on behalf of investors. Another commenter asserted that providing information to, and allowing the assessment by, audit committees would be more likely to provide greater benefits to investors and the capital markets than public reporting, while minimizing unintended consequences (such as users reaching inappropriate conclusions), and would be consistent with the PCAOB's objective to improve audit quality. Another commenter, who questioned the value of metrics for most investors, said metrics had the potential to be quite useful for audit committees, who could use their direct access to the auditor to gain valuable context and would have the opportunity, using metrics, to communicate more about the audit process in their audit committee report. On the other hand, an investor-related group pointed out that audit committees are reliant on communications from the auditor regarding the company's audit issues and the quality of the audit; their principal tool is inquiry, not observation, which, in audit parlance, is the weakest form of audit evidence.

Many commenters that objected to publicly available metrics like the ones the Board proposed advocated a non-prescriptive, principles-based approach, whereby auditors and audit committees would discuss potential metrics and the audit committee would determine which metrics and other information it finds meaningful and when it wants to receive and evaluate them. This

approach, the commenters said, would encourage more tailored metrics that could be appropriately discussed in context and could change over time, adapting to changes in the audit environment, regulation, technology and audit processes, and the information needs of audit committees and investors and would prioritize relevance rather than consistency. Some commenters specifically recommended amending AS 1301 to mandate such a discussion (for example, initially in connection with audit planning and later as part of reporting on audit results). However, one investor-related group disagreed with this principles-based approach, asserting that it would not promote comparability or accountability because a set of principles would inevitably result in qualitative rather than quantitative disclosure and the information would not be comparable between firms and engagements and over time. This commenter asserted that the standardized metrics the Board proposed would be more useful to investors.

This commenter also provided analysis of audit quality reports published by the Big 4 firms, observing that elements of the proposed firm-level metrics are already presented in those reports under a principles-based approach whereby each firm has developed its own metrics.⁷⁴ The commenter noted that some of these metrics are qualitative, some are quantitative, some use different definitions, and some unfavorable metrics or facts may be excluded. This commenter also asserted that because metrics voluntarily published by firms are self-defined and principles-based and are only at the firm level and not at the engagement level, they are largely unused by the investment community; they are regarded as marketing materials rather than investor information. This commenter emphasized that investors need more standardized information contextualized at the engagement-level to the company they are investing in and that are anchored to the firm-level standardized information.

Several commenters noted that it would be possible for audit committees to provide additional public disclosure via the audit committee report in the issuer's proxy statement,⁷⁵ which

⁷⁴ This commenter provided several examples of inconsistencies in reporting metrics. For example, it stated while all Big 4 firms provide data on turnover or attrition, they are defined and calculated in different ways and any comparison among the firms is stymied.

⁷⁵ See Schedule 14A, *Information required in proxy statement*, 17 CFR 240.14a-101. If action is

investors could consider in deciding whether to ratify the audit committee's selection of auditor and whether to vote for the board members who serve on the audit committee. Some of these suggested that the SEC could take action instead of, or along with, the PCAOB. Two argued that expanded audit committee disclosure would result in more relevant and decision-useful information for investors than the proposed metrics or would be a more direct way to address the information asymmetry than through this rulemaking. The other suggested that the SEC, together with the New York Stock Exchange and Nasdaq, should require inclusion of the metrics in the proxy statement to provide context for existing fee disclosures and to make investors aware of the metrics without having to search for them separately.

One firm suggested that the PCAOB gather the information underlying the metrics via inspection. However, this would defeat the objective of enhancing transparency to enable better informed decision-making by stakeholders.

Another firm expressed concern that engagement-level metrics may not be useful because they will become available only once a year, with a delay of up to 35 days after the audit is completed until Form AP is filed. However, an investor-related group disagreed with this argument indicating that the financial results for companies are delivered with the same, or a more significant delay, to investors and usefulness of the information is not simply its immediate discrete disclosure but the trends in the information within and between companies over time.

In addition, commenters raised general concerns about metrics requirements, including

- the risk that publishing metrics would involve releasing confidential or nonpublic information, which may violate confidentiality obligations imposed by the American Institute of CPAs ("AICPA") Code of Professional Conduct or conflict with non-US laws and regulations;
- diverting the attention of the engagement team and firm resources away from performing quality audits;
- lessening competition by releasing competitively sensitive information and reducing the number of registered public accounting firms, particularly in foreign jurisdictions, that would be available to play a substantial role in a large multinational group audit;

to be taken at a shareholders' meeting with respect to the election of directors, Item 7 of Schedule 14A requires the proxy statement to contain a report of the audit committee as specified in Item 407 of Regulation S-K, 17 CFR 229.407.

- being burdensome and costly to compile data for each individual engagement;

- becoming a “check the box” or compliance exercise that may not improve audit quality or provide meaningful transparency to stakeholders; and

- implying that audit committees have a legal duty to consider metrics even though the PCAOB has no authority over audit committees.

The Board adopted requirements for firms to provide both firm- and engagement-level metrics, with changes from its proposal as described in further detail below. The Board continues to believe that public reporting of a mandated set of firm- and engagement-level metrics will provide stakeholders with comparable information that is not currently available, would otherwise be difficult or impossible to obtain, and will position them to make better-informed decisions. Further, the Board believes that required public disclosures will facilitate development of standardized data for consistent comparison and analysis over time, which will be more valuable than the ad hoc, individualized disclosures that some firms have made on a voluntary basis or the information that could be provided by individual firms to audit committees or investors without any basis for cross-firm comparisons. The Board believes the new data points, when analyzed together with the audited financial statements, critical audit matters, auditor tenure, and other information about the firm and the engagement on Form 2 and Form AP, will provide more information about the audit and, therefore, the reliability of the auditor’s report.

The Board considered comments questioning the value of metrics, whether they will be used by investors and other stakeholders or would represent only a “check the box” compliance exercise, and whether they might contribute to information overload or have other negative consequences. Based on comments received from investors and other data provided, among other factors, the Board does not share those concerns. Investors and investor-related groups have commented throughout the course of this rulemaking that the metrics will be useful. A firm-related group commented that, in a recent investor survey it conducted, almost all of the metrics the Board proposed were regarded as “extremely helpful” by between 30% and 50% of participating investors. (The commenter did not indicate whether the survey allowed positive responses other than

“extremely helpful”—for example, “helpful” or “somewhat helpful”—and, if so, what the results were inclusive of those responses.) By contrast, the Board understands—including from one commenter that argues that the voluntary approach should be maintained—that voluntarily provided metrics have not proven useful to investors. The Board believes that the value of voluntary metrics is undermined by a lack of the consistency and comparability, as well as enhanced credibility, that can be achieved through common definitions and calculations and required reporting.

The Board also noted that similar objections—that the new information would not be used or would be confusing or misleading—were raised by many of the same commenters in connection with the Board’s last two rulemakings requiring disclosure of additional information about audits and auditors: Form AP reporting of the name of the engagement partner and information about other firms participating in the audit, and auditor communication of critical audit matters. In both cases, these commenter concerns appear unsubstantiated. The Form AP data set is now one of the most frequently visited areas of the PCAOB website.⁷⁶ Indeed, in an investor survey conducted by one commenter, 79% of respondents indicated that they often or very often navigate to AuditorSearch, the search tool for Form AP data on the PCAOB website. As for CAMs, in a recent investor survey conducted by the same commenter, over 90% of the respondents indicated that CAMs play an important role in their investment decision-making.⁷⁷ In addition, data aggregators, such as Audit Analytics, compile and make available data on CAMs, which suggests market demand for that information. The Board’s experience suggests that contrary to concerns about irrelevance and information overload, stakeholders seek out additional information about auditors and audit engagements when it is available.

In lieu of public reporting, the Board considered the alternative of encouraging or mandating communication of engagement-level metrics to the audit committee, as many commenters suggested. However, such an approach would not achieve the

Board’s goals of increasing the information about audit engagements and audit firms available to investors and other stakeholders, and fostering comparability of data through mandated reporting based on common definitions and specified calculations. The Board also believes that a non-prescriptive, principles-based approach, whereby firms would potentially develop and discuss different metrics for different audit committees, drawn from different data and based on different definitions and calculations and changing over time, could itself create significant costs and challenges for firms without necessarily contributing to the audit committee’s ability to understand the audit it oversees in a broader context.

Of course, under the Board’s final requirements auditors and audit committees will be free to discuss performance metrics—whether the metrics required under the Board’s rules or additional or alternative metrics they develop themselves—through the kinds of discussions the commenters recommend. The Board is not requiring that auditors make metrics-specific communications at this time. However, where matters addressed by the metrics are the subject of an otherwise required communication, discussion of the metrics may be a useful part of the communication.

The Board appreciates that the audit committee is charged by statute with responsibility for oversight of the auditor, and the Board cannot, and do not purport to, impose any obligations on audit committees or imply that audit committees have any specific duties in relation to metrics. The Board assumes that audit committees will fulfill their responsibilities as they see fit; whether that entails, for example, discussion of metrics with auditors or proxy statement disclosure regarding their consideration of metrics will be for them to determine.

But the Board also notes that investors—including many investors that are themselves fiduciaries for others—have their own investment and voting decisions that they are called upon to make, like decisions about electing members of the board of directors, including those who serve on the audit committee, and ratifying the appointment of the auditor. And in the current environment, they have extremely limited access to information about the auditor’s work—work that, after all, is undertaken for their benefit. By requiring public reporting of metrics, the Board is not suggesting that investors will have the ability or the responsibility to oversee the work of the auditor. However, they will have the

⁷⁶ In 2023, there were over 333,000 unique searches performed on AuditorSearch and the Form AP data set was downloaded over 2,000 times. Information related to usage statistics can be found on the PCAOB’s website (<https://pcaobus.org/resources/auditorsearch>).

⁷⁷ The Center for Audit Quality Critical Audit Matters Survey (July 2024) at 9.

opportunity to gain new perspective to inform their decision-making. The Board agrees with a commenter that, far from undermining investor trust, this new transparency should enhance that trust by helping investors better understand the audit and the audit committee's oversight of it.

The Board has determined to go forward with published metrics so that investors and other stakeholders will have direct access to the metrics and so that comparative data can be accumulated that will allow comparisons to be made across different firms and different engagements. As discussed below, the Board believes it has addressed many of the challenges associated with potential lack of comparability by narrowing the metrics to a group that it believes will send relatively clear, comprehensible signals that users will be able to interpret when taken together with the other information about the issuer and the auditor that is available to them. In the Board's view, public reporting is the most practical way for comparative data to be created and disseminated. While two commenters suggested that audit committees could obtain comparative data when they consider changing auditors, the Board's understanding is that is a relatively infrequent occurrence, and in any case is not a route available to other stakeholders.

The Board also believes that gathering data and calculating the final metrics, given the subjects they address, will not be overly time-consuming or burdensome, and will not entail disclosure of confidential or otherwise protected information, as discussed below.

Regarding the concerns of possibly disclosing confidential information and competition lessening effect due to public reporting of metrics; unintended consequences, including attention diversion, litigation and reputation risks, competition lessening effect, and audit labor market impacts; and costs, see discussions below.

3. Legal Authority

Some commenters questioned the Board's statutory authority to require all or some of the proposed firm and engagement metrics. In addition, one commenter stated that the statement in the proposal that "this [rulemaking] would advance investor protection and promote the public interest by enabling stakeholders to make better informed decisions, promoting auditor accountability and ultimately enhancing capital allocation and confidence in our capital markets" is beyond the Board's rulemaking authority. Other

commenters questioned the Board's authority with respect to specific aspects of the rulemaking. Two commenters questioned how the requirements could extend beyond the accounting firms' issuer and broker-dealer audit practices. One of these commenters stated that it believes including non-issuer information could be misleading to stakeholders who may mistake such disclosures as being within the PCAOB's purview and that including the non-issuer portion of a firm's audit practice appears contradictory to the Board's pursuit of clarity through its proposed PCAOB Rule 2400, *Proposals Regarding False or Misleading Statements Concerning PCAOB Registration and Oversight and Constructive Requests to Withdraw from Registration*. This commenter suggested that if the Board intends to make clear what lies within and outside its purview through proposed PCAOB Rule 2400, the rulemaking related to firm- and engagement-level metrics should reflect similar principles.⁷⁸ Another commenter suggested that several new requirements seem to require public production of information that is confidential or otherwise outside of or unnecessary for the Board's oversight function.

In accordance with Sarbanes-Oxley, the PCAOB is endowed with regulatory powers designed to ensure transparency, uphold high professional standards, and protect investors in the auditing process. This discussion outlines the statutory basis for this rulemaking as outlined in Sections 101, 102, and 103 of Sarbanes-Oxley. In particular, here and throughout the release, the Board discussed how the final rules will increase transparency regarding audit practices, increase the comparability and accessibility of information available to investors and others, and enhance investors' ability to efficiently and effectively make investment and voting decisions, in line with the Board's statutory mandate.

Section 102 of Sarbanes-Oxley mandates that each registered firm must submit an annual report to the Board. Beyond this, Section 102 grants to the Board the authority to require more frequent and detailed reporting, empowering the Board to require registered firms to report "such additional information as the Board or the Commission may specify."⁷⁹ This authority must be exercised through PCAOB rulemaking that deems the information "necessary or appropriate

in the public interest or for the protection of investors."⁸⁰ This statutory language supports the Board's authority to adapt its reporting requirements to the evolving needs of audit oversight, thereby enhancing investor protection and public confidence in the financial markets.

The metrics the Board adopted in its release are important for increasing transparency regarding the practices of registered firms, particularly in their audits of issuers. By mandating the disclosure of this information, the PCAOB will enable investors and other market participants to have a clearer and more comprehensive view of the operational practices of the registered firms that audit issuers. This enhanced transparency will allow investors and other market participants to make more informed decisions, contributing to the integrity and reliability of financial reporting and audit practices.

Additionally, Section 103 of Sarbanes-Oxley grants the Board authority to establish auditing standards and quality control standards "to be used by registered public accounting firms in the preparation and issuance of audit reports" as "may be necessary or appropriate in the public interest or for the protection of investors."⁸¹ Although the information the PCAOB requires from registered firms does not appear directly within audit reports, it is comfortably within the ambit of the Board's rulemaking mandate under Section 103—especially given the flexibility inherent in the statutory language.⁸² In brief, this mandate involves establishing the procedures and practices of registered firms that promote the quality and accuracy of audit reports, which extends to

⁸⁰ 15 U.S.C. 7212(b)(2)(H).

⁸¹ 15 U.S.C. 7213(a)(1).

⁸² See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2263 (2024) (the term "appropriate" "leaves agencies with flexibility" (citation and quotation marks omitted)); *Kisor v. Wilkie*, 588 U.S. 558, 632 (2019) (Kavanaugh, J., concurring in the judgment) (the word "appropriate" "afford[s] agencies broad policy discretion"); *Metropoulos Telecomms'ns, Inc. v. Global Crossing Telecomms'ns, Inc.*, 423 F.3d 1056, 1068 (9th Cir. 2005) ("Given the reach of the [FCC's] rulemaking authority under 201(b)"—which granted to the FCC the "broad power to enact such 'rules and regulations as may be necessary in the public interest to carry out the provisions of this Act'"—"it would be strange to hold that Congress narrowly limited the Commission's power to deem a practice 'unjust or unreasonable.'"); *Brown v. Azar*, 497 F. Supp. 3d 1270, 1281 (N.D. Ga. 2020) ("[W]hen an agency is authorized to 'prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the Act,' Congress' intent to give an agency broad power is clear."); *appeal dismissed as moot*, 20 F.4th 1385 (11th Cir. 2021) (mem.).

⁷⁸ To date, the Board has not adopted proposed PCAOB Rule 2400.

⁷⁹ 15 U.S.C. 7212(d).

overseeing how firms report their operational conduct.

In alignment with Section 103 of Sarbanes-Oxley, the PCAOB views the rule, form, and associated amendments requiring the metrics as fundamental auditing and quality control standards at their core. The information required by the metrics relates to practices of the firm that directly bear on the conduct of audits and ultimately the quality and accuracy of audit reports. By mandating the submission of this information to the PCAOB, the Board provides deeper transparency into the auditing practices that support issuer audits. The information required by the metrics will also support the Board's oversight and enhance the reliability of audit performance.⁸³

Finally, the Board notes that Section 101 of Sarbanes-Oxley provides ancillary authority that supports the Board's primary powers in Sections 102 and 103.⁸⁴ This provision enables the PCAOB to develop standards that protect investors and serve the public interest.

Some firms and firm-related groups questioned the Board's statutory authority to require the reporting of the proposed metrics on the basis that the Board's rulemaking authority should correspond directly with the type of information outlined in Sarbanes-Oxley Section 102(b)(2) for the contents of registration applications. However, this interpretation significantly misreads the reporting provisions of Sarbanes-Oxley. Sections 102(b)(2)(H) and 102(d) clearly grant to the Board broad authority to require additional information in periodic reports that it finds necessary or appropriate to serve the public interest or protect investors.

Section 102(b)(2) generally details baseline requirements for reported information and Section 102(b)(2)(H) primarily details requirements for any additional information the Board

requires, providing that additional information in reports must be deemed "necessary or appropriate in the public interest." It is incorrect to construe those provisions as imposing a rigid limitation that restricts the content of reports exclusively to the types of information specified in Section 102(b)(2)(A)–(G) for initial registration applications. Indeed, Section 102(b)(2)(H) expressly contemplates the provision of "other information" the Board may require through rulemaking. This provision shows that Congress intended to provide the Board authority to require additional information beyond that enumerated in Section 102(b).⁸⁵ By referencing this provision, Section 102(d) applies this broader authority to periodic reports that the Board finds necessary or appropriate to serve the public interest or protect investors. The Board's release has outlined how the disclosures mandated by the metrics will enhance transparency and bolster the PCAOB's oversight capabilities. Such enhancements are designed to ultimately improve audit quality. For example, as discussed more completely below, the final metrics will enhance (i) audit committees' ability to efficiently and effectively monitor and select auditors as well as (ii) investors' ability to efficiently and effectively make decisions about ratifying the appointment of their auditors and allocating capital. In addition, as an important indirect benefit, the final rules could further spur competition to the benefit of investors. Thus, the final rules align with the overarching objectives of Sarbanes-Oxley, and therefore are appropriate exercises of the Board's authority under Section 102.

In response to the concerns raised by firm commenters regarding the Board's use of Sarbanes-Oxley's relevant "necessary and appropriate" clauses, it is important to clarify that the Board has not claimed any implicitly delegated authority beyond the regulatory

parameters established by Congress. The use of the Section 101, 102, and 103 authorities in this rulemaking is firmly grounded within the explicit mandates provided by Sarbanes-Oxley, and is consistent with the statutory limitations and directives outlined in those provisions. The Board's application of these authorities has been specifically aimed at enhancing the transparency and quality of audits of issuers and broker-dealers, which directly aligns with the Board's core mission to protect investors and the public interest. The Board has utilized the tools provided by Sarbanes-Oxley to carry out the responsibilities entrusted to it.

Other commenters raised concerns about the Board's authority to include metrics extending beyond a registered firm's issuer and broker-dealer audit practice. One of these commenters asserted that including non-issuer information could be misleading to stakeholders who may mistake such disclosures as being within the PCAOB's regulatory purview. The Board disagrees with these comments. The metrics the Board is requiring are designed to provide information that directly relates to firms' audits of issuers, and will be important for such matters as assessing auditor performance and resource allocation as it relates to issuer audits. For instance, in the Workload metric, firms are required to report not only the hours worked dedicated to issuer engagements but the entire workload of the personnel involved. This includes hours spent on non-issuer engagements, training, practice development, staff development, or other firm activities. A narrower focus, which only accounts for hours worked on issuer engagements, could provide an incomplete picture. It would fail to reflect the true extent of the auditor's commitments and how these may impact their capacity and focus on tasks in issuer audit work. Without this comprehensive view, investors and other stakeholders would lack important information to assess the potential risks over overcommitment on audit quality and auditor performance in audits of issuers. By requiring firms to report certain narrowly tailored information regarding their audit engagements and audit practices, the Board is not seeking to extend its purview to regulate those aspects of the firm's operations. Rather, in line with the Board's statutory authority, it is enhancing the transparency and the depth of information available to investors and other stakeholders concerning firms' audits of issuers.

⁸³ See, e.g., Mark DeFond and Jieying Zhang, *A Review of Archival Auditing Research*, 58 *Journal of Accounting and Economics* 275, (2014) (asserting that audit quality improves financial reporting quality by increasing the credibility of the financial reports).

⁸⁴ For example, Section 101(c)(5) empowers the Board to perform additional duties or functions that are "necessary or appropriate to promote high professional standards among, and improve the quality of audit services offered by" registered firms and their associated persons. 15 U.S.C. 7211(c)(5). This provision empowers the PCAOB to implement measures that enhance the integrity and efficacy of the auditing profession. In addition, Section 101(g)(1) provides rulemaking authority to the Board, specifying that the Board's rules, subject to the approval of the Commission, are to "provide for the operation and administration of the Board, the exercise of its authority, and the performance of its responsibilities under" Sarbanes-Oxley. 15 U.S.C. 7211(g)(1).

⁸⁵ See *Navajo Nation v. Dalley*, 896 F.3d 1196, 1212–13 (10th Cir. 2018) ("Congress expressed its scope in broad terms, to encompass 'any other subjects that are directly related to the operation of gaming activities.' But the key word here is 'other.' . . . And applying the ordinary and everyday meaning of the word 'other' . . . , it becomes patent that Congress did not intend for that clause to address the 'subjects' covered in the preceding clauses of subsection (C).") (citation omitted); see also, e.g., *Madison v. Virginia*, 474 F.3d 118, 133 (4th Cir. 2006) ("other Federal statute prohibiting discrimination" is a "catch-all provision"); *Meehan v. Atl. Mut. Ins. Co.*, 2008 WL 268805, at *7 (E.D.N.Y. Jan. 30, 2008) ("The term 'other policies' now accomplishes the task of including all governmental activity and becomes a catch-all phrase including all other policies not already implied[.]" (citations and quotation marks omitted)).

4. Summary of the Metrics

The Board adopted a set of firm-level and engagement-level metrics across eight areas. Firm-level metrics will provide a basis for drawing comparisons between firms as well as a baseline for evaluating engagement-level metrics. Engagement-level metrics will elicit more granular information and will enable comparisons over time and across engagements both within the firm and across other firms.

Firm-level metrics will be disclosed on a new Form FM, *Firm Metrics*, and engagement-level metrics will be disclosed on a revised and renamed Form AP, together with the other engagement-specific information currently required (the name of the engagement partner and information regarding other firms participating in the audit).

Most of the metrics the Board has adopted will be presented at both the firm and the engagement level. However, two metrics will be reported

only at the firm level, because the Board believes aggregated data will be most meaningful or appropriate.

The metrics are:

- *Partner and Manager Involvement.*

Hours worked by senior professionals relative to more junior staff across the firm's large accelerated and accelerated filer engagements and on the specific engagement.

- *Workload.* For senior professionals who incurred hours on large accelerated and accelerated filer engagements, average weekly hours worked on a quarterly basis, including time attributable to all engagements, administrative tasks, training, and all other matters.

- *Training Hours for Audit Personnel.*

Average annual training hours for partners, managers, and staff of the firm, combined, across the firm and on the engagement.

- *Experience of Audit Personnel.*

Average number of years worked at a public accounting firm (whether or not PCAOB-registered) by senior

professionals across the firm and on the engagement.

- *Industry Experience.* Average years of career experience of senior professionals in key industries audited by the firm at the firm level and the audited company's primary industry at the engagement level.

- *Retention of Audit Personnel (firm-level only).* Continuity of senior professionals (through departures, reassignments, etc.) across the firm.

- *Allocation of Audit Hours.*

Percentage of hours incurred prior to and following an issuer's year end across the firm's large accelerated and accelerated filer engagements and on the specific engagement.

- *Restatement History (firm-level only).* Restatements of financial statements and management reports on ICFR that were audited by the firm over the past three years.

Figure 1. Firm and Engagement Metrics Reporting

Firm and engagement metrics reporting	Firm-level	Engagement-level
Partner and Manager Involvement	✓	✓
Workload	✓	✓
Training Hours for Audit Personnel	✓	✓
Experience of Audit Personnel	✓	✓
Industry Experience	✓	✓
Retention of Audit Personnel	✓	X
Allocation of Audit Hours	✓	✓
Restatement History	✓	X

The final suite of metrics focuses primarily on information about audit personnel. The Board believes these metrics will provide new insights into how engagements are staffed, including the extent of involvement of senior personnel; auditors' overall workload; retention of personnel across the firm; and levels of training, audit experience, and industry-specific expertise. The final metrics will also provide information about the extent of audit work completed prior to the issuer's year end, an aspect of the audit process that the Board believes is associated with improved audit outcomes, and about the firm's history of restatements, a key measure of audit outcomes.

This new information will allow users to draw inferences about audits and audit firms that are not possible today. Some may relate to specific metrics. For example, a heavy workload for a particular engagement team relative to the firm average or compared to peer firms may raise questions about the quality of the work performed. Conversely, a relatively high level of industry-specific experience,

particularly for an engagement in an industry requiring specific accounting and auditing expertise, would be a positive signal. Other inferences may relate to combinations of metrics. For example, the personnel-related metrics, taken together, give an overall sense of how an engagement is staffed that can be compared to firm averages and to engagements for similar issuers. It is possible that the precise numerical values of metrics may be important in some cases, but in general the Board believes the metrics will be more useful to convey a sense of whether a particular engagement or firm appears fairly typical or is an outlier in one or more respects. This should provide a richer context for understanding the work of the auditor than the current environment of almost no publicly available information.

Based on the Board's oversight activities, it appears that the largest firms are already tracking data in many of these areas,⁸⁶ and the Board believes that all firms should be able to capture

the data required by the metrics without undue burden. Many of the metrics are based on data that firms already track or will be required to track for purposes of other PCAOB requirements. For example, Partner and Manager Involvement and Allocation of Audit Hours are based on the same "total audit hours" that firms are already required to track for Form AP reporting. Training hours will reflect the same information that firms track to ensure proper licensing of their personnel. Restatement data, to the extent firms are not already tracking it, is required to be tracked under QC 1000.⁸⁷ In addition to required data, many firms track the experience of their personnel, as well as industry experience, for use in marketing materials and for inclusion in requests for proposals, and some firms already track staff retention and turnover metrics as part of their human capital management. Firms should be able to generate other data required by the final metrics, such as Workload,

⁸⁶ This point is discussed more fully below.

⁸⁷ See QC 1000.64g, Note to QC 1000.67e.

from their existing timekeeping systems with minimal additional effort.

Below, the Board provides a detailed discussion of key terms and concepts used in the metrics, as well as a description of each final metric and its calculations.

5. Comparability

Developing comparable data regarding firms and engagements has been one of the Board's key objectives throughout this rulemaking. As noted previously, the information currently provided in firm transparency reports is not based on common definitions or methods of calculation, which prevents users from being able to make comparisons across firms or over time. The Board believes that an important benefit of mandatory reporting will be the ability of investors and other stakeholders to compare the metrics, within the same firm over time, among firms, and among engagements.

The basic approach of the Board's final rules—a required set of metrics, derived from specified calculations incorporating consistently defined terms and concepts—is designed to generate comparable data with respect to firms and engagements that are subject to the reporting requirements. One investor-related group agreed that standardized and contextualized metrics will provide investors with a consistent data set for analysis over time and for comparison between companies and firms and a set of standardized data is more valuable than the ad hoc individual measures that some firms have made on a voluntary basis.

In some cases, considering the importance of scalability, the Board has also designed the proposed metrics as percentages (e.g., relative to total audit hours) or averages where the Board believes that will provide more comparability across firms and engagements than methods based on absolute amounts.

Several firms and firm-related groups expressed skepticism about whether the metrics could generate comparable data because of inherent differences across firms and engagements, either with regard to any metrics or engagement-level metrics specifically. For example, one commenter said that differences between firms and among engagements will create heterogeneity in the underlying data, so that cross-sectional differences and changes over time will be unclear and challenging to interpret, and will cause confusion. Another commenter emphasized the importance of comparability between larger and smaller firms so that investors and audit committees can interpret them appropriately.

Two commenters stated that if context, including qualitative aspects of data, is necessary to understand the metrics, that would suggest that the data are not comparable, which could mean that the metrics are not decision-useful and are at risk of misinterpretation. One commenter expressed the opposite concern, that metrics would become homogenized over time due to peer comparisons, making them considerably less useful to investors.

One commenter asserted that the Board's choices in defining terms and specifying calculations undermine the comparability of the metrics—for example, because some metrics include issuers other than accelerated or large accelerated filers, the Board's proposed industry classification taxonomy differs from the one used by the SEC, and its proposed period for measuring restatements differs from the period used by a commonly-used data provider. These issues are addressed below in the discussion of the final metrics.

With regard to firm-level metrics, several commenters expressed concern that some or all of the metrics would not be comparable across firms. They cited factors such as the size of the firm (including the number of issuer and non-issuer engagements), specialization of the firm's audit practice, strategies, priorities, investments, organizational structure and quality control system of the firm, and size of the issuer (which affects, among other things, whether an integrated audit is required).

Several commenters expressed particular concern about comparability between U.S. and non-U.S. firms because non-U.S. firms tend to have structural, jurisdictional, and cultural aspects that differ from U.S. firms. In addition, non-U.S. firms may have a relatively smaller issuer audit practice, which could skew metrics that are based on the entire practice because there may be significant differences between issuer audits and the rest of the firm's audit practice, and could increase the volatility of metrics based on the issuer practice because of its small size. One of these commenters also criticized the application of metrics to non-U.S. firms because they would not capture the qualitative benefits of being a part of a global network (e.g., use of consistent policies and procedures that drive use of training, technology, consultation and other centrally available support across the network). Another commenter also noted that some non-U.S. firms may publicly report firm-level metrics on similar topics, such as workload, using different calculation methods under PCAOB and local reporting

requirements, which would be costly for these firms and potentially confusing to the users.

Many commenters expressed concern that engagement-level metrics are inherently incomparable. Commenters suggested a number of factors that could affect the comparability of engagement-level metrics, some relating to the firm (e.g., the firm's organizational structure, IT systems, resources, and audit methodologies), some to the individual audit engagement (e.g., selected audit approaches including substantive analytical procedures or test of details, audit findings including internal control deficiencies, use of technology, first year or recurring engagement, and risk of material misstatement), and some to the issuer (e.g., business structure (including the extent of centralization or decentralization and number of business units), complexity of the organizational structure and IT infrastructures, number of significant unusual transactions, and business and industry risks affecting the issuer). In addition, one commenter noted that there are significant developments (e.g., in delivery models, technology, and professional rules and standards) that affect the way audits are performed each year.

The Board solicited comment on whether comparability could be enhanced by further segmenting firm-level reporting (for example, on the basis of the size of the firm or the size of the issuer) or engagement-level reporting (for example, on the basis of industry sector, region, or whether it is a first-year audit). One commenter stated that all stakeholders would benefit from a consistent calculation methodology and comparable presentation format of firm-level reporting. Several commenters indicated that more disaggregated data for engagement- or office-level reporting could be useful, though one acknowledged that this benefit would need to be weighed with the cost of requiring this data. Other commenters cited challenges associated with providing subsets of information, including that firm and issuer sizes change over time and that smaller firms' metrics could disclose individual client information. One of these asserted, however, that the reported data could be disaggregated and compared without additional data fields being collected.

The Board determined not to collect additional data fields or require additional segmentation of the metrics at this time because of the potential cost and complexity it would add to the process of compiling and reporting the metrics. Stakeholders that want to perform more detailed analysis (for

example, segmenting data based on size of the issuer, size of the firm, region, or industry sector) will be able to do so using information that is already publicly available in combination with the metrics.

The Board understands that firms differ from each other in the number and types of audits they perform and in their resources, such as the number, experience, and degree of specialization of their people as well as their access to technological resources and resources provided by networks. The Board also understands that engagements differ based on factors such as the size of the engagement, the industry of the company, the risks related to the company and the audit, whether it is a new engagement for the firm or the engagement partner.

However, the Board does not believe that such differences make useful, comparable metrics impossible. As one commenter noted, investors are experienced in using a wide array of performance metrics, such as non-GAAP measures and key performance indicators, and are able to analyze them despite a lack of perfect comparability between companies or over time. Indeed, the commenter argued that, due to the nature of the audit process and audit firms, the proposed firm and engagement metrics have a greater propensity for comparability than many companies whose financial results investors already analyze.

The Board believes it has also addressed many of the challenges associated with potential lack of comparability by narrowing the metrics to a group that should send relatively clear, comprehensible signals in a variety of different contexts. Metrics on workload, training hours, experience in public accounting, retention of personnel, and restatement history should send a clear signal, regardless of the circumstances of the firm and the engagement. Metrics on partner and management involvement and allocation of audit hours may be more influenced by those circumstances. For example, unusually high involvement by senior professionals could signal an especially complex audit or one that encountered unexpected problems; a relatively low percentage of audit hours incurred before year end could signal a poorly planned audit or simply that, due to the nature and scope of a company's business, it was unnecessary or impractical to perform many audit procedures prior to year end. The Board has limited the scope of the Partner and Manager Involvement, Workload, and Allocation of Audit Hours metrics to large accelerated filer and accelerated

filer engagements to enhance the comparability of the underlying data. The metric on relevant industry experience may also be influenced by the circumstances of the firm and the engagement in that industry experience may be more important in some industries than others. However, the Board believes users will be able to interpret this metric when taken together with the other information about the issuer and the auditor that is available to them. Common definitions and consistent methodology will also contribute to comparability. Taken together, the metrics should enable users to make both broad comparisons across the full population of reporting firms and accelerated filer and large accelerated filer audits, and more targeted comparisons across smaller subgroups of similar firms and engagements, and will be a very significant improvement over the information that is currently available—ad hoc reporting by the largest firms at the firm level, and essentially no information at the engagement level.

Of course, any additional context that firms believe is necessary for proper understanding can be provided as narrative disclosure. While narrative disclosure will not make the metrics comparable, it will balance the comparability of standardized metrics disclosure with the ability to provide further context if needed. For example, a firm could provide an explanation for why a metric changed significantly from what was reported in the prior year.

6. Time Period Covered by the Metrics

Firm-level metrics are reported as of September 30, generally covering the period from October 1 of the previous year through September 30.⁸⁸ Specific commenter feedback regarding the reporting period is discussed in detail below. Firms are required to file Form FM on or before November 30, 61 days after the end of the reporting period, also discussed below.

Related to the Training Hours for Audit Personnel metric, the Board understands that many firms already have defined periods or cycles that may not align with the final reporting date (e.g., for which the firm tracks training data in order to comply with state continuing professional education (“CPE”) reporting requirements). Therefore, the firm is permitted to use its already-established training calendar

cycle for calculation and reporting of this metric, provided that the cycle covers a 12-month period (which is expected to be consistently applied). The Board does not believe that the data will be especially sensitive related to any particular 12-month period. The Board believes allowing firms flexibility to use their internally established dates for this metric is appropriate and still provides the comparability discussed above since all firms would be reporting this metric based on a 12-month period.

For engagement-level metrics, which will be reported on Form AP, the data and information underlying the reported metrics will generally be based on the most recent period's audit. However, some engagement-level metrics relate to information about personnel on the engagement, such as Experience of Audit Personnel, and these metrics will reflect information that may not be directly related to the most recent period's audit. Specific commenter feedback regarding the reporting period and filing date of Form AP is discussed in detail below.

In addition, the time period covered by each metric also is discussed in more detail below.

7. Rounding and Use of Estimates

Many of the metrics involve the calculation of a numerical value that may result in very small fractional parts. Consistent with the proposal, firms are required to report metrics that are rounded to the nearest whole number, except where additional decimal places (no more than two) are needed to properly interpret the result or to enable comparison to prior periods.

In calculating the firm- and engagement-level metrics, actual amounts should be used, if available. However, if actual amounts are unavailable, firms are permitted to use a reasonable method to estimate the components of a calculation. This approach is consistent with existing Form AP, which allows firms to use a reasonable method to estimate certain information required in the calculation of total audit hours.⁸⁹ Firms are also required to document in their files the method(s) used to estimate amounts when actual amounts are unavailable.

Commenters generally agreed with the proposed approaches, with one commenter agreeing that rounding and estimation should be permitted for all metrics. Other commenters stated that rounding and estimation will be

⁸⁸ For two of the metrics areas the Board proposed, Quality Performance Ratings and Compensation and Audit Firms' Internal Monitoring, firms would have reported based on their own internally established cycles. Neither of these is included in the metrics the Board adopted.

⁸⁹ See Instructions to Part IV of Form AP as currently in effect. Under the amendments to Form AP adopted by the Board, this appears in General Instruction 9, as amended.

especially important for metrics related to the reporting of hours, with two of these pointing to the subjectivity involved with the proposed metrics that would require allocation of hours to specific audit areas.⁹⁰ One commenter stated that the PCAOB should not restrict the number of decimal places. However, the Board believes that limiting reporting to hundredths will allow for the presentation of an appropriate level of detail while ensuring comparability of presentation and avoiding the technical issues that could arise with unlimited digits.

8. Operational Narrative Disclosure

In order to give firms the ability to provide any context they thought necessary for an appropriate understanding of the reported metrics, the Board proposed that firms would be permitted, but not required, to provide a brief narrative disclosure (no more than 500 characters per metric) to accompany any, or all, of the firm-level and engagement-level metrics reported on Form FM or Form AP. While some commenters agreed with the proposal to provide firms with the ability to include an optional narrative to accompany the metrics, one commenter explicitly agreed with the proposed 500-character limit, one commenter asserted that the 500-character limit greatly limits the context that could be provided, and one commenter suggested revising the character limit to no more than 1,000 characters. Two commenters suggested increasing the character limit beyond 500 characters without suggesting an upper limit. Approximately half of the commenters suggested that there should be no character limit imposed on the optional narrative. A firm-related organization also suggested that the narrative be mandatory and not optional, while a firm suggested that the utility of metrics would be diminished without potentially extensive accompanying narrative.

One commenter suggested that firms can also provide a link in the narrative to their transparency reports and audit quality reports if they wish to provide further context to the metrics. One commenter stated that there should be guidelines such as the narratives being factual, directly relevant to the metric, and free from promotional or marketing language. Another commenter stated that it would provide the following narrative in Form FM, potentially with respect to every firm metric:

We do not believe any one metric or even a combination of metrics is necessarily indicative of audit quality, nor is it useful or productive to speculate on the questions reviewers of this information may have on each metric for every audit. We further discuss this metric in our Audit Quality Report, along with the measures we believe are better indications of our audit quality.⁹¹

Taking into consideration commenter feedback, the Board is retaining the option to provide narrative disclosure with each metric but expanding the character limit to 1,000 characters. The Board believes this character limit strikes the right balance between allowing firms the ability to provide any contextual information they believe is necessary to interpret the results of a particular metric while also managing the length of the forms and keeping them to a manageable size.⁹²

In addition, in an effort to assist firms in making the optional narrative disclosures as helpful and substantive as possible, to help remind firms of their responsibility under QC 1000 to produce and report information that is accurate and not misleading, and to reduce the possibility that users will find the narrative confusing or in conflict with the required metrics, the following provision has been added as a general instruction to Form FM and a note to Part VI of Form AP to provide additional direction to those firms electing to provide an optional narrative for any metric:

“When the Firm elects to provide a brief narrative to accompany any of the Items in [the part of the form in which metrics are reported], language should be concise and focused on the reported metrics, with a view to facilitating the reader’s understanding of the metrics.”

Firm and Engagement Metrics

1. General Comments

Investors and investor-group commenters were broadly supportive of the proposed metrics, saying that the metric areas would provide investors with decision-useful information about audit firms and audits. However, they expressed mixed views on certain specific metric areas. These commenters also suggested additional metric areas, including investments in both training audit professionals and in technology, and further details related to PCAOB inspection results (e.g., Part I.A deficiencies). The Board has addressed these comments in the discussion of

each metric area below. On the topic of implementation of the proposed metrics, one commenter requested analytical tools and research showing how investors might use metrics. The information disclosed on Form FM will be available in a searchable database on the Board’s website, similar to the Form AP database, and will provide users of the information the ability to perform comparisons across engagements.

Firms and firm-related groups were broadly supportive of some of the proposed firm-level metrics. However, they generally opposed public reporting of engagement-level metrics, asserting that no amount of context around engagement-level metrics would provide an appropriate basis for public reporting. These commenters suggested that the audit committee, being deeply familiar with the company, the audit, and the independent auditor, is the only party equipped to appropriately interpret the metrics. Instead of public reporting, they suggested several alternatives, including adding a requirement for communication to the audit committee under AS 1301; expanding SEC requirements for audit committee disclosures; encouraging voluntary reporting; issuing PCAOB Spotlights, practice alerts, or guidance; and performing further outreach before adopting any requirements. These alternatives are discussed in greater detail above. One commenter suggested that the PCAOB take a proactive role in educating all users as to the proper use of reported metrics, including the need for them to be interpreted in context and making users aware of potential dangers and drawbacks associated with a mere comparison of isolated metrics between firms. The Board discussed the forms and how the data can be accessed in more detail below.

Commenters generally expressed concern that proposed metrics were not all calculated from the same data sources. Some metrics were calculated on the basis of all audit engagements, others on the basis of issuer engagements, and engagement-level metrics on the basis of large accelerated and accelerated filer engagements. Some commenters suggested that calculating firm-level metrics based solely on total audit hours on large accelerated and accelerated filer engagements may result in more comparable data among firms. The Board discussed this in greater detail below.

Other commenters recommended that the PCAOB establish criteria for determining which metric areas warrant public disclosure, so as to build in flexibility over time and minimize the risk of misinterpretation. The following

⁹⁰ The proposed Audit Hours and Risk Areas metric is not included in the metric that the Board adopted, as discussed further below.

⁹¹ See Letter from PricewaterhouseCoopers LLP (June 7, 2024).

⁹² Nothing in PCAOB rules and forms, including Form FM and Form AP, provides for incorporation by reference of external documents or other materials.

criteria were among those suggested by these commenters:

- Is the metric's relation with audit quality unambiguous?
- Can the metric be appropriately interpreted on its own, without additional context (e.g., client mix or complexity—size, industry, international operations; firm's audit approach; etc.)?
- If disclosure of the metric results in behavioral change in audit firms, does research suggest the change will improve audit quality or, at least, not adversely impact audit quality?
- Will the metric require firms to develop systems, processes, and procedures that they do not already have and at a reasonable cost?
- Will the metric impose ongoing administrative burdens on engagement teams that result in a reallocation of effort away from audit quality enhancing activities?
- Will the metrics align with measures used in the system of quality control to manage the audit practice?
- Will the metrics meet the information needs of the users?
- Will the disclosure of metrics not result in the communication of proprietary information?

In responding to commenters and articulating the rationale for adopting the firm- and engagement-level metrics below, the Board considered the views of commenters, including these suggested evaluation criteria. The Board believes some of the suggested criteria would impose an unworkable framework that is inconsistent with the Board's regulatory objectives. For example, the Board does not think it is necessarily practicable to establish an "unambiguous" relationship to audit quality, as suggested, for any individual metric, nor would such an exercise be consistent with the intended uses of the metrics, which envisions their being considered as part of the total mix of information available to stakeholders. Moreover, the Board believes that imposing rigid criteria for each proposed metric imposes too high a burden and is not conducive to effective regulation. It does not permit the Board to account for facts and circumstances unique to individual metrics and their potential uses, nor does it account for the holistic manner in which the Board intends for the metrics to be used or developing information about the utility of the metrics over time.

A number of commenters recommended that the PCAOB engage in additional stakeholder outreach, sponsor pilot programs, or otherwise engage in further study and research before finalizing the metrics

requirements, or even withdraw the proposal. Based on the lengthy project history described in Section II, which includes repeated input over time from the Board's advisory groups, multiple rounds of public notice and comment, study of relevant academic literature, study of voluntary firm disclosures, and consideration of actions taken in other jurisdictions, the Board does not believe further study is necessary or that the Board's investor protection mission would be served by delaying adoption of the final rules. However, the Board will monitor and determine if further implementation resources or support is appropriate for users of these metrics.

2. Key Terms and Concepts

As described below, the Board developed certain key terms and concepts that were used in calculating the proposed metrics. Where practical and relevant, these key terms and concepts align with existing definitions in PCAOB standards and rules. In other cases, the Board has developed new definitions and new descriptions of terms specifically for use in the metrics, which are not intended to inform the interpretation of other rules, standards, or forms of the PCAOB. The Board provided the key terms and concepts along with formulas for calculating each metric to drive consistency among firms and engagement teams.

One investor-related group said that the units of account (e.g., hours, years of experience) or measurement used within the proposed metrics are sufficiently standardized and adaptable by firms as they are commonly used within audit practice or defined within the existing standards.

Some commenters raised concerns about the definitions and descriptions of the population used for various metrics or about not having a defined set of terms applicable to all standards and rules. Other commenters questioned whether the PCAOB had provided sufficient guidance to address potential variations in the interpretation and application of terminology used in the metrics or asserted that not having sufficient guidance would add complexity and challenges in calculating the metrics and understanding them or result in inconsistent reporting of metrics or lack of comparability across audit firms and audits engagements. Two of these commenters recommended that the PCAOB create a glossary of defined terms to support consistent use of terms throughout the standards and rules or conduct additional study to evaluate the defined terms in the proposal against terms already defined in other PCAOB

standards and rules. Another commenter raised a concern that defining terms and specifying computations for each metric undermines their comparability.

Some firms offered examples of areas where they suggested that clarification would be needed, which the Board discussed below in the context of the relevant metrics. In general, however, the Board continues to believe that the use of defined terms is critical to driving consistent calculation of the metrics.

Other firms questioned why different metrics are based on different underlying data (for example, total audit hours vs. total hours worked or engagement team vs. core engagement team). In general, the Board's choice of the data on which to base a metric is tailored to the intended objective of the metric, and also takes into account the practicality and potential costs associated with gathering data and calculating the metrics. The Board does not believe that metrics based on a single data set would be as clear or as informative.

The Board addresses specific concerns raised in the discussion of each metric below. The Board has clarified certain terms and concepts used or revised the descriptions of proposed terms and concepts after consideration of the specific comments received.

i. Populations Covered by the Metrics

a. Partners and Managers (Used in All Metric Areas Except for Allocation of Audit Hours and Restatement History); Staff (Used in Training Hours for Audit Personnel)

While some of the functional roles played by individuals involved in an audit are otherwise defined and used in the Board's standards (e.g., engagement partner⁹³ and EQR),⁹⁴ the Board proposed to clarify following additional functional roles referred to in the metrics to ensure consistent reporting by firms.

Partners—Partners or persons in an equivalent position (e.g., shareholders, members, or other principals) who participate in audits;⁹⁵

⁹³ See paragraph .A1 of AS 1201, *Supervision of the Audit Engagement* ("the member of the engagement team with primary responsibility for the audit").

⁹⁴ See AS 1220, *Engagement Quality Review*, for a description of the engagement quality reviewer's role.

⁹⁵ As noted in the proposing release, the Board believes this is consistent with the use of the term "partner" in the Board's auditing standards. Although the Board does not usually state expressly that partners are limited to those who participate

Managers—Accountants or other professional staff commonly referred to as managers or senior managers (or persons in an equivalent position) who participate in audits; and

Staff—Accountants or other professional staff who participate in audits and are not partners or managers.

Some engagement-level metrics differentiate between engagement partner and the other partners who participate in the audit. The Board believes the differences between the responsibilities borne by engagement partner and those of other participating partners justify presenting data for the two categories separately in those metrics. For firm-level metrics, “engagement partners” include all partners who served as the engagement partner on any audit the firm performed of an accelerated filer or large accelerated filer. Partners that are included in the metrics as an engagement partner are not included as an “other partner,” even if they served in a non-engagement partner role in other audits (in other words, partners are only counted once within any metric).

The Board adopted the definitions of partners, managers, and staff as proposed, with clarifications discussed below.

The Board solicited comment on whether the proposed definitions of partners, managers, and staff are clear and appropriate. Two commenters agreed that the proposed definitions for partners, managers, and staff are clear and appropriate, one saying that linking the definitions used in the metrics to existing definitions would help in preventing multiple definitions throughout the auditing standards. However, some commenters expressed concern that titles and roles are not consistent across firms or most firms have roles which do not clearly or obviously reconcile to the roles listed. One of these commenters also raised a concern about continuing emphasis on the engagement staffing model that currently exists, on the basis that artificial intelligence and other tools could affect the staffing of audit engagements in the future. This commenter recommended including “contractors” engaged by firms in the definition and clarifying whether the definitions are meant to be descriptions of the roles rather than legal interpretations of the roles. Another commenter recommended aligning the definitions of partners, managers and staff with the definition of engagement

in audits, as a practical matter the Board’s auditing standards apply only in those circumstances.

team, by using the phrase “who perform audit procedures” instead of “who participate in audits” to avoid inclusion of personnel who may participate in audits in an administrative or project management function, but who do not perform audit procedures. Another commenter expressed concern that audit effort associated with roles typically referred to as “national office” and “professional practice development,” especially for managers through partners, would be excluded from the definitions and calculations of the metrics.

For the definition of partners, one commenter questioned whether the definition is intended to have any alignment with ownership interests in a firm and requested clarification as to how a leadership level role such as a managing director would be classified because, in the commenter’s view, that role does not appear to meet the definition of either a partner or a manager.

For the definition of managers, the same commenter requested clarification on whether the manager title is based on the person’s general title in the firm because, for example, in certain cases an experienced supervisor may serve a manager capacity on a less complex engagement. Another commenter suggested adding a specific number of years of audit experience to the definition of managers because of the risk that firms could inflate percentage of audit hours incurred by managers by changing the titles of more junior professionals to increase the number of managers.

The Board adopted the definitions of partners, managers, and staff as proposed. Because there are differing legal structures and titles among firms, the Board is providing foundational definitions so that each firm can allocate its professionals in three levels: partners, managers, and staff. The Board believes that the vast majority of firms have these three levels, and that, although staffing models may change over time, these levels are likely to be retained for the foreseeable future. The Board also believes that other job titles, such as managing director, can be fit into the appropriate category based on the level of responsibility assigned to them. For example, in a firm where managing directors are given similar responsibilities as the firm’s principals (for example, signing authority on audit engagements), they would be treated as partners under the Board’s definition; otherwise, they would align with managers. Similarly, professionals in a firm that does not use the title “manager” would be reported as

managers if they are assigned the duties that are typically carried out by managers and senior managers at firms that do use those titles. Professionals who work under the firm’s direction and control and function as the firm’s employees, such as secondees and contractors, may or may not have these titles but would be reported based on their level of responsibility and decision-making authority. In all cases, the determination would be made based on the responsibilities, decision-making authority, and scope of duties of the person. If necessary, firms could utilize the optional narrative disclosure to describe how the firm aligned their categories of professionals with partners, managers, or staff levels.

The Board considered adding a specified minimum number of years of audit experience in the definition of manager but determined not to. Some managers qualify for promotion with fewer years of audit experience due to other relevant education or experience. The Board was concerned that building a minimum number of years of audit experience into the definition would result in people with the responsibilities and title of manager being required to be reported as staff, making the metrics less meaningful while increasing the administrative burden associated with reporting.

The Board did not use the phrase “who performed audit procedures” in the definitions of partners, managers, and staff because use of this term would exclude professionals who do not perform audit procedures—for example, partners who only conduct engagement quality reviews⁹⁶ or national office personnel in connection with certain types of consultations that are not audit procedures.

Because the definitions of managers and staff are limited to “accountants or other professional staff,” administrative personnel are not included.

In the Board’s proposal, the Board generally did not specify how to account for promotions within the reporting period from one level to another (e.g., from manager to partner),⁹⁷ although the Board noted that firms would be expected to be consistent in their approach across metrics. The only commenter to address this issue supported the flexibility

⁹⁶ Engagement quality review is not considered the performance of an audit procedure. See AS 1220.07 (The EQR “should not make decisions on behalf of the engagement team or assume any of the responsibilities of the engagement team.”).

⁹⁷ Note, however, that the Retention of Audit Personnel metric treats promotions as if they had occurred at the beginning of the year. See note to Item 4.6 of Form FM.

proposed with respect to the treatment of promotions. Consistent with the proposal, the final rules do not impose any prescriptive requirements regarding the reporting of professionals whose job title or responsibilities change during the reporting period. However, the Board believes that treating such transitions inconsistently, whether within a metric or across metrics, would be misleading and the Board expects firms to report such changes in a consistent way.

(1) Participate in Audits (Used in the Terms Partners, Managers, and Staff)

“Participate in audits” is a broad concept that would include the work of all professionals (partners, managers, and staff) that are involved in the firm’s audits, including tax personnel, information technology (“IT”) personnel, and employed specialists.

The Board proposed the phrase “participate in audits” rather than referring to the activities of individuals assigned to a specific business line, such as the firm’s audit practice, because some firms do not assign individuals to specific business lines. However, the Board solicited comment on whether the relevant population would be partners, managers, and staff of the firm’s audit practice, if the firm assigns its professionals to specific business lines.

Some commenters agreed with the phrase “participate in audits” as used in the proposal. One of these commenters suggested that, because firms have different structures, attempting to separate members of the engagement team based on a firm’s structure could lead to less comparability across metrics. One firm stated that it assigns individuals to specific business lines, and collecting data based on that assigned business line would be more practical to implement versus the proposal’s requirement to include all individuals participating in audits.

Some other commenters stated that firm-level metrics should look only to the firm’s audit practice because (i) the inclusion of other service lines in the metrics would impair comparability between firms due to the varying size and scope of non-assurance practices and (ii) the work of tax professionals and consultants would not improve the usefulness of these metrics for the purposes outlined in the Board’s proposal. Another commenter requested clarification on how to account for individuals who move between audit support roles and engagement-facing functions.

The final definitions of “partners,” “managers,” and “staff” include the

phrase, “who participate in audits,” as proposed. Because some firms do not assign partners and other professionals to a specific business line, the Board believes this approach is the best way to drive consistent reporting by firms with different organizational structures.

In the proposal, the Board clarified that members of the engagement team who participate in audits would include every partner and manager who worked on any aspect of the audit, even if their involvement was extremely limited. The Board proposed not to provide a participation threshold, such as a minimum number of hours, because the Board believes, based on the objectives of these metrics, that the metrics should capture all partners, managers, and staff who participate in audits in any capacity. However, the Board solicited comment on whether the concept should include a participation threshold.

One commenter agreed there was no need to create a minimum threshold for participation on the basis that it would increase the complexity and cost of calculating the metrics without a corresponding benefit. Another commenter recommended establishing a minimum threshold for participation because exclusion of professionals with certain firm roles (e.g., firm leadership, national office, or specialist line of service individuals with limited participation during the year in any specific engagement) would not reduce the reliability of the metric. This commenter further recommended creating a minimum threshold for purposes of firm-level metrics, such as individuals who spent more than 10% of their time participating on audit engagements, and engagement-level metrics (e.g., similar to the concept of core engagement team). This commenter and another commenter recommended the additional threshold as optional for firms to use due to cost-benefit considerations, particularly for smaller firms, and should only be considered if additional thresholds allow for simpler aggregation or preparation of the data.

The Board did not adopt additional thresholds to be used for firm-level or engagement-level metrics, except for the concept of core engagement team used in certain engagement-level metrics discussed below. The objectives of the five metrics that use “partners, managers, and staff of the firm” are to understand the firm’s professionals who participate in audits in totality, and the Board believes imposing a threshold on what counts as participation would defeat that objective.

(2) Partners, Managers, and Staff “of The Firm” (Used in Workload, Training Hours for Audit Personnel, Experience of Audit Personnel, Industry Experience, and Retention of Audit Personnel)

Because firm-level metrics provide information about the firm, in calculating some firm-level metrics, the Board proposed to include partners, managers, and staff “of the firm,” which refers to individuals participating in audits who work for the firm or work under the firm’s direction and control and function as the firm’s employees (e.g., secondees and contractors), regardless of whether the audits are performed under PCAOB standards or other auditing standards.⁹⁸ The Board believes including individuals in the firm-level metrics who participate on any firm audit is appropriate because these metrics would provide information about the firm and not about specific engagements (for example, in the area of firm-level industry experience, which would be relevant across a firm’s entire audit practice). The Board added a new section to Part III, Terminology in Form FM to clarify the meaning of these phrases. The Board also clarified that participation in audits means any involvement (including, for example, consultation on specific matters), and thus may include individuals outside the engagement team, such as national office personnel.

b. Engagement Team (Used in Partner and Manager Involvement)

The Board proposed to provide information about partners and managers on the engagement team, a term defined in AS 2101, *Audit Planning*.⁹⁹ The Board believes it is

⁹⁸ This should be interpreted consistently with “firm personnel,” as defined in QC 1000.A5.

⁹⁹ The “engagement team” is defined in AS 2101.A3 [as adopted by the Board in Planning and Supervision of Audits Involving Other Auditors and Dividing Responsibility for the Audit with Another Accounting Firm, PCAOB Rel. No. 2022–002 (June 21, 2022)], to take effect with respect to audits of fiscal years ending on or after December 15, 2024] as follows (footnotes omitted):

.A3 Engagement team—

a. Engagement team includes:

1. Partners, principals, and shareholders of, and accountants and other professional staff employed or engaged by, the lead auditor or other accounting firms who perform audit procedures on an audit or assist the engagement partner in fulfilling his or her planning or supervisory responsibilities on the audit pursuant to this standard or AS 1201, *Supervision of the Audit Engagement*; and

2. Specialists who, in connection with the audit, (i) are employed by the lead auditor or an other auditor participating in the audit and (ii) assist that auditor in obtaining or evaluating audit evidence

appropriate to provide metrics related specifically to the engagement team because this would provide investors and other stakeholders with relevant information related to the audit as a whole, who perform audit procedures on the audit or assist in planning or supervising the audit.

One commenter suggested clarifying whether “engagement team” for purposes of this rule includes internal specialists. Another commenter stated that the proposal appeared to provide an

alternative definition of partners and managers on the engagement team compared to AS 2101, which is aligned to other PCAOB standards, and recommended providing clarity as to the treatment of specialists. Another commenter expressed concern that the definition of “engagement team” under AS 2101 could have ramifications for the calculation of engagement-level metrics, but did not provide any indication of what those ramifications might be.

The Board adopted the AS 2101 term “engagement team,” as proposed. The definition of engagement team in AS 2101 includes specialists who, in connection with the audit, (i) are employed by the lead auditor or an other auditor participating in the audit and (ii) assist that auditor in obtaining or evaluating audit evidence with respect to a relevant assertion of a significant account or disclosure. It excludes engaged specialists.

Figure 2. Engagement Team Members

Examples of Engagement Team Members	Examples of Parties Who are NOT Engagement Team Members
- Engagement partner - Personnel from the engagement partner's firm who perform audit procedures on the audit - Personnel of accounting firms and individual accountants outside the engagement partner's firm who perform audit procedures on the audit supervised under AS 1201 - A firm professional in the national office or centralized group in the firm (including within the firm's network) who performs audit procedures on the audit or assists in planning or supervising the audit	- Auditor-engaged specialists¹⁰⁰ - Engagement quality reviewer and those assisting the reviewer¹⁰¹ - Service auditors of a third-party service organization¹⁰² - A firm professional who performs a contemporaneous quality control function (e.g., internal inspection or quality control review) but does not perform audit procedures or help plan or supervise the audit work - Individuals employed or engaged by the company being audited, such as a company's internal auditors, a company's specialists, and a company's consultants¹⁰³

with respect to a relevant assertion of a significant account or disclosure.

b. Engagement team does not include:

1. The engagement quality reviewer and those assisting the reviewer (to which AS 1220, *Engagement Quality Review*, applies);

2. Partners, principals, and shareholders of, and other individuals employed or engaged by, another accounting firm in situations in which the lead auditor divides responsibility for the audit with the other firm under AS 1206, *Dividing Responsibility for the Audit with Another Accounting Firm*; or

3. Engaged specialists.

c. Core Engagement Team (Used in Workload, Training Hours for Audit Personnel, Experience of Audit Personnel, and Industry Experience)^{100 101 102 103}

For some engagement-level metrics, the Board proposed to include information about members of the “core engagement team” rather than the full “engagement team,” so as to focus the metrics on the individuals who make the primary decisions regarding planning and performance of the audit and determine the final conclusions supporting the auditor’s opinion. With

the “core engagement team” concept, the Board intends to provide more meaningful and focused data by excluding information about certain partners and managers with lesser participation. The Board also simplifies the data collection effort by limiting these metrics to firm personnel.

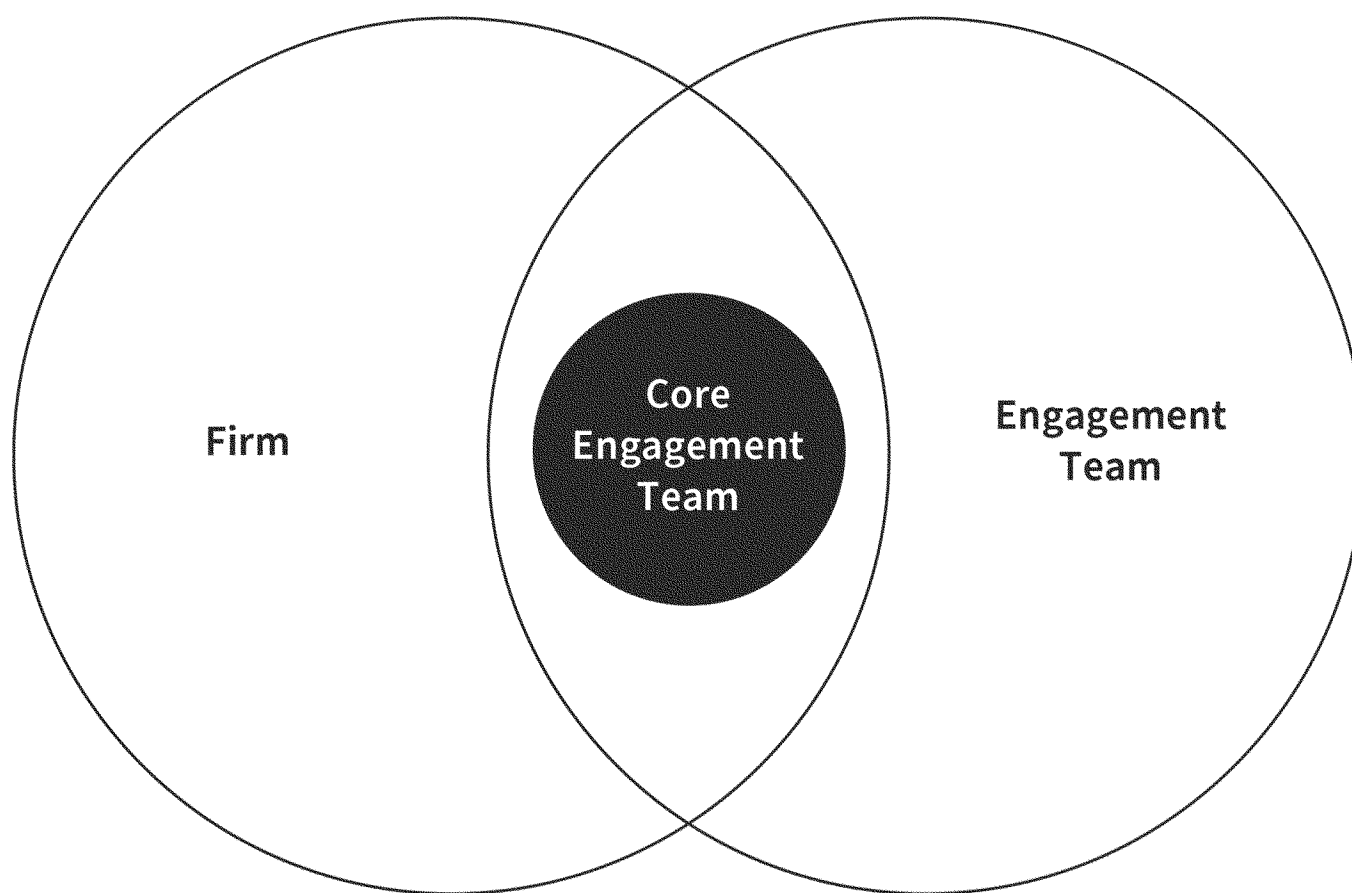
The Board proposed that the core engagement team would include the engagement partner and members of the engagement team who are partners or employees of the firm issuing the audit report. In addition, under the proposal, core engagement team would include

either a partner (excluding the engagement partner as described above) who worked ten or more hours on the engagement or a manager or staff who worked on the engagement for 40 or more hours or, if less, 2% or more of the total hours.¹⁰⁴

Figure 3 illustrates how partners, managers, and staff used in the calculation of the metrics, relate to the firm, engagement team, and the core engagement team.

Figure 3. Relationship Between the Groups of Individuals Included in Metric Calculations

Partners, Managers, and Staff



The Board solicited comments on whether the proposed definition of core engagement team, and the proposed participation thresholds for inclusion in

the core engagement team, were appropriate.

One commenter agreed that at the engagement level, metrics related to only the core engagement team will be

more useful to investors and other stakeholders. Two commenters supported the proposed 10-hour minimum threshold for partners other than engagement partners. One of these

¹⁰⁰ See AS 1210, Using the Work of an Auditor-Engaged Specialist.

¹⁰¹ AS 1220 applies to those persons.

¹⁰² AS 2601, *Consideration of an Entity's Use of a Service Organization*, sets forth the auditor's responsibilities with respect to using the work of service auditors who issue reports on the controls of a third-party service organization.

¹⁰³ Because of their roles at the company, the work of individuals employed or engaged by the company is not subject to supervision under AS 1201; they are not considered members of the engagement team under the adopted definition. PCAOB standards include requirements regarding the auditor's use of work performed by some of these individuals. See, e.g., AS 1105, *Audit*

Evidence, Appendix A; AS 2201, *An Audit of Internal Control Over Financial Reporting That Is Integrated With An Audit of Financial Statements*; AS 2605, *Consideration of the Internal Audit Function*.

¹⁰⁴ See below for the discussion of “total audit hours.”

also supported the proposed threshold for managers and staff. This commenter suggested, however, that the Board includes only partners and employees of the lead audit firm and exclude component auditors.

One commenter suggested aligning the definition of “core engagement team” with the “lead auditor” definition in amended AS 1201 and AS 2101. Another commenter indicated that the creation of thresholds would conflict with other existing aspects of Form AP. This commenter further stated there would be challenges for firms to accumulate and report this data, specifically obtaining the data from firms that are not required to report on Form FM or Form AP and additional time may be needed for implementation of these metrics.

Another commenter recommended replacing the phrase “who worked” in the proposed definition to “who performed audit procedures” to be consistent with the definitions of engagement team because this commenter was concerned that wording inconsistencies may cause confusion as to whether the same criteria apply across the various definitions. One commenter indicated that it is not clear on what basis the proposed threshold is determined and further indicated that the concept of core engagement team suggests that certain work in the engagement would be either not important or optional and recommended further study.

The proposal also asked whether other individuals involved in the audit (e.g., individuals in the firm’s national office, the EQR, employees of shared service centers, or individuals involved in loaned staff arrangements and alternative practice structures) should be treated differently in the metrics and, if so, how they should be considered in the definition of core engagement team.

One commenter sought clarification as to whether shared service center employees should be included in the definition of core engagement team and recommended considering the nature and use of centralized services and how service centers continue to evolve across a changing professional landscape. Another commenter suggested including the EQR and specialists in the core engagement team but not treating them differently from other individuals involved in the audit. Two commenters recommended the definition to simply include all individuals who charged time to the engagement or whose cost was included within the engagement to minimize the cost of reporting the metrics, but one of the two commenters recommended excluding the quality functions such as the EQR to avoid any impression that they are part of the engagement team.

The Board adopted the proposed definition of core engagement team substantially as proposed:

1. The engagement partner and
2. Members of the engagement team who are:
 - a. Partners or employees of the registered public accounting firm issuing the audit report (or individuals who work under that firm’s direction and control and function as the firm’s employees); and
 - b. Either of the following:
 - i. A partner (excluding the engagement partner) who reported ten or more hours on the engagement; or
 - ii. Managers and staff who reported 40 or more hours on the engagement or, if less, 2% or more of the total audit hours.

As suggested by two commenters, the Board reformatted the presentation of core engagement team to clarify that the engagement partner is part of the core engagement team. In addition, the Board modified the descriptions of core

engagement team members by substituting “who reported” for “who worked” to make clear that the basis for determining whether hours thresholds have been reached is time reported in the firm’s timekeeping system. The Board did not align the definition of “core engagement team” with the “lead auditor” definition because including information from all of the partners and managers of the firm, rather than just those with significant participation in the engagement, would potentially skew or dilute the data, making the metrics less meaningful.

As the Board proposed and the Board adopted, the term core engagement team excludes other auditors. As a result, there will be no need to obtain data from other auditors, and the definition will not encompass firms that are not required to file Form AP. Under current reporting requirements for Form AP, the lead auditor has to accumulate all of the hours worked on issuer engagements.¹⁰⁵ While it will require some disaggregation of this data, the Board does not believe reporting the data for the engagement team for Partner and Manager Involvement and total audit hours for Allocation of Audit Hours will create a significant challenge for firms. Regarding individuals at shared service centers, if partners or managers employed by a shared service center meet the definition of core engagement team, they will be included. As further discussed below, the Board did not include the EQR in the definition of the “core engagement team”; the core engagement team is a subset of the engagement team, and the EQR is not a part of the engagement team.

Figure 4. Core Engagement Team Members

¹⁰⁵ See discussion of “total audit hours” used for Form AP reporting below.

Example firm-level calculation:Total audit hours of the firm's accelerated filer and large accelerated filer engagements

Accelerated filer and large accelerated filer engagements	Total Audit Hours	Total Audit Hours incurred by partners and managers on the engagement team
Company X	3,900	1,400
Company Y	2,500	625
Company Z	1,500	300
Total	7,900	2,325

Total audit hours incurred by partners and managers on the engagement team for all accelerated filer and large accelerated filer engagements / Total audit hours for all accelerated filer and large accelerated filer engagements

Calculation: $2,325 / 7,900 = 29\%$

Example firm-level reporting for Form FM:

Partner and Manager Involvement	Percentage of total audit hours for partners and managers for all accelerated filer and large accelerated filer engagements	29%

Example engagement-level calculation:Details for total audit hours of the accelerated filer or large accelerated filer engagement

- Lead auditor issues the audit report for Company X.
- Total audit hours for the engagement: **3,900**

Details for partners and managers

d. Engagement Quality Reviewer (Used in Experience of Audit Personnel and Industry Experience)

The objective of the EQR is to perform an evaluation of the significant judgments made by the engagement team and the related conclusions reached in forming the overall conclusion on the engagement and in preparing the engagement report, if a report is to be issued, in order to determine whether to provide concurring approval of issuance.¹⁰⁷ The EQR must possess the level of knowledge and competence related to accounting, auditing, and financial reporting required to serve as the engagement partner on the engagement under review.¹⁰⁸ While reporting on specific hours spent by the EQR or including the EQR's time in engagement-level metrics may have a negligible quantitative impact, the Board believes reporting on EQR's competency for two of the engagement-level metric areas will be important and valuable for stakeholders.

Because the EQR is not a member of the engagement team as defined in AS 2101, EQRs were not included in the proposed metrics when the proposed metrics required disclosure of the engagement team's information unless the disclosure of EQRs was specifically called out in the proposed metric area. Therefore, the Board solicited comment about whether EQRs should be added to any of the proposed metrics, separately or together with a group such as the engagement team.

Some commenters agreed that EQRs should be excluded from the engagement-level metrics. These commenters indicated not to add them as a separate category because the EQR is not a part of the engagement team as defined by AS 2101 and the inclusion of the EQR would be inconsistent with AS 2101.

One commenter suggested that the EQR should be included in the metrics but presented separately, to ensure that there is no impression that the EQR is not independent. One commenter recommended including EQR in firm-level metrics because firms generally do not assign partners to solely perform engagement quality reviews and firm-level metrics should include all partners with no requirement to allocate their time spent between the roles of an engagement partner and an EQR. Two investor-related commenters generally supported including EQR hours in the metrics. Another commenter questioned

the rationale for not including metrics relating specifically to engagement quality reviewers, despite the fact that they are not part of the engagement team.

In the final requirements, EQRs are included in the two experience-related metrics (Experience of Audit Personnel and Industry Experience), where the Board believes that the information would be significant to users. EQRs are not included in other metrics, primarily due to their quantitatively insignificant impact on the metrics and to avoid any confusion regarding whether they are part of the engagement team. For metrics that depend on total audit hours (*i.e.*, Partner and Manager Involvement and Allocation of Audit Hours), this approach also aligns with the reporting required for purposes of Form AP, from which EQRs are excluded.

ii. Total Audit Hours (Used in Partner and Manager Involvement and Allocation of Audit Hours)

For several metric areas, the Board proposed to use "total audit hours," which would be the same as the hours used to compute the extent of participation in an audit of other accounting firms in Form AP.¹⁰⁹ Total audit hours include hours attributable to: (1) the financial statement audit; (2) reviews pursuant to AS 4105, *Reviews of Interim Financial Information*; and (3) the audit of ICFR pursuant to AS 2201.¹¹⁰

Under the proposal, some firm-level metrics were based on total audit hours across all issuer engagements while others were based on specific subsets of total audit hours (*e.g.*, partner and manager hours). The Board also clarified that some engagement-level metrics would also use a subset of total audit hours (*e.g.*, those incurred by partners and managers, on certain areas of the audit, or within stated time periods before or after the issuer's year end).

The Board adopted the definition of total audit hours as proposed.

Two commenters criticized the use of hours in metrics. One expressed concern that basing metrics on hours

would encourage stakeholders to focus on time spent rather than on whether the work was effective, and potentially exacerbate the notion that auditors should reduce the hours spent on an engagement. The other, while generally not objecting to the use of the hours in specific metrics, asserted that many firms have moved away from the burden of time reporting and that there is no incentive to track time on fixed fee engagements. The Board continues to believe that basing certain metrics on audit hours is appropriate. It will allow firms to leverage systems already in place for purposes of Form AP reporting and human capital management. Moreover, the Board is not aware of any alternative method of tracking auditor work that is commonly accepted by firms and could be implemented without the creation of entirely new systems.

Commenters responding to the specific questions in the proposal on total audit hours generally expressed support for using Form AP hours for the total audit hours in the metrics. A few commenters recommended including engagement quality review hours in total audit hours. A commenter stated that hours from shared service centers should be excluded from both the partner and manager involvement metrics. A few commenters asked that the Board either include or exclude certain specialist hours in total audit hours. Two commenters suggested that hours spent on quarterly reviews should either be excluded or disaggregated, one stating that otherwise the metric area related to allocation of audit hours would generally show that most hours were incurred before year end. Another commenter requested clarification as to whether hours spent on quarterly reviews are included or excluded from total audit hours, stating that if excluded, firms may need to implement more detailed time tracking mechanisms or estimations of time between quarterly review and year-end audit procedures.

In general, as required for Form AP, total audit hours is comprised of the hours of the lead auditor, other accounting firms participating in the audit with whom the principal auditor does not divide responsibility for the audit, and nonaccounting firm participants that assist the principal auditor or other accounting firms. Consistent with the calculation of total audit hours for Form AP, total audit hours exclude hours incurred by certain persons and entities. In addition, existing Form AP includes reviews performed pursuant to AS 4105 because these reviews are an integral part of the overall audit process. The Board

¹⁰⁹ See Part IV of Form AP.

¹¹⁰ "Total audit hours" [as amended and adopted by the Board in PCAOB Rel. No. 2024-005, to take effect on December 15, 2025] exclude the hours incurred by: (1) the engagement quality reviewer; (2) specialists engaged, not employed, by the firm; (3) accounting firms in performing the audit of entities in which the issuer has an investment that is accounted for using the equity method; (4) internal auditors, other company personnel, or third parties working under the direction of management or the audit committee who provided direct assistance in the audit of internal control over financial reporting; and (5) internal auditors who provided direct assistance in the audit of the financial statements.

¹⁰⁷ See AS 1220.02.

¹⁰⁸ See AS 1220.05.

continues to believe that using total audit hours, as already defined by Form AP and collected by firms, will provide an appropriate and cost-effective basis for calculating metrics.

Commenters, mostly firms and firm-related groups, noted that several metric areas use total audit hours, which includes information from other auditors. According to these commenters, referring to such metrics as “firm-level metrics” is misleading, and they recommended the firm-level metrics be limited to data related solely to the firm filing the Form FM and exclude information from other accounting firms. The Board is retaining the label of “firm-level metrics” for the metric areas in question as the Board believes it is important to include all of the relevant information for the lead auditor’s engagements. In addition, the Board believes this information will provide key insights into the way that engagements are conducted by the firm that is the lead auditor.

iii. Terms Used in Metrics

In addition to the terms discussed above, many of the terms used in the metrics are defined elsewhere in the Board’s standards and rules. Other terms will be defined specifically for use in the metric calculations and may differ from the way such terms are used elsewhere in PCAOB rules and standards.¹¹¹ Terms that are used in only one metric are discussed in greater length below, in the context of discussing the relevant metric. The Board has italicized the terminology in the final calculations.

3. Metric Descriptions and Calculations

This section describes the firm-level and engagement-level performance metrics the Board adopted. The Appendix provides illustrative examples to show how metrics would be calculated based on specific facts and circumstances presented therein.

a. Partner and Manager Involvement

Partners and managers are responsible for oversight of the engagement team, which includes less experienced staff. Spending time to oversee the work of the audit staff is critical to the engagement. Included in this oversight is the engagement partner’s responsibility to exercise due professional care related to supervision

and review of the audit, including evaluating whether significant findings or issues are appropriately addressed and determining that the significant judgments and conclusions on which the auditor’s report is based are appropriate and supported by sufficient appropriate audit evidence.¹¹² Less extensive supervision raises the risk of less effective audit procedures. With a lower ratio of senior engagement team time to staff time, the risk may be greater that partners and managers may not be devoting sufficient time to supervise and review staff work and evaluate audit judgments. Academic research also suggests that greater partner or manager involvement in the audit is positively associated with proxies for the quality of the audit.¹¹³

The proposal set forth requirements for firms to calculate firm-level and engagement-level metrics for the percentage of total audit hours incurred by partners and managers. As described in the proposal, this metric area could provide users with information regarding each firm’s oversight of their engagements and the supervision of less experienced engagement team members. The Board adopted this metric area substantially as proposed, with one modification discussed in more detail below.

Commenters generally agreed with requiring public reporting of the proposed firm-level metrics for Partner and Manager Involvement. Investor-related commenters stated that disclosure of hours worked by senior

professionals relative to more junior staff across the firm and on the engagement is valuable. One investor-related group noted that information regarding the hours worked by senior professionals who have more experience in making judgments and evaluating estimates relative to more junior staff provides important insights into the oversight, supervision, and review of the engagement team. One commenter agreed that the proposed metrics would provide useful information to investors, audit committees, or other stakeholders because it would provide a salient indicator of audit quality. Another commenter agreed that the firm-level metric is clear and appropriate because it provides an indication of the level of involvement of partners and managers in the firm’s audit engagements. At the same time, a few commenters were concerned that the engagement-level metric could be misunderstood because the level of supervision and review should vary based on the nature of the company (e.g., size and complexity), the nature of the work assigned to engagement team members, the risks of material misstatement, and the knowledge, skill, and ability of each engagement team member. Further, a commenter stated that the engagement-level metric would not provide meaningful information without contextual information obtained through a discussion with the audit committee.

The Board solicited comment on whether data for partners and managers should be presented separately, including whether there should be a separate calculation for the engagement partner. Two commenters expressly supported this disaggregation, one stating that because the engagement partner is the person signing the opinion, it would appear to be more consistent to separate this data. The other commenters on this topic said that further disaggregation of the involvement of partners and managers is not warranted and could create unnecessary complexity. For example, a commenter stated that segregation of involvement by levels in the firm does not provide incremental value and would dilute or potentially mischaracterize what can be inferred from this metric (e.g., disaggregation of the engagement partner role is not likely to be meaningful due to the engagement partner’s ability to have assistance). Two commenters expressed concern that adding up partner and manager data and calculating these metrics for all issuer engagements could be very time consuming and unnecessarily increase

¹¹² See *General Responsibilities of the Auditor in Conducting an Audit and Amendments to PCAOB Standards*, PCAOB Rel. No. 2024-004 (May 13, 2024), as adopted by the Board and approved by the SEC, to take effect with respect to audits of fiscal years beginning on or after December 15, 2025, at 8-11 (describing responsibilities of engagement partners under existing PCAOB standards) and 17 (describing clarification for the existing responsibilities of engagement partners); see also, e.g., *In the Matter of Melissa K. Koepfel, CPA*, PCAOB File No. 105-2011-007, at 78 (Dec. 29, 2017) (concluding that, as the individual with final responsibility for the audit, the engagement partner must act with due professional care to ensure that the audit team performs all required audit procedures).

¹¹³ See, e.g., a research paper, Joshua Khavis, Mengtian Li, and Brandon Szerwo, *Manager Staffing Leverage at the Audit Office and Audit Quality*, available at https://papers.ssrn.com/sol3/cfm?abstract_id=4856541; a study using Korean data, Suyon Kim, *Does Engagement Partners’ Effort Affect Audit Quality? With a Focus on the Effects of Internal Control System*, 9 *Risks* 225, (2021); a study using Japanese data, Sarowar Hossain, Kenichi Yazawa, and Gary S. Monroe, *The Relationship Between Audit Team Composition, Audit Fees, and Quality*, 36 *AUDITING: A Journal of Practice and Theory* 115, (2017); and Agnes WY Lo, Kenny Z. Lin, and Raymond MK Wong, *Does Availability of Audit Partners Affect Audit Quality? Evidence from China*, 37 *Journal of Accounting, Auditing & Finance* 407, (2022).

¹¹¹ For example, the Board adopted the definition of “partner” to include only persons who participate in audits. While the Board believes that is consistent with the use of that term in the Board’s auditing standards (see footnote above), it is narrower than the use of the term in connection with registration and reporting requirements.

compliance costs. Another commenter expressed concern that further breakdown by role could lead to more inconsistencies in reporting across engagements (e.g., differences in how firms are structured, such as a managing director role). Commenters also recommended further study by the PCAOB.

The Board notes, in response to commenter concerns about the need for further study, there is extensive academic literature on this topic and widespread support among investor-related groups (see above discussion). The Board does not believe that adding up partner and manager data and calculating and reporting these metrics will unnecessarily increase compliance costs as firms are already required to track these hours in aggregate for purposes of Form AP reporting. While the Board acknowledges the importance of the engagement partner's role, as this person is primarily responsible for the engagement as evidenced by the fact that they sign the opinion and is required to be identified on Form AP, the Board continues to believe that the aggregation of partner and manager involvement and reporting of one percentage provides a more holistic picture of the overall supervision and review of the audit engagement. The Board agrees with most commenters who said that further disaggregation of the involvement of partners and managers is not warranted.

Some commenters, mostly firms and firm-related groups, suggested excluding hours from other accounting firms and focusing only on the involvement of partners and managers of the reporting firm. These commenters were concerned that in situations where accounting firms outside the lead auditor's network are involved, both the firm- and engagement-level metrics would require information from outside the lead auditor's system of quality control. Another commenter requested that firms should present partner and manager involvement across high-, medium-, and low-risk engagements. According to this commenter, it would enhance comparability across firms.

The Board believes the metric area on partner and manager involvement could be less informative or even potentially misleading if it were based only on the lead auditor, rather than the entire engagement team (including other auditors). Moreover, since relevant data in aggregated form is already collected for purposes of Form AP reporting, it is subject to existing quality controls over firm reporting. The Board does not believe the additional administrative burden of reporting partner and

manager hours will be significant. As to the suggestion to present partner and manager involvement across different engagement risk profiles, the Board notes there is no requirement in PCAOB standards or rules for such categorization and no established framework for differentiating among engagements in that way. Therefore, the Board does not believe this suggestion would yield comparable information. However, firms will have the ability to provide context in an optional narrative disclosure if they believe information as to relative risk profiles is helpful in interpreting the metric.

The Board adopted the firm- and engagement-level metrics for partner and manager involvement substantially as proposed. The Board believes they will provide useful information to assist in understanding hours worked by senior professionals relative to more junior staff and gauging the associated risks.

However, the final requirements have been modified in one respect, to narrow the population of engagements covered by firm-level reporting. Considering comments received expressing concern with the potential lack of comparability across different types of issuers, the Board has limited firm-level reporting to only engagements for accelerated filers and large accelerated filers—that is, the engagements for which engagement-level reporting is required—rather than all issuer engagements. The Board believes this narrower scope will yield better alignment between firm- and engagement-level metrics and more comparable information across engagements. Additionally, this modification should further reduce data collection and reduce the administrative burden associated with calculating and reporting these metrics.

(See Exhibit A, “Partner and Manager Involvement.”)

b. Workload

The Board believes that in general, the greater the workload, the greater the likelihood that members of the engagement team may have insufficient time to appropriately perform the necessary audit procedures and make the appropriate judgments that an audit requires.

Professionals may become less effective when working long hours,¹¹⁴

¹¹⁴ See, e.g., Julie S. Persellin, Jaime J. Schmidt, Scott D. Vandervelde, and Michael S. Wilkins, *Auditor Perceptions of Audit Workloads, Audit Quality, and Job Satisfaction*, 33 *Accounting Horizons* 95, 101 (2019) and Brant E. Christensen, Nathan J. Newton, and Michael S. Wilkins, *How Do Team Workloads and Team Staffing Affect the Audit? Archival Evidence from U.S. Audits*, 92

and such an environment may affect the level of due professional care they exercise. For example, a heavy workload may create pressure on the audit staff to focus too much on efficiency in executing auditing procedures rather than on ensuring the effectiveness of those procedures or on supervising less experienced engagement team members.

The Board believes heavy workloads could prevent an engagement partner from providing adequate and focused attention to an audit engagement. The information provided by the metrics at the engagement level may help audit committee members and other stakeholders understand the various activities competing for an engagement partner's time.

Studies find that excessive audit partner workloads can have negative impacts on audit effectiveness, although the literature also suggests that partners may be less affected than more junior staff.¹¹⁵

The proposal set forth requirements for firms to calculate firm-level and quarterly engagement-level workload metrics for (i) engagement partners and (ii) other partners, managers, and staff. The Board proposed separate reporting for engagement partners at both the firm and engagement level, as they have primary responsibility for the audit. At the engagement level, the Board proposed limiting reporting to the core engagement team, which the Board believes would be more useful to investors and other stakeholders than information regarding the entire engagement team (some of whom may have extremely limited participation in the audit).

The proposed calculations for workload at both the firm and engagement levels included all working hours incurred during the relevant periods: hours incurred on issuer and non-issuer engagements as well as on training, practice development, staff development, or other firm activities.¹¹⁶

The Board adopted this metric area substantially as proposed, with modifications discussed in more detail below.

Accounting, Organizations and Society 101225, (2021).

¹¹⁵ See, e.g., Seokyoung Hwang and Philip Keejae Hong, *Auditors' Workload and Audit Quality under Audit Hour Budget Pressure: Evidence from the Korean Audit Market*, 26 *International Journal of Auditing* 371, (2022); John Goodwin and Donghui Wu, *What is the Relationship Between Audit Partner Busyness and Audit Quality?*, 33 *Contemporary Accounting Research* 341, (2016); Persellin, et al., *Auditor Perceptions*.

¹¹⁶ Hours worked for purposes of the proposed metrics excluded hours that were not considered working hours (e.g., paid time off and holiday time).

Some commenters agreed with requiring firm- and engagement-level metrics in this area, stating that the proposed workload metrics ensure there is appropriate attention and focus on audit engagements. One commenter asserted that the proposed firm-level metric is significantly less complicated than the engagement-level metric and should be sufficient for assessing a firm's capacity to accept new clients. However, the same commenter expressed concern that the proposed engagement-level metric is very complicated and would take considerable effort for firms to compile and calculate for every engagement. Further, the commenter expressed concern that the cost of calculating this metric likely exceeds any benefit. Another commenter stated that just having higher workload during peak months does not necessarily impact audit quality.

While some firms and firm-related groups generally expressed support for public disclosure of the firm-level workload metrics, they also expressed concerns with the metrics or requested modifications be considered for firm-level workload calculations. Some firms and firm-related groups questioned what benefits stakeholders would gain from the information. Commenters suggested that alternative measures, such as an annual utilization metric as reported in firms' audit quality reports, may be more meaningful to reflect how a firm is measuring and monitoring the activities competing for their professionals' time.¹¹⁷ Further, some of these commenters expressed concern about the effort involved in collecting, analyzing, and reporting the data for average weekly hours on a quarterly basis.

The Board continues to believe that disclosing the firm-level workload metrics quarterly as opposed to annually will provide a comparative basis for the engagement-level metrics. At the engagement level, the Board believes that information for members of the core engagement team will be especially useful to investors and other stakeholders for the quarter in which the auditor's report is issued, usually the busiest time of the year for the auditor. The Board also believes that a workload metric based on actual hours worked (*i.e.*, productivity) versus a utilization metric based on a standard number of work hours (*e.g.*, a 40-hour

week, including time off) will provide more useful information.

The Board solicited comment on hours worked, including whether the proposed term should be changed. Some commenters expressed support for including all hours worked including time spent on audits and time spent on activities other than audits. One commenter expressed concern that many firms do not require detailed recording of "non-chargeable" time, so the disclosure of hours worked will be a rough estimate at best for some firms. This commenter expressed a view that the benefits of the workload metrics would not justify the burden of asking firm professionals to spend more time and energy tracking all of their "non-chargeable" time. Another commenter suggested that the Board break out training and development from the rest of the hours worked. Further, a commenter stated that a clearer definition of the proposed term "hours" is required if this metric is to be used. For example, firms may be inconsistent on how they report hours spent on travel for work purposes. A commenter stated the proposed metrics exclude time off, which is a key component of workload and may vary significantly between levels. By excluding time off or leaves of absences, this commenter expressed concern that the workload metric would not provide consistent and comparable information.

The Board continues to believe it is important to capture the sum of hours that are incurred on engagements and hours spent on training, practice development, personnel development, or other firm activities in the workload metrics, while excluding holiday or other paid time off (*i.e.*, when individuals would not be working). The Board believes the potential additional administrative burden of including "non-chargeable" time for partners and managers on issuer engagements (firm-level workload metric) will not be burdensome based on the Board's understanding that many firms track this time already. Disaggregating the hours worked, as suggested by one commenter, will further complicate the workload metrics. Finally, the Board believes the definition of hours worked is sufficiently clear and does not require further explanation for certain types of non-engagement hours.

Firms and firm-related groups stated that because the proposed workload metrics were based on the definitions of partner, manager, and staff, which determination is based on "participation in the audit," it was not clear whether and where certain individuals should be included in this metric as they move

between audit support and engagement-serving functions (*e.g.*, individuals who provide tax reporting and compliance services to other clients). One commenter stated that including these individuals would dilute the value that could be derived from metrics related to workload, as peak periods for these other services and activities would mask meaningful trends in the workload of other members of the engagement team whose primary responsibility is performing audit work.

At the engagement level, the Board does not believe the commenter's concern is relevant because the individuals in question are not likely to be part of the core engagement team (see above for discussion of the definition). At the firm level, the Board believes the workload of these individuals will still be relevant as they presumably shift between engagement work and non-engagement work as needed. Further, trying to figure out a systematic approach for excluding these individuals will only add to the administrative burden of gathering the data and calculating and reporting the metrics.

Other commenters requested that the Board reconsider the inclusion in the workload metrics of partners and professional staff who do not work on issuer audits. One expressed concern that comingling statistics associated with professionals who do not participate in any way on the firm's issuer audits would be contrary to the stated objective of "advancing investor protection and promoting the public interest by enabling stakeholders to make better-informed decisions . . ." Another stated that the metric as proposed would encompass individuals who work on engagements other than issuer audits (*e.g.*, audits of non-issuer employee benefit plans or governmental entities), who may have a different "busy season" than individuals working on issuer audits. As a result, this metric may show a relatively consistent average weekly hour throughout the year across the firm, even though specific individuals may have more variability in their schedules.

The Board streamlined the workload metrics in some respects, in part based on commenter input. To provide a more useful metric, the Board is limiting the firm-level metric to partners and managers who participate in accelerated filer and large-accelerated filer engagements for which the firm issued an audit report. The Board believes this will provide information that will be comparable to the engagement level information. The Board excluded staff from the firm- and engagement-level

¹¹⁷ One example of a utilization metric reported in firms' audit quality reports is "average annual hours worked by audit professionals over 40 hours per week."

calculations in order to focus the metric area on the more senior members of the engagement team—those individuals determining that the significant judgments and conclusions on which the auditor's report is based are appropriate. In addition, this will also lessen the administrative burden of gathering the data and calculating and reporting the metrics.

Some commenters found the proposed requirement to segregate engagement partners from other partners in the proposed calculations to be impractical to implement and not a meaningful distinction in the metric. A commenter pointed out that segregating the roles may create a practical challenge in calculating the metrics, as in practice a large portion of partners generally fill both roles. Another commenter asserted that because the proposal provided no justification for distinguishing between “engagement partners” and “other partners,” the distinction between engagement and non-engagement partners should be eliminated for purposes of calculating the firm-level workload metric.

The Board adopted a firm-level metric that does not require differentiating between engagement partners and other partners in reporting on workload because the Board questions whether useful information could be derived from that distinction, given that many partners serve in both capacities. In addition, the Board understands it may be a difficult and manual process to identify and track the distinction between the types of partners. As stated above, the Board continues to believe it is important for firms to disclose their engagement partners' workloads at the engagement level. Overall, the Board believes the modifications will improve or maintain the value of the information provided by this metric area compared to the proposal, while reducing the administrative burden associated with gathering data and calculating and reporting the metrics.

(See Exhibit A, “Workload.”)

c. Training Hours for Audit Personnel

The professional development training auditors receive should enhance their competence and therefore their ability to perform effective audits. Competence encompasses having the knowledge, skill, and ability to perform assigned activities in accordance with applicable professional and legal requirements and the firm's policies and procedures.¹¹⁸ Training is a critical

aspect of developing auditor competence.

Licensing requirements for continuing education for public accountants to obtain and retain certification speak to the relationship between quality and appropriate training and education.¹¹⁹ Additionally, QC 1000 mandates certain training requirements, including with respect to ethics and independence.¹²⁰

While the Board did not propose a training metric, the Board's proposal solicited comment on training as a potential additional metric. Commenters on the topic all agreed about the importance of training to the development of auditors. One commenter included training hours per professional as one of six metrics they believed would increase technical excellence, and other commenters suggested an alternative training metric focused on the percentage of revenue firms spend on training. Other commenters highlighted challenges to defining a training metric that would provide decision-useful information. One commenter stated that training is important for development and building awareness, but on-the-job training is invaluable, yet not measurable. One commenter suggested that training metrics may not be informative given they would be quantitative and not qualitative and also suggested that these concerns would be best addressed through the implementation of QC 1000 and related standards.

The Board believes there are benefits to having firms report information regarding training. Indeed, academic research provides evidence that certain proxies for auditor training are positively associated with some proxies for audit quality, although the results vary depending on the type of training.¹²¹ The Board also observes that almost all of the firms that provide voluntary reporting include their average training hours as well as information about their policies and procedures regarding training, which appears to emphasize the value those firms place on the development of their professionals as well as the potential informativeness of an hours-based

quantitative measure. The Board's research also indicates that at least eight other jurisdictions include training as a firm-level metric.¹²²

The Board recognizes that quantitative measures such as the number of professional development training hours cannot capture qualitative factors, such as the skill of trainers, the quality and relevance of training content, whether the training is in a specialized area specific to the trainee, and the degree of trainee engagement, that contribute to the effectiveness of training. However, the average number of training hours per audit professional provides an indication of the importance the firm places on the training of its professionals. In addition, given that the metrics are presented as a suite of metrics and are not expected to be considered in isolation, providing some visibility into firm's commitments and efforts to promote the development of their professionals through ensuring they receive adequate training will provide an additional data point for consideration in that context.

Metrics the Board considered in this area, both at the firm level and the engagement level, include (i) the average total number of CPE hours per professional; (ii) average number of CPE hours received by audit professionals in specified fields of study, such as (a) accounting and auditing and (b) ethics and independence; and (iii) CPE compliance rates at the firm or specific to engagement teams. In consideration of the importance of training to the development of audit professionals and the impracticality of measuring training through qualitative means, the Board adopted metrics for average annual professional development training hours¹²³ for audit partners, managers, and staff, both firm-wide and for the core engagement team. These metrics will create visibility into training at both the firm and engagement level, using

¹²² See Accountancy Europe Report at 6, 7, 8, 11, 12, 13, and 14 for IDW (Germany), Quattermasters (Netherlands), CMVM (Portugal), CPAB (Canada), ICAI (India), ACRA (Singapore), and IRBA (South Africa). See also FRC Feedback Statement, at 18.

¹²³ Professional development training hours are training hours for credit in support of obtaining or maintaining a professional accounting license in a jurisdiction in which the auditor is licensed or pursuing a license. For example, in the United States, professional development training hours would be synonymous with CPE credits as defined by the National Association of State Boards of Accountancy (NASBA). In some jurisdictions, including the United States, a training hour may be less than 60 minutes. If a jurisdiction does not impose training requirements in support of professional licensure, professional development training hours are hours of training associated with acquiring and maintaining professional competence.

¹¹⁸ See PCAOB Rel. No. 2024-004, at 8-9 (describing competence to perform an audit under existing PCAOB standards).

¹¹⁹ See paragraph .08 of AS 1000, *General Responsibilities of the Auditor in Conducting and Audit*.

¹²⁰ See QC 1000.50 (“The firm should design, implement, and maintain policies and procedures regarding licensure such that the firm and firm personnel hold licenses or other qualifications required by the relevant jurisdiction(s) under applicable professional and legal requirements.”). See also QC 1000.34(e) and PCAOB Rel. No. 2024-005, at 151-52 (describing mandatory training under PCAOB standards).

¹²¹ See below for additional discussion on the academic literature.

data that the Board believes will be readily accessible to firms.

The Board considered the suggested alternative of a training metric focused on the percentage of a firm's revenue invested in training. However, the Board believes that any approach based on the costs of training would be difficult to implement. For example, some firms develop their own training, some firms purchase training, and other firms may reimburse their professionals for third-party training. Also, firms may develop training for non-audit professionals within the organization and then subsequently provide that training to audit professionals, further adding to the complexity of suggested cost-based training metrics. By contrast, the Board expects that firms will generally already be tracking training hours as part of monitoring ongoing compliance with CPE requirements, which should ease implementation of the hours-based metrics the Board adopted. The Board believes that the difficulties associated with measuring costs would outweigh the advantages of a cost-based metric, as compared to the hours-based approach.

(See Exhibit A, "Training Hours for Audit Personnel.")

iv. Experience of Audit Personnel

The auditor's years of experience at a public accounting firm can provide useful information about how the auditor staffs the audit. Academic studies show that auditor experience is related to improved audit effort and skill, through both pre-client and client-specific experience,¹²⁴ and through behavioral adaptations associated with managing their clients.¹²⁵ At the firm level, an experience metric can provide information regarding the "bench depth" of firm personnel and the ability of the firm to staff its engagements. At the engagement level, the engagement team's years of experience can provide useful information about the depth of experience of the engagement team for that particular engagement.

The Board proposed firm-level reporting of the average years of experience at a public accounting firm of the firm's engagement partners, partners other than engagement partners, and managers; and engagement-level reporting of the years

of experience at a public accounting firm of the engagement partner and the EQR, as well as the average years of experience of other partners and managers on the core engagement team. Both metrics captured all experience at a public accounting firm, whether or not the firm was registered with the PCAOB, and included audits of issuers and non-issuers, as well as non-audit work.

Some commenters agreed in concept with firm- and engagement-level metrics for experience, stating that they agreed that auditor's years of experience at a public accounting firm may provide useful information about how the auditor staffs the audit. One of these commenters broadly supported both metrics but suggested a number of potential refinements, discussed below. One commenter suggested that an employee experience metric could identify firms that are more likely to have a firm culture that contributes to audit quality. Another commenter suggested that a metric depicting years of experience after CPA licensing would provide insight into whether a firm has more experienced professionals.

Several commenters generally supported the firm-level experience metric, while objecting to all proposed engagement-level metrics, including the experience metric. One of these commenters stated that the proposed firm-level metric met its criteria of being readily interpretable, aligning with measures used by the firm in its system of quality control, having broad linkage to audit quality, having minimal unintended consequences, and meeting the information needs of users.

Some commenters asserted that proposed experience metrics, both at the engagement and firm levels, were not useful or meaningful, saying that there is great potential for misunderstanding and misuse with little value to be derived. Another said that the emphasis on years of experience overlooks the centrality of technology in the future.

Some commenters raised questions about the professionals covered by the metrics. Two commenters suggested that the firm-level metric cover only individuals who have been assigned to issuer audits, one of whom said that firms may use different personnel on issuer audits than non-issuer audits, so a metric that includes personnel regardless of whether they work on issuer audits would not provide an accurate view of personnel that may be staffed on an issuer audit. One commenter questioned whether it was appropriate to provide engagement-level reporting regarding the experience of the EQR, because it might imply that the EQR was part of the engagement team.

Commenters also questioned the appropriate level of disaggregation for reporting. One commenter described the requirement to segregate engagement partners from other partners as impractical to implement and not a meaningful distinction in the metric. Another suggested further disaggregation, with partner and manager experience reported separately and data broken down by industry.

Commenters reacted to the proposal to count only experience in public accounting as relevant. One agreed that experience metrics should be limited to audit experience. Several others suggested that experience in addition to years worked at a public accounting firm, such as industry experience or time spent working at a relevant regulator, should be included. For example, one said that limiting relevant experience exclusively to auditing experience could potentially overlook the comprehensive skill set that individuals gain from various roles throughout their career. Two commenters said that context is needed to understand metrics depicting experience, as the depth of experience and whether it is current may differ considerably. Some commenters expressed concern about the challenges of gathering data regarding experience, particularly if the experience metric is not limited to time spent at the individual's current firm.

Commenters also raised issues with the calculation of the proposed metric. One remarked that the experience metrics provided an incentive to have a number of very experienced partners provide modest assistance in order for their experience to be included in, and significantly improve, the metric. This commenter suggested that requiring a weighted average for this metric would act as a deterrent. One commenter expressed that the calculation did not address how to treat personnel role changes at the firm level.

One commenter suggested that further outreach was needed to determine the ability to prepare such information and for investors and audit committees to understand how such firm-level metrics would be used in decision making.

After considering commenter input, the Board adopted the firm- and engagement-level metrics with the modifications described below. While the Board appreciates that there are limits to the information an experience metric can provide, the Board believes that it is and will continue to be a useful element in a suite of metrics, even in the context of technological advances and other changes in the audit market.

¹²⁴ See, e.g., Wuchun Chi, Linda A. Myers, Thomas C. Omer, and Hong Xie, *The Effects of Audit Partner Pre-Client and Client-Specific Experience on Audit Quality and on Perceptions of Audit Quality*, 22 *Review of Accounting Studies* 361, 363 (2016).

¹²⁵ See, e.g., G. Bradley Bennett and Richard C. Hatfield, *The Effect of the Social Mismatch Between Staff Auditors and Client Management on the Collection of Audit Evidence*, 88 *The Accounting Review* 31, (2012).

The Board considered whether, as some commenters suggested, the firm-level experience metric should be narrowed to cover only professionals who worked on an issuer audit in the most recent year. However, the Board does not believe that approach would increase the information value of the metric, because individuals may participate in issuer audits in some years but not others, so it would cover only a portion of the total talent pool. Such an approach would also add significant complexity to the calculation, as well as variability year over year. Accordingly, the Board concluded that it would be more appropriate for firms to report the experience of all audit professionals, as proposed.

The Board also considered whether to eliminate engagement-level reporting of the experience of the EQR, based on commenter concern that this could imply that the EQR is a member of the engagement team. However, the Board does not believe that concern is well founded. There is nothing in Form AP to support such an implication, and the Board's standards are clear that the EQR is not a member of the engagement team. Because of the significance of the EQR role, the Board continues to believe that EQR experience is important and should be separately reported.

The Board is eliminating the requirement to provide separate firm-level reporting of the experience of engagement partners. Instead, the final rules require firm-level reporting of (i) the average experience of all partners in aggregate, both those who serve as engagement partners and those who do not, and (ii) the average experience of all managers in aggregate. After considering commenter responses, the Board is concerned that separate reporting of engagement partner experience may not add significant information value but will increase the complexity and administrative burden associated with the metric. The Board believes these metrics, with all partners in aggregate, will also serve as a useful baseline for comparison of the engagement-level reporting of engagement partner and EQR experience. The Board has also separated the partner and manager experience metrics at the engagement level for consistency and comparability with the firm-level metrics.

The Board considered broadening the scope of relevant experience beyond public accounting but decided to adopt that aspect of the metric as proposed. The Board notes that the commenters who recommended a broader scope had inconsistent recommendations as to

what would constitute relevant experience (e.g., experience in a financial accounting role, previous experience at a regulator, etc.), reflecting the difficulty of arriving at an agreed-upon view of the non-audit experience that would be relevant and should be included. The Board believes a metric focused on experience in public accounting will be better focused and would avoid that difficulty.

Several commenters raised concerns about the ability to track the historical information called for by the metric, some implying that the experience metric should be limited to experience with the individual's current firm. The Board is concerned that such a limited metric could be misleading, as it would understate the experience of anyone who changed jobs. Moreover, the Board believes that firms could readily capture the information from current personnel and otherwise during the hiring and onboarding process, and the information would therefore generally be available to firms without a significant ongoing administrative burden.

The Board noted the questions commenters raised about how to calculate averages, including how to treat partial years of experience and whether the average at the engagement level should be calculated on a weighted basis to reflect the extent of participation in the audit. As to partial years of experience, firms will be free to report in whole years on a rounded basis or, if they wish, more precisely. While the Board appreciates that it may be possible to make staffing changes in an effort to manage this or other metrics, the Board believes that calculating the experience metric for the other partners and managers as a weighted average would add unnecessary complexity. The Board also considered that the risk of managing the engagement-level experience metrics is minimized by other considerations, such as industry or other specialized experience needs, that go into staffing decisions. In addition, the Board expects that comparisons of trends in the reported metrics over time will provide balance.

The Board also notes that, if a firm believed additional information or context would be required for a reader to understand the metrics provided, the firm could provide it as narrative.

(See Exhibit A, "Experience of Audit Personnel.")

v. Industry Experience

As part of the planning activities of an audit, auditors have a responsibility to gain an understanding of the company's business. These activities include gaining an understanding of matters

affecting the industry in which the company operates, such as financial reporting practices, economic conditions, laws and regulations, and technological changes.¹²⁶ Experience in a particular industry helps an auditor understand the industry's operating practices, the critical accounting issues confronting companies in that industry, the risks of material misstatement of the financial statements specific to industry factors, and any industry-specific audit procedures.

Understanding the experience of firms' audit personnel across industries is an important factor in assessing the firm's capacity and resources to perform audits of issuer engagements that benefit from specific industry knowledge. The Board believes industry experience metrics will assist in gaining that understanding.¹²⁷

Importantly, academic literature has long identified auditor industry specialization as related to the effectiveness of audits.¹²⁸ One study that examines the impact of auditor industry specialization on the assessment of audit risk and in audit planning found that auditors with industry-specific knowledge improved the auditor's assessment of differential audit risk and the quality of their audit planning decisions.¹²⁹

Investor-related commenters were generally supportive of industry experience metrics stating they believe that it is critical for auditors to have an elevated level of industry-specific knowledge. One investor-related group stated that experience in a particular industry helps an auditor understand that industry's operating practices, critical accounting issues faced in that industry, the risks of material misstatement of the financial statements specific to industry factors, and any industry specific audit procedures. Another commenter suggested that further guidance on the classification of

¹²⁶ See AS 2101.07.

¹²⁷ QC 1000.38a.(2)(d) requires firms to establish quality objectives that address the firm's judgments about the extent to which the firm has or can obtain resources to perform the engagement as part of its acceptance and continuance of engagements.

¹²⁸ See, e.g., W. Robert Knechel, Vic Naiker, and Gail Pacheco, *Does Auditor Industry Specialization Matter? Evidence from Market Reaction to Auditor Switches*, 26 *Auditing: A Journal of Practice and Theory* 19, (2007); Steven Balsam, Jagan Krishnan, and Joon S. Yang, *Auditor Industry Specialization and Earnings Quality*, 22 *Auditing: A Journal of Practice and Theory* 71, (2003); and Allen T. Craswell, Jere R. Francis, and Stephen L. Taylor, *Auditor Brand Name Reputations and Industry Specializations*, 20 *Journal of Accounting and Economics* 297 (1995).

¹²⁹ See Kin-Yew Low, *The Effects of Industry Specialization on Audit Risk Assessments and Audit-Planning Decisions*, 79 *The Accounting Review* 201, 202 and 214 (2004).

industries would be helpful and also suggested that weighting current experience should be considered. One commenter suggested that the metric be disaggregated between partners and managers.

While most firm and firm-related commenters opposed industry experience metrics, one firm commenter stated that they understand in principle why industry metrics may be perceived as meaningful. Some commenters stated that the proposed industry experience metrics were not useful due to issues with comparability and complexity. Some commenters believed that the industry metrics gave rise to the potential for confusion and misunderstanding, in part because any classification system could group together very different types of issuers that could result in inappropriate comparisons.

One commenter suggested that the proposed metric does not address the issue that not all audits require specific industry experience and that audit quality is enhanced when an engagement team includes personnel with diverse experiences. Another commenter stated that metrics depicting experience would need context to be meaningful.

After considering commenter input, the Board has retained industry experience metrics, but simplified them from the proposal. The changes include limiting the scope for reporting at the firm level and limiting the requirements for reporting at the engagement level to the engagement partner, the engagement quality reviewer and certain members of the core engagement team among other changes further discussed below. At a high level, the Board believes this addresses the concerns of commenters regarding complexity, certain data collection concerns, the potential for confusion and misunderstanding, and also provides for more comparable information.

a. Thresholds

The Board proposed that the metrics would count partners who have at least five years of experience throughout their careers in a particular industry and managers who have at least three years of such experience.¹³⁰ For determining

what counted as a year's experience, the Board proposed a minimum threshold of 250 hours, or 25% of hours worked, focused on an industry in a given year.

The proposed instructions for reporting the metric included qualitative considerations to assist in determining whether an individual had experience in a specific industry, including consideration that industry experience may be, but is not required to be, exclusive to experience on audit engagements, or exclusive to experience gained at a public accounting firm, but must be relevant, which includes experience in accounting or auditing roles and other specializations, such as experience that is related to fair value estimates in the industry. The instructions also clarified that industry experience may be acquired in non-consecutive years.

One commenter expressly agreed with the proposed requirement of 250 hours or 25% of the auditor's time as being a reasonable criterion for a year of qualifying industry experience. However, several other commenters criticized the proposed threshold. Some of the concerns raised included tracking the information throughout the career of professionals, particularly at the global network level; obtaining historical data; complying with the proposed 250 hour or 25% thresholds; and maintaining documentation to support the metrics. Another commenter expressed that the thresholds were not meaningful as different individuals may perform the same tasks in different amounts of time. This commenter also expressed that without research supporting the thresholds, it is not possible to recommend how much industry experience would be necessary. While one commenter acknowledged the proposal allowed self-reporting as an option, they had concerns about the ability of personnel to accurately determine whether they worked 250 hours or more in a specific industry going back many years, potentially decades, and encouraged qualitative thresholds for determining industry experience.

One commenter agreed with the proposed 3- and 5-year thresholds for measuring industry experience and also suggested adding an additional threshold of 10-years at the partner level. Other commenters raised other concerns with the proposed reporting requirements. Some commenters

disagreed with the proposal to count managers with three years of experience and partners with five years of experience. Among these commenters, some expressed that it would unfairly exclude some partners and managers, could be a disadvantage to smaller firms, could be time consuming to compile data to support, and should not include individuals with de minimis involvement. Commenters that responded to the question of whether industry experience should be limited to audit experience or rather should include all relevant experience agreed with the proposal to include all relevant experience. They also agreed that it need not be consecutive years.

Several additional commenters voiced concern about whether industry experience was required to be recent. Two commenters claimed that the Board's recently adopted quality control standard acknowledges that there is no right level of industry experience,¹³¹ and each audit may require different background and experience.

After considering commenter feedback, the Board retained the 3- and 5-year thresholds for determining whether partners and managers should be included in the industry experience metrics. The Board has also retained the threshold of 250 hours or 25% of hours worked as the baseline to determine whether a year qualifies as industry experience but recast it as a general expectation rather than a requirement to allow firms to exercise reasonable judgment. At the firm level, once the 3- or 5-year industry experience threshold has been attained, partners and managers should be included in the metrics until or unless a firm determines, in its reasonable judgment, that the particular industry experience is no longer relevant. At the engagement level the Board has simplified the reporting requirements by limiting the metrics to the years of experience of the engagement partner, the EQR, and members of the core engagement team. The metrics will not include a requirement to determine the industry experience of other partners and managers who participated in the audit who are not members of the core engagement team. The Board believes these changes will appropriately address commenter concerns about potential difficulties in gathering and verifying data while continuing to allow

¹³⁰ A note to the calculations clarifies that industry experience is accumulated throughout an individual's career (*i.e.*, aggregates experience obtained at all career levels). When determining whether an individual has experience in a specific industry the following may be taken into account: (i) industry experience may be, but is not required to be, exclusive to experience on audit engagements, or exclusive to experience gained at an accounting firm, but must be relevant, and (ii) industry experience can be acquired in non-

consecutive years. Relevant experience includes experience in accounting or auditing roles and other specializations, such as experience that is related to fair value estimates in the industry. See Note 2 to Item 4.5 of Form FM, Note 1 to Item 6.5 of Form AP.

¹³¹ QC 1000.47 requires firms to design, implement, and maintain policies and procedures such that their personnel obtain and maintain the competence to fulfill their respective assigned engagement roles, including an understanding of, among other things, the industry in which the company operates and its relevant characteristics.

firms to take into account matters like experience in related industries, the nature of non-audit experience, and whether experience is recent or remote in time. In addition, consistent with the proposal, the final rules do not specify how the relevant information should be accumulated. Because experience may be obtained in different ways at different points throughout a professional's career, there are many ways in which information could be accumulated to support the firm's judgment, including personnel self-reporting or a firm's own time-keeping system.

b. Industry Classification

The proposal set forth requirements for firms to provide information regarding partner and manager experience in particular industries. In order for firms to use a consistent approach to industry identification, the Board proposed the Industry Classification Benchmark (ICB), operated and managed by FTSE Russell. The ICB is used by global stock exchanges, including the London Stock Exchange, Euronext, and NASDAQ OMX, to categorize listed companies. Based on the ICB classification system, firms would have selected from among a total of 31 possible industry classifications.¹³²

Several commenters agreed that the proposed index was an appropriate reference for industry classification. One commenter acknowledged that there was a potential for imprecision when reporting on large conglomerate companies that operate in many different industries, but stated their belief that using the ICB rather than the legacy Standard Industrial Classification (SIC) codes is a better strategy from the outset of the creation of the metrics. This commenter also expressed their understanding that there could be some imprecision at the margins. On the other hand, several commenters stated that it would be inconsistent with other reporting required by the SEC using the SIC codes or the North American Industrial Classification system (NAICS). Some commenters stated that firms do not necessarily align with the industries proposed. One commenter pointed out that the ICB listing does not include public sector or government and asked whether these should be omitted from the reporting requirements.

Commenters responding to the proposal's question about whether reporting should be expanded to allow

for industries in addition to an issuer's primary industry stated that industry reporting for large issuers is complex, some stating that changes over time from mergers and other activities would add to the complexity. Some commenters also stated that the proposed industry metrics would provide challenges with respect to data collection.

In response to these concerns and after further considering recent voluntary public reporting by firms,¹³³ the Board has expanded the classification taxonomy and added flexibility. With respect to the proposed industry classification listing, the final requirements continue to provide a listing from which to select industries for reporting purposes, but have been revised to include certain additional industries such as agriculture and forestry and government and public services categories to facilitate reporting for firms that have large practices in these industries or sectors. In addition, for certain industry groupings, such as finance and health care, an "other" sub-grouping has been added to provide flexibility while maintaining a level of comparability at the overall industry level. Firms are also permitted to specify additional industries for reporting in the event that the listing does not include an industry that accurately represents the industries that they serve.

The taxonomy the Board adopted is as follows:

[Form FM and Form AP will provide drop-down menus for industry classifications]

Industry Classification

- 1 Agriculture and Forestry
 - 1.1 Agriculture and Forestry
- 2 Automotive
 - 2.1 Automotive: Manufacturing
 - 2.2 Automotive: Retail
- 3 Basic Resources
 - 3.1 Basic Resources: Chemicals
 - 3.2 Basic Resources: Industrial Materials
 - 3.3 Basic Resources: Industrial Metals and Mining
- 4 Construction and Materials
 - 4.1 Construction and Materials
- 5 Consumer Products and Services
 - 5.1 Consumer Products and Services
- 6 Energy
 - 6.1 Energy: Alternative Energy
 - 6.2 Energy: Oil, Gas, and Coal
 - 6.3 Energy: Other Energy and Transportation
- 7 Finance

- 7.1 Finance: Banks (Excluding Investment Banking and Brokerage Services)
- 7.2 Finance: Investment Banking and Brokerage Services
- 7.3 Finance: Finance and Credit Services
- 7.4 Finance: Insurance
- 7.5 Finance: Real Estate
- 7.6 Finance: Other
- 8 Government and Public Services
 - 8.1 Government and Public Services: Government
 - 8.2 Government and Public Services: Public Services
- 9 Health Care
 - 9.1 Health Care: Health Care Providers
 - 9.2 Health Care: Pharmaceuticals and Biotechnology
 - 9.3 Health Care: Medical Equipment and Services
 - 9.4 Health Care: Other
- 10 Industrial Goods and Services
 - 10.1 Industrial Goods and Services: Aerospace and Defense
 - 10.2 Industrial Goods and Services: General
- 11 Technology, Media, and Telecommunication
 - 11.1 Technology, Media, and Telecommunication: Media
 - 11.2 Technology, Media, and Telecommunication: Technology Hardware and Equipment
 - 11.3 Technology, Media, and Telecommunication: Telecommunication
 - 11.4 Technology, Media, and Telecommunication: Other
- 12 Trades and Services
 - 12.1 Trades and Services: Travel and Leisure
 - 12.2 Trades and Services: Retail
 - 12.3 Trades and Services: Wholesale
 - 12.4 Trades and Services: Other
- 13 Utilities
 - 13.1 Utilities: Electricity
 - 13.2 Utilities: Gas, Water, and Multi-utilities
 - 13.3 Utilities: Waste and Disposal Services
- 14 Other Industry [specify]
 - 14.1 [Industry]

The Board acknowledges that its taxonomy does not align with issuer reporting using SIC or NAICS codes. As discussed in the Board's proposal, the Board rejected those systems, as well as others, based on several considerations, including that the SIC system has not been updated since the 1980s, the NAICS system uses a production-oriented and North America-centric structure that would not be appropriate as applied to many issuers, and that none of the alternative systems the Board considered would provide a basis for a meaningful metric. For example,

¹³² See FTSE Russell Industry Classification Benchmark (ICB), available at <https://www.lseg.com/en/ftse-russell>.

¹³³ Consideration was given to recent Transparency Reports and information available on public firm websites.

the SIC code system, in addition to being dated, is highly fragmented, employing more than 440 different industry classifications as listed on the SEC's website.¹³⁴ The Board believes this fragmentation would dramatically impair the utility of the metrics, particularly because there is no logical hierarchy by which industries with a need for similar accounting or auditing specializations can be grouped together. By comparison, the Board believes that the curated taxonomy that the Board developed and refined in consideration of the ICB system most closely aligns with the industries that firms generally disclose in their transparency reporting and will provide the most relevant basis for comparison among firms.

c. Metrics

The firm-level metrics provide information related to the firm's industry specialization and the engagement-level metrics provide information related to experience in the issuer's primary industry of engagement partners and engagement quality reviewers. The following sections discuss the proposed metrics, comments received, responses to those comments, and the final requirements for firm- and engagement-level metrics.

(1) Firm-Level Metrics

At the firm level, having industry experience may provide a group of professionals who can both work on engagements and advise members of engagement teams when additional technical, industry-specific knowledge is needed. Firm-level industry experience may indicate that the firm has specific industry-based audit knowledge, industry-specific tools related to risk assessment, and industry-specialized methodologies for accounting and auditing. As a firm-level metric, the Board proposed that firms report, for each industry that represents at least 10% of the firm's revenue from audit services, the number of partners and managers who have accumulated five or more years or three or more years, respectively, of industry experience throughout their careers. The Board also proposed to allow firms to provide the same information for additional industries voluntarily. As discussed above, the proposed reporting instructions specified a minimum threshold number of years of industry experience for reporting and how those years were to be calculated.

Some commenters questioned the proposed 10% of revenue threshold for

identifying the firm's top industries. One commenter stating that considering both the proposed threshold and the fact that the proposed index is not inclusive of all industries in which the firm earned revenue from audit services, the calculation would be problematic or would result in the exclusion of those industries. Another commenter questioned what period the 10% was meant to be measured over and whether it was meant to be aligned with the firm's fiscal year or another period. One firm commenter expressed concern that the proposed metric would require it to compile data for industries in which it did not perform any issuer audits. This commenter, and another, suggested an alternative of calculating the metric based on 10% of a firm's issuer audit practice rather than its overall audit practice. Other commenters suggested that the metric be narrowed to a firm's issuer audit practice, particularly in light of the proposed 10% of the firm's revenue from audit services threshold. One of these commenters additionally suggested that the metric include only partners who serve on issuer audits.

In the Board's proposal, the Board solicited comment on alternatives to the 10% threshold, such as requiring firms to disclose their top five or top ten industries by revenue from audit services. One commenter stated that this approach would be more practical and clearer for stakeholders.

Some commenters suggested potential alternative approaches. One commenter suggested requiring public disclosure of industry expertise at the firm level based on the percentage of a firm's issuer clients according to the industry marked on those issuers' SEC filings. Another suggested reporting the number of entities under audit in a certain industry rather than partner and managers with years of experience. Other commenters suggested that, rather than focusing on the percentage of revenue and using the ICB listing, each firm should be allowed to list the industries, presumably not limited to the proposed ICB listing, and to choose the number of industries, for which they have specific expertise and report on those.

Several commenters suggested that further study or outreach was needed to determine the ability to prepare such information and for investors and audit committees to understand how such firm-level metrics would be used in decision-making.

After considering the comments received, the Board simplified firm-level reporting of industry experience in several ways:

- The Board is limiting reporting requirements to firms that issued five or more audit reports for accelerated filers and large accelerated filers during the reporting period, combined. The Board believes this will reduce the chances that a firm's top industries will not include the industries represented in its issuer audit practice, resulting in a more meaningful data set, while also alleviating compliance burdens on firms with a small issuer practice.¹³⁵

- Rather than requiring reporting with respect to industries that account for at least 10% of the firm's revenue from audit services, the Board is requiring firms to report the top five industry sectors based on such revenue, regardless of the percentage of revenue they represent. The Board believes this will address commenter concerns regarding potential complexities of the calculation. The Board has also clarified the instructions to provide that the determination is based on revenue for the firm's most recently completed fiscal year. While this means that the top five industries will be measured over a different period than the years of experience, the Board believes that consequences of that misalignment are likely to be immaterial, while it will simplify data collection and align it with the firm's business cycle. The Board has also provided the ability for firms to report additional industries if the Board's list does not include an appropriate industry grouping.

While the Board considered commenter suggestions to limit the metric to firm revenue from issuer audits rather than revenue from all audit services, the Board continues to believe that the metric is more relevant if it includes all audit services. The information it provides offers a user of the information a view to the firm's entire audit practice, not just its issuer audit practice, which informs users of the depth of industry experience of the firm's people. The Board believes this information is more relevant than the number of issuers a firm audits in a particular industry because, in absence of an understanding of the specific issuer population, that data may be less easily interpreted.

(2) Engagement-level Metrics

At the engagement level, industry experience provides professionals with

¹³⁴ See <https://www.sec.gov/search-filings/standard-industrial-classification-sic-code-list>.

¹³⁵ Based on PCAOB staff's analysis performed on the data obtained from Audit Analytics, Standard & Poor's, and publicly available data from the PCAOB's Registration, Annual and Special Reporting (RASR), available at <https://rasr.pcaobus.org>. For the two-year period ended September 30, 2023, the Board expects that approximately 50 firms will be required to report this metric each year.

an understanding of risks unique to the industry and industry-specific auditing and accounting considerations. The proposed engagement-level metrics required disclosure of the years of experience in the issuer's primary industry for the engagement partner and the engagement quality reviewer. In addition, the Board proposed that the number of partners (excluding the engagement partner) and managers on the engagement team with experience in the issuer's primary industry also be disclosed.

Commenters raised questions with respect to personnel to be included in the engagement-level industry metrics. One commenter suggested that industry experience metrics be limited to the core engagement team, suggesting that including the EQR implies that the EQR is part of the engagement team, when they are not. This commenter, and some others, suggested that industry experience should be limited to recent experience. A commenter stated that these metrics should be limited to the engagement partner and the EQR, while another commenter stated that partners, other than the engagement partner, and managers, should be disaggregated.

As discussed above, many commenters had concerns with the calculations, including the thresholds to be used in the calculations. In response to these concerns, the Board has limited reporting to the engagement partner and the engagement quality reviewer, and other partners (excluding the engagement partner) and managers on the core engagement team. The Board has eliminated the proposed reporting for other firm partners and managers who are not members of the core engagement team. The Board believes, given the key roles played by the engagement partner and the EQR, and other partners and managers on the core engagement team that this will focus the metric on the most salient information.

(See Exhibit A, "Industry Experience.")

vi. Retention of Audit Personnel

The retention rate and the headcount change inform the overall readiness, availability, and ability of the firm to conduct effective and efficient audits. While some turnover is expected within audit firms,¹³⁶ a comparatively high rate of turnover or higher-than-expected turnover could adversely affect audits.¹³⁷ It could diminish the

available pool of talent who have the appropriate competency. It may take time and resources for the firm to replace the competency lost, likely through effective recruiting and further training. Academic literature consistently finds the same conclusion: turnover negatively affects audit quality, more so at longer-tenured engagements than newer engagements.¹³⁸

The proposal set forth requirements for firms to calculate the average annual retention rate and the average annual headcount change of partners and managers both at the firm- and engagement-level.

At the firm level, the Board also proposed to require disclosing the average number of partners and managers to provide context for the retention and headcount change metrics. For example, a 67% retention rate at a larger firm (200 departures out of 600 professionals) would involve a different level of employee continuity and hence imply a different magnitude of possible impact on the firm's human resource management, than at a smaller firm (e.g., one departure out of three professionals) because this larger firm will likely need to replace 200 professionals while the smaller firm will only need to replace one professional assuming all things are consistent.

At the engagement level, the Board also proposed to require disclosing the average tenure on the engagement for partners and managers to quantify the overall continuity of the engagement team members. Average annual retention rate is a year-over-year metric, but tenure would provide overall engagement-level experience as an important component to understand the experience of the engagement team on the specific audit.

a. Firm-Level Reporting

The annual retention rate measures the percentage of firm personnel continuously employed for the reporting period to demonstrate the continuity of firm personnel. The average annual headcount change measures changes in the firm's overall headcount of

managers or partners, giving an indication of the firm's success in replacing professionals who left roles performing audits and the overall availability of firm personnel. The annual retention rate and the annual headcount change are closely related; however, the annual retention rate would measure the "same people" within the firm, while the annual headcount change would measure the "same number of people." The annual retention rate measures whether the same individuals are still holding their positions at the firm while the annual headcount change is focused on the change in the number of individuals serving in those positions. Changes in annual headcount over time could result from a variety of reasons, for example, changes in a firm's human resource strategy (e.g., greater use of technological resources, shifting more work to shared service centers), or a downturn in the economy.

Commenters generally supported the proposed firm-level metrics. Some said they were sufficiently objective or straightforward and easy to interpret. One of these commenters also indicated that some firms already published similar metrics in firm audit quality reports and another commenter indicated that these metrics allow for some comparisons and may help a user in better understanding a firm. Two investor-related groups agreed with the proposal that a comparatively high rate of turnover or higher-than-expected turnover could adversely affect the audit, while another commenter indicated that staff turnover reporting is directionally supporting audit quality improvement through better continuity year-over-year. One of these commenters also stated that retention metrics will add to the mix of information provided in the final metrics without drawing a specific inference as to an "ideal" retention rate, considering the need to strike a balance between maintaining continuity of the engagement team members and introducing new personnel who will take a "fresh look" at the audit. Another commenter stated that a benefit of the headcount change metric is that it will provide context for the retention metric. A commenter stated if a firm reports favorable employee retention metric, the firm's culture is ideal to contribute to higher audit quality. One commenter supported the firm-level metrics and acknowledged the importance of assessing the readiness and availability of the firm for conducting effective audits, but requested the Board determine how the metrics correlate

Working Paper, Vrije Universiteit Brussel, SSRN (2023).

¹³⁸ See, e.g., Joshua Khavis and Brandon Szerwo, *Audit-Employee Turnover, Audit Quality, and the Auditor-Client Relationship*, SSRN Electronic Journal, (2023); Linden, et al., *Audit Firm Employee Turnover and Audit Quality*; W. Robert Knechel, Juan Mao, Baolei Qi, and Zili Zhuang, *Is There a Brain Drain in Auditing? the Determinants and Consequences of Auditors Leaving Public Accounting*, 38 Contemporary Accounting Research 2461 (2021); and Brant E. Christensen, et al., *How Do Team Workloads and Team Staffing Affect the Audit? Archival Evidence from U.S. Audits*. The Board notes that SSRN does not peer review its submissions.

¹³⁶ See, e.g., Kris Hardies, *A Survival Analysis of Organizational Turnover in the Auditing Profession*, 97 MAB 5 (2023).

¹³⁷ See Christophe Van Linden, Marie-Laure Vandenhaute, and Aleksandra Zimmerman, *Audit Firm Employee Turnover and Audit Quality*,

with audit quality before requiring public reporting.

One commenter supported firm-level reporting of this metric area, but expressed concern that users could misinterpret the average annual headcount change metric due to unfamiliarity with the distinction between the turnover rate and headcount change. This commenter urged the PCAOB to host a roundtable discussion or pilot test to determine how audit committees or investors may interpret and use this information. Another commenter agreed that the turnover at various levels could have an impact on audit quality.

Two commenters did not support the firm-level reporting of these metrics. While one commenter agreed with the proposed calculation and description of the metrics, this commenter was concerned that it could be misconstrued and present firms with a competitive disadvantage for recruiting talent without providing context (e.g., turnover due to changes in firm structure, shifting industry concentration, performance, ethical, or independence issues). Another commenter claimed the metric was convoluted and would be at the risk of misinterpretation.

Additionally, two other commenters raised a concern; one of them questioned whether these metrics would be meaningful or of value to investors and whether firms would be sufficiently consistent in calculating the metrics to make them worthwhile and another questioned that the inclusion of all the firm's managers and partners may make this metric meaningless for firms whose issuer audit practice is small in relation to the total practice and recommended more outreach regarding the usefulness for stakeholders.

Regarding the description and calculation of these metrics, several commenters asked questions or suggested refinements. One commenter questioned how the metrics would be calculated in a case of voluntary partner rotation. Another commenter recommended clarifying whether "other service lines within the firm" includes "other accounting services" as defined by PCAOB Rule 1001(o)(i). Additionally, one commenter recommended renaming the description of the average annual headcount change to align with the calculation to avoid confusion; as proposed, it would provide current year headcount as a percent of the prior year headcount, not a change as a percent of the prior year. This commenter also suggested clarifying the meaning of "holding the same position," used in the retention

calculation and "transferred out of audit practice," and "continuously employed during the 12-month period" used in the illustrative example of the firm's average annual retention rate calculation. One commenter suggested disaggregating partners and managers.

Three commenters did not support separately reporting senior or all staff level annual retention and annual headcount change metrics.

Taking into account commenter feedback, the Board adopted the retention metric as proposed and adopted the headcount change metric with some modifications.

As noted above, academic literature consistently supports that turnover negatively affects audit quality. The Board believes the retention metric is objective, provides important data, and is already publicly reported by a number of firms in their audit quality or other reports. This metric was also generally supported by commenters from the different constituencies, including firm, firm-related groups, investor-related groups, and others. Since this or similar metrics are already reported by firms, the Board does not believe there will be a disadvantage in recruiting, difficulty in consistently reporting of this metric, or a risk of misinterpretation. Firms could also use the expanded narrative disclosures to provide context, if necessary.

The Board also continues to believe the inclusion of all partners and managers who participate in audits, not a subset of partners and managers who serve issuer engagements, is appropriate because the retention rate and the headcount change inform the overall readiness, availability, and ability of the firm to conduct an effective and efficient audit. While this metric area provides historical information, the Board believes historical data signals impact on the firm's near-future staffing needs and ability to conduct effective audits due to the time it takes to hire and train additional resources. Firms with sufficient overall headcount could reallocate staffing due to a possible staffing shortage on issuer engagements.

The Board does not believe that partner rotation, whether mandatory or voluntary, is likely to affect firm-level reporting of this metric, as the rotating partner will likely continue to participate in audits in the subsequent year (albeit on different engagements). The term used in the calculation "holding the same position" means that a partner remains as a partner and a manager remains as a manager of the firm during the reporting period. The term "continuously employed within the 12 months" means the individual is

continuously employed by the firm throughout the 12 months, without departing to another employment.

The Board revised the average annual headcount change calculation to address concerns raised by commenters, specifically that users may misunderstand this metric as a turnover rate and that the calculation should align with the title. The Board believes that the revision will help a user's understanding of the metric and align with the title of this metric by reporting the headcount change as a percentage of prior year. For example, using the illustrative example in the proposal,

Firm A had 204 managers and 200 managers as of October 1, 20X0 and September 30, 20X1, respectively. Under the revised calculation, the average annual headcount change will be -2% based on $(200-204)/204 = -1.96\%$.

The Board believes this change will help users understand that the average annual headcount change of -2% means a 2% decrease in headcount from prior reporting year end to current reporting year end. This information is often used as a human resource management metric.

Lastly, regarding the description and the calculation of the proposed average number of the firm's partners and managers, one commenter indicated that they are clear and appropriate. Another commenter indicated that it would help to provide context for the retention metric but use a simple average of the count at the beginning and end of the year. This commenter also agreed with treating the promotions to another level of seniority as if they occurred at the beginning of the year.

Based on commenters' feedback on firm-level reporting of average number of managers and partners, the Board adopted this metric as proposed because comments received agreed with the proposed description and calculation and this metric will help provide context for retention and headcount change metrics. The proposed calculation provided a simple average of the number of partners or managers as of the previous reporting period end and the current reporting period end so that the numbers at the end of each reporting period will be used consistently in the calculation. Because the proposed calculation was not significantly different from using the simple average of the count at the beginning and end of the year, as suggested by a commenter, the Board adopted the calculation as proposed.

b. Engagement-Level Reporting

For the engagement-level reporting, commenters generally did not support metrics in this area, while several commenters supported both firm- and engagement-level reporting. Many commenters who did not support such metrics cited the lack of context in the metrics itself or difficulties in explaining a wide range of factors that caused the engagement-level turnover (e.g., mandatory partner rotation, personal issues (i.e., family or medical leave, or relocations), firm's strategic resources management (i.e., scheduling conflicts, resource constraints, independence issues, or need for additional expertise)). Some commenters also cited the difficulty in interpreting the information, the risk of misinterpretation, misuse and misleading users, and even potentially being punitive to engagement teams and issuers. Others offered further reasons for not including this metric, which included difficulty in tracking and having consistent reporting on Form AP to make these metrics worthwhile. One commenter indicated the possibility of being detrimental to audit quality if these metrics incentivize firms to manage to achieve certain metrics, based on the commenter's view that engagement staffing should be based on identified risks of material misstatement of the issuer. This commenter and another commenter further expressed concerns that the engagement-level retention rate for smaller engagement teams will be significantly more sensitive to any turnover relative to the retention rate for larger engagement teams because the size of engagement teams tends to vary with the size of the engagement.

Two commenters also indicated that this metric is unnecessary because engagement resource management is already covered by the firm's quality control system. One commenter indicated that the engagement partner is responsible for determining the sufficiency and appropriateness of engagement resources and prior year information will not be relevant in evaluating the quality of an engagement team in the current year. Another commenter emphasized that properly managed turnover will increase audit quality to reduce familiarity biases.

Some commenters believe these metrics will be more relevant to the audit committee or audit committee and management or should be provided only to the audit committee to allow for robust discussions. One commenter only supported disclosure of the engagement-level tenure metric to the

audit committee because it will provide meaningful information to assist audit committees in exercising their duties to oversee the auditor; however, this commenter did not support other retention metrics as the engagement team staffing is a firm-level decision with factors that are not engagement specific or local laws and regulations that the firms may not be able to disclose.

One commenter indicated that these metrics should be considered in conjunction with other metrics reported rather than presuming a specific correlation with audit quality or auditor's independence, indicating as an example that there are specific legal and ethical mandatory rotation of key audit partners requirements in Europe. Another commenter asked various questions in the calculation of the engagement-level metrics for inclusion or exclusion of certain specific conditions (e.g., whether there is a time limit in how far back a partner or manager's tenure to be included).

Based on comments received, the Board did not adopt the engagement-level reporting of these metrics at this time, primarily due to some of the challenges described by commenters including difficulty in providing context (including some information that is not permitted for public disclosure), consistent reporting, and interpreting this metric area at the engagement level, due to, for example, sensitivity of engagement-level turnover on smaller engagements compared to larger engagements because turnover will have more direct and significant impact to engagement-level reporting due to the relatively smaller size of the managers and partners involved in each engagement.

(See Exhibit A, "Retention of Audit Personnel.")

vii. Allocation of Audit Hours

At the engagement level, the Board believes performing audit procedures prior to the issuer's year end will allow the engagement team to identify significant issues in a timely manner and provide the engagement team with the opportunity to address those issues earlier. The Board also believes it will enable engagement teams to have the resources available to appropriately respond to significant issues identified after year end. Discussing this metric with the audit committee could provide the audit committee with information regarding aspects of the engagement's performance. Academic literature suggests that allocation of a greater proportion of total hours to earlier audit phases, prior to a company's year end,

is associated with a lower likelihood of restatements¹³⁹ and late Form 10-K filings and also decreased total audit hours.¹⁴⁰

As proposed, the firm-level and engagement-level metrics related to allocation of audit hours would have required firms to report the percentage of total audit hours incurred both prior to the issuer's year end and following the issuer's year end, separately.

Several commenters supported the reporting of this metric as proposed (i.e., at both the firm and engagement level), while some commenters only supported required reporting of this metric at the firm level. Of those commenters that supported reporting this metric at only the firm level, two commenters requested the following clarifications regarding various elements of the calculation:

- Whether the period being reported at the firm level should be based on audit reports dated from 10/1—9/30 or based on engagements with a fiscal year-end from 10/1—9/30. This commenter expressed concern that if the proposal's intention was the latter, significant challenges with the proposed 11/30 reporting period for Form FM should be anticipated.

- How this metric would be applied to an initial public offering ("IPO") engagement where the audit covers up to three years where often the work doesn't follow the traditional audit cycle or timeline.

A commenter expressed concern that because the reporting period for Form FM is different than the engagement period for which total audit hours are calculated for Form AP, this will create a challenge with data collection and validation for different periods. This commenter also expressed concern that this metric requires the use of total audit hours, which relies on information from other auditors. The commenter recommended that the Board consider whether the use of other auditor information is necessary to meet the Board's objective. One commenter expressed concern that the firm-level metric would not be comparable due to changes in circumstances of specific issuers because while individual issuer circumstances may not be significant enough to move the metrics for larger

¹³⁹ Daniel Aobdia, Preeti Choudhary, and Noah Newberger, *The Economics of Audit Production: What Matters for Audit Quality? An Empirical Analysis of the Role of Midlevel Managers within the Audit Firm*, *The Accounting Review* (2024).

¹⁴⁰ Brant E. Christensen, Nathan J. Newton, Michael S. Wilkins, *Archival Evidence on the Audit Process: Determinants and Consequences of Interim Effort*, 38 *Contemporary Accounting Research* 2 (2021).

firms, for smaller firms individual issuer circumstances could impact the overall results. As an example, for a smaller firm with an issuer that had a large acquisition during the fourth quarter, that would lead to a significant shift of hours after the end of the year.

As described above, the reporting period for firm-level metrics reported on Form FM will generally be the 12-month period ended September 30 in each year. When reporting this metric, the firm could use the information reported at the engagement level on Form AP for this metric to calculate the firm-level metric for reporting on Form FM. For multi-year audit engagements, including IPO engagements, because the audited financial statements would be included in one auditor's report, it is not possible to identify one particular year-end that a firm should use that would not skew the reported metric. Therefore, the Board excluded multi-year audits from the required reporting of this metric. Given the commenter concerns raised around the collection and data validation of this metric for all issuer engagements, the Board has modified the firm-level description and calculation of this metric area to include only those accelerated filer and large accelerated engagements that will be reported at the engagement level. The Board believes this narrower scope will yield better alignment between firm- and engagement-level metrics and more comparable information across engagements. Related to commenter concerns about the collection of information from other auditors, Form AP currently requires firms to collect information regarding the hours of other auditors in calculating total audit hours. Total audit hours collected for Form AP already includes hours related to the quarterly reviews, so those hours would also be included in the numerator and denominator for this metric, see also discussion above.

Some commenters stressed the importance of providing narrative context in relation to the reporting of this metric, for example:

- One commenter (that only supported reporting at the firm level) asserted that reported metrics may be misleading without proper narrative disclosure to provide the necessary context to users. This commenter elaborated that circumstances beyond the auditor's control may influence the allocation of overall audit hours, and users should be cautioned against making presumptions that a higher proportion of hours after the issuers' year ends is a signal of lower quality.
- One commenter expressed the view that comparability of these metrics can

be highly dependent on factors such as industry, type of audit (*i.e.*, financial statement audit or integrated audit), and transaction timing and volume, among others and that stakeholders will need appropriate context to interpret the significance of these metrics. This commenter also stated that there is a risk that stakeholders may be biased towards inferring that a quantitative metric for allocation of audit hours is a proxy for audit quality, which further supports the need for sufficient appropriate context to interpret the results.

The Board agrees that allowing firms to provide a narrative disclosure will be important in certain situations to help users understand the context of a specific metric. See additional discussion related to this optional narrative disclosure above.

Several commenters, firms and firm-related groups, disagreed with the proposal to report this metric at the engagement level publicly and instead suggested that this metric would be more effectively addressed via dialogue with the audit committee. These commenters expressed the following views:

- For the engagement-level metrics to achieve the Board's stated objectives, such metrics would best be delivered through effective two-way communication between the auditor and the audit committee to provide the relevant and necessary context.
- Even if offered the opportunity to provide narrative context, auditors may not be inclined to provide a full explanation as to why hours allocation may have skewed to after year end for a particular issuer, as doing so might disclose confidential information about the issuer's preparedness for the audit or other facts, which might result in disputes.

• There are a variety of factors that influence the allocation of hours before or after the entity's year-end which are beyond the control of the auditor and may drive a disproportionate allocation of hours before or after the entity's year-end in a given audit, including those related to the entity entering into transactions and changes in the entity's operations or systems.

Other commenters disagreed with the proposal to report this metric entirely. These commenters expressed the following concerns:

- The timing of audit procedures (and resulting hours) is primarily a function of audit strategy decisions based on the assessment of a company's ICFR and inadequate ICFR may require most hours to be incurred after the balance sheet date. This commenter stated that

more hours incurred after the balance sheet date may, in fact, indicate a proper evaluation of ICFR and higher audit quality and therefore this metric would provide little insight into audit quality.

- This metric is not directly related to audit quality. The timing of the engagement procedures depends on many variables, including the nature of the audit areas, specific risks on an engagement, the effectiveness of interim and roll-forward procedures, the availability of staff, when the client is available, the client's specific financial reporting systems, and internal controls. This commenter stated that this information could potentially be misleading or misinterpreted.

- This metric seems somewhat arbitrary and may provide misleading information for those smaller engagements where a higher proportion of the work is performed post-year end.

- It is unclear whether the metric is meaningful because it might be impacted by among other factors, macro-economic trends, company controls and activities, and use of shared service centers and more generally, may require too much explanation to provide meaningful comparisons.

- This metric would not be comparable between larger firms and other firms and could have unintended consequences. In an audit of a smaller reporting company, it is frequently impracticable to perform much work prior to an issuer's year end, both out of concerns for efficiency and because small companies, who might have an outsourced finance function, cannot support significant interim work.

- Since most companies have a calendar year end, firms have strong incentives to perform work as of an interim date to move hours outside of the traditional busy season. A firm's ability to shift work to an interim period is dependent upon a variety of factors, many of which are unrelated to audit quality.

The Board considered commenter feedback, and in particular commenter concerns related to the fact that particular facts and circumstances surrounding an engagement could significantly skew a firm's reported metric when compared to other firms that may have a different portfolio of issuer engagements. While the Board understands that each engagement is affected by the specific facts and circumstances, the Board continues to believe that users of this information will benefit from understanding how audit hours are allocated on engagements, supplemented by

narrative disclosure to provide context, as needed.

At the engagement level, it may be more relevant for a firm to provide a narrative disclosure to explain the particular facts and circumstances related to the current reporting period's metric for this area. One firm stated that "Pulling work forward, where feasible and appropriate, enables engagement teams more time to focus on areas of highest risk in the audit." Based on the Board's oversight activities, the Board agrees with this statement, and the Board believes that this information will be beneficial to users at both the firm level and the engagement level. As with all the metrics, the Board encourages the auditor and audit committee to have a robust dialogue.

The proposal asked whether a different, more granular, metric would be more appropriate, for example allocation of audit hours devoted to each phase of the audit—planning, quarterly reviews, interim field work, final field work up until report release date, and post-report release date until audit documentation completion date. Most commenters who commented on this question did not agree that a different, more granular, metric would be more appropriate. Views provided by these commenters included the following:

- A more granular metric devoted to different phases of an engagement would be very challenging to measure and interpret as the audit is an iterative process. In addition, audit procedures may be performed to meet more than one specific objective and thus may relate for instance to both planning and execution phases of the engagement.
- It will be costly to assemble the information to report and such additional time spent on data reporting diverts very important time during the audit and creates an unnecessary dilemma for engagement teams as to whether it is more important to comply with audit quality standards or reporting requirement rules.

The Board agrees with these commenters that a more granular metric is not necessary to achieve the objectives of this metric and did not modify the proposed metric to make it more granular.

Other than clarifying that multiyear audits are outside the scope of the reporting requirement and revising the scoping of the firm level metric to limit it to only those accelerated filers and large accelerated filers of the firm, the Board adopted this metric as proposed.

(See Exhibit A, "Allocation of Audit Hours.")

viii. Restatement History

Restatements for errors (e.g., not for changes in accounting principles) are generally considered a signal of potential difficulties in at least parts of a firm's audit practice. Academic literature suggests that restatements provide the cleanest empirical measure of audit failure.¹⁴¹ Overall, the Board believes the academic literature supports a measure that accumulates the pattern of restatements for firms, as this would provide a strong measure against which other metrics may be identified in the future.

The proposed firm-level metric set forth requirements for firms to report information related to restatements,¹⁴² including both revision restatements (sometimes referred to as "little r" restatements)¹⁴³ and reissuance restatements (sometimes referred to as "Big R" restatements)¹⁴⁴ of audited financial statements for all issuer engagements of the firm. The proposal also included reporting of reissuance restatements of management's report on ICFR.¹⁴⁵ The Board adopted this metric area with several modifications discussed in more detail below.

The proposal asked whether the proposed descriptions of revision restatement and reissuance restatement were clear and appropriate. The two commenters on this question agreed that the proposed descriptions were clear

¹⁴¹ See, e.g., DeFond and Zhang, *A Review of Archival Auditing Research*.

¹⁴² The term "restatements" has the same meaning as defined in the FASB Accounting Standards Codification ("FASB ASC") Topic 250, *Accounting Changes and Error Corrections*; see also, "retrospective restatement" as defined in IFRS Accounting Standard (IAS) 8, *Accounting Policies, Changes in Accounting Estimates and Errors*. The phrase "error in previously issued financial statements" has the same meaning as defined in the FASB ASC 250; see also "prior period errors" as defined in IAS 8.

¹⁴³ A "revision restatement" of audited financial statements was described in the proposal as "when an immaterial error in previously-issued audited financial statements, that is material to the current period financial statements, is corrected by an issuer in the current period comparative financial statements by restating the prior period information and disclosing the revision."

¹⁴⁴ A "reissuance restatement" of audited financial statements was described in the proposal as "when a material error in previously-issued audited financial statements, report on management's assessment of the effectiveness of ICFR, or both, is identified and disclosed by an issuer in a filing with the SEC (e.g., on Form 8-K Item 4.02, Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review)."

¹⁴⁵ A "reissuance restatement of management's report on ICFR" was described in the proposal as "When a material error in a previously-issued report on management's assessment of the effectiveness of internal control over financial reporting is identified and disclosed by an issuer in a filing with the SEC."

and appropriate. The descriptions were adopted with modifications: (i) in addition to referring to restatements identified and disclosed by the issuer in a filing with the SEC, the final description of reissuance restatement also refers to circumstances in which the firm is required to file a notice pursuant to Item 2.1 of Form 3,¹⁴⁶ and (ii) the final description of revision restatement was revised to improve the alignment with the description used by the SEC in its adopting release for exchange listing "clawback" rules¹⁴⁷ and to clarify that the restated financial information and the disclosure appear in a filing with the SEC. The revisions to the description of reissuance restatement ensure that the data set is complete because it captures circumstances where the issuer fails to comply with its reporting obligations. The revisions to the description of revision restatement avoid potential misalignment with the SEC's characterization of little r restatements and also provide a clear trigger (SEC filing) for when a restatement is included in the metrics.

Accordingly, the descriptions of reissuance restatement and revision restatement in the final rules provide as follows (footnotes omitted):

Reissuance restatement: When a material error in previously-issued financial statements is identified and disclosed by an issuer in a filing with the SEC (e.g., on Form 8-K Item 4.02, Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review) or the firm is required to file a notice pursuant to Item 2.1 of Form 3.

Revision restatement: When an error in previously-issued financial statements that did not result in a reissuance restatement, but would give rise to a material misstatement if (a) the error was left uncorrected in the current report or (b) the error correction was recognized in the current period, is corrected and disclosed by an issuer in a filing with the SEC.

¹⁴⁶ Item 2.1 applies when a firm:

has withdrawn an audit report on an issuer's financial statements, or withdrawn its consent to the use of its name in a report, document, or written communication containing an issuer's financial statements, and the issuer has failed to comply with a Commission requirement to make a report concerning the matter pursuant to Item 4.02 of Commission Form 8-K.

¹⁴⁷ See *Listing Standards for Recovery of Erroneously Awarded Compensation*, SEC Rel. No. 34-96159 (Oct. 26, 2022) at 28 ("restatements that correct errors that are not material to previously issued financial statements, but would result in a material misstatement if (a) the errors were left uncorrected in the current report or (b) the error correction was recognized in the current period").

The proposed metric included only restatements that related to corrections of errors and excluded all other restatements, including those resulting from changes in accounting principles. The proposed metric also excluded corrections in the current period financial statements of errors that were not material to the previously-issued financial statements and are not material to the current period financial statements (e.g., a voluntary restatement or an out-of-period adjustment), because these are not restatements as described in this rulemaking. One commenter suggested that the metric should explicitly exclude restatements resulting from stock splits and similar activities that result in non-error restatements. As proposed, the metric addressed only restatements for errors, and the Board does not believe it is necessary to list specific types of non-error restatements.

Commenters generally supported the reporting of a restatement metric, including all of the investors and investor-related groups that addressed the topic. Some pointed out that firm transparency or audit quality reports often include a similar metric.

However, two commenters questioned the usefulness of the proposed metric and asserted that such a metric alone could provide only limited insight into the quality of public oversight over issuers and auditors. One commenter stated that this information was already publicly available, and it did not appear necessary to require firms to report it but if it were reported, a streamlined metric that merely reported on the total number of restatements for the year would be preferable. One commenter, who generally supported the proposed metric, stated that it should only include those audits where the auditor withdrew and amended the opinion.

Some commenters generally supported the proposed metric but suggested changes to various elements discussed in more detail below, including:

- Removing revision restatements from the proposed required reporting.
- Counting multi-year restatements as one restatement, not separately.
- Reducing the number of reporting periods to be reported from five to three.
- Not requiring engagement-level reporting.

One aspect of the proposal that did not draw comment, and which the Board adopted as proposed, was the proposed reporting of reissuance restatements of management's report on ICFR, together with reporting of the number of issuer engagements for which the firm initially issued an audit report

expressing an opinion on ICFR.¹⁴⁸ Firms are required to report those reissuance restatements of management's report on ICFR that disclose an additional material weakness or additional elements to a previously disclosed material weakness for all issuer engagements.

a. Revision and Reissuance Restatements

The proposed metric set forth requirements for firms to include information related to both reissuance restatements and revision restatements for all issuer engagements of the firm in the firm's required reporting. Three commenters agreed specifically with this aspect of the required reporting with one commenter stating that providing information related to revision restatements gives a holistic picture of the firm's audit performance, reliability of the financial statements, and transparency from the fact that all restatements are reported and not just reissuance restatements.

The other commenters on this aspect of the proposal, all firms or firm-related groups, disagreed with the proposed requirement to include revision restatements in the metric. They expressed the following concerns:

- Such restatements are not material to the prior periods and to report them suggests an inappropriate level of importance to information deemed immaterial.
- These types of restatements are not currently separately tracked by some smaller firms, given that revision restatements are not material to the year to which they relate, thus are not necessary or useful to decision-making.
- Requiring the disclosure of these instances in the same context as reissuance restatements could inappropriately suggest that there are potential implications for the quality of the audit performed.

The Board continues to believe that the restatement history metric should include all restatements for errors, both revision restatements and reissuance restatements. As noted above, several commenters were supportive of the Board's proposed scope, including all the investors and investor-related groups that addressed the issue. The Board believes that this scope will provide a more complete picture of the extent to which financial statements

audited by the firm contain errors that subsequently have to be corrected.

The Board also believes that its reporting requirements should not distinguish between revision restatements and reissuance restatements in a way that may create inappropriate incentives for auditors and issuers as they make materiality determinations with respect to previous period errors. The SEC addressed this concern in its rulemaking regarding exchange listing "clawback" rules, which also apply to both revision restatements and reissuance restatements.¹⁴⁹

The Board understands that revision restatements and reissuance restatements do not necessarily convey the same information, particularly as to the performance of the auditor. As the Board proposed, revision restatements will be reported on a separate line from reissuance restatements, which will enable users to analyze the two different types separately.

In the final metric, both revision restatements and reissuance restatements will be measured based on disclosure in an SEC filing. Reissuance restatements will also include circumstances in which the issuer is required to make an SEC filing under Form 8-K Item 4.02¹⁵⁰ and fails to do so, which triggers a requirement for the firm to file a notice pursuant to Item 2.1 of PCAOB Form 3. Disclosure in an SEC filing could take a variety of forms, such as checking the box on the cover page of Form 10-K and Form 20-F to indicate correction of error in a previously issued financial statement, as one commenter suggested; filing a Form 8-K in response to Item 4.02; or simply including restated prior period information in a periodic report or registration statement. The Board believes that measuring restatements based on SEC filings will provide an objective point of reference that will enable firms to track the relevant data.

¹⁴⁹ See SEC Rel. No. 34-96159 at 35-6 (in connection with including both revision restatements and reissuance restatements in its clawback rules, stating that "this construction of the statutory language addresses concerns that issuers could manipulate materiality and restatement determinations to avoid application of the compensation recovery policy"). See also *Assessing Materiality: Focusing on the Reasonable Investor When Evaluating Errors* (Mar. 9, 2022), available at <https://www.sec.gov/newsroom/speeches-statements/munter-statement-assessing-materiality-030922>, (observing that some materiality analyses appear to be biased toward supporting an outcome that an error is not material to previously-issued financial statements, resulting in "little r" revision restatements).

¹⁵⁰ See Form 8-K Item 4.02, *Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review*.

¹⁴⁸ Under Sarbanes-Oxley, the auditor is required to attest to management's assessment of the effectiveness of the company's internal control only for companies that qualify as "large accelerated filers" or "accelerated filers," other than "emerging growth companies." See Section 404 of Sarbanes-Oxley, 15 U.S.C. 7262.

The Board notes that one commenter asserted that some smaller firms do not currently track revision restatements. As mentioned above, under QC 1000 firms are required to track restatement data (i.e., both types of restatements) in order to design engagement monitoring activities and determine whether engagement deficiencies exist. In addition, given the public availability of the data and the ease with which the SEC's electronic data gathering analysis and retrieval ("EDGAR") database can be searched, the Board does not believe that gathering the data will be overly burdensome, regardless of whether it is a firm's current practice to do so.

b. Multi-Year Audit Restatements

The proposal contemplated that, in the case of multi-year audits where one auditor's report covers the audits of multiple years of financial statements, the metric would treat every year that is restated as a separate restatement. While one commenter supported the proposed treatment of these types of audit restatements, firms and firm-related groups stated that multi-year restatements should be based only on the initial year audited, and should not be counted separately for each year. These commenters expressed concern that, as proposed, the metric would reduce understandability and comparability as it would misalign with how the audit was classified when reporting the metrics in the initial year the audit report was issued, creating the potential for a misleading multiplier effect. One firm stated that some restatements may be triggered by a distinct issue in one year, which may or may not be material to other years presented, but those other years are still corrected in the restatement process. Another firm expressed concern about the potential complexity and difficulty of the proposed reporting. A firm-related group suggested that, as an alternative, the multi-year-audit restatements might instead be covered by providing total years impacted by restatements as a supplementary metric.

The Board considered commenter input on this issue, but the Board continues to believe that the most accurate and appropriate presentation of multi-year audit restatements is to count each year that is restated as a separate restatement when reporting this metric. If a firm has additional context related to a multi-year audit restatement that it believes will assist users in properly interpreting the metric, the firm could describe it as optional narrative accompanying the metric.

c. Number of Reporting Periods to Present

The proposal provided that this metric would be reported for the current reporting period and each of the preceding four years, for a total of five years.¹⁵¹ One firm agreed with the proposal, stating that the five-year period strikes a balance between providing sufficient historical context to identify trends and patterns in audit quality and restatements and it also maintains the current relevance.

The other commenters on this aspect of the metric, all firms and firm-related groups, disagreed with the proposal and instead suggested that firms be required to report the current period and each of the two preceding years, for a total of three years. These commenters offered the following rationales:

- Three years would be consistent with an issuer's reporting of periods in an annual report in accordance with SEC rules and regulations.
- It would be better to require firms to report three years because it will greatly reduce the burden on terminated firms to track the restatements of their former audit clients (e.g. newly implemented monitoring and communication protocols with successor audit firms and previously audited companies). Since issuers are required to present three years of income statements in the financial statements included in Form 10-K, they will need to obtain consents from former auditors for those prior periods. As a result, terminated firms will be made aware of any restatements when requested to provide consents.
- Five years is unnecessarily long given this information is readily available via the SEC's EDGAR system.

The Board considered the comments received and determined to limit the metric to three years, rather than the five years initially proposed. As commenters have pointed out, this will better align with SEC requirements regarding financial statement presentation and may therefore reduce any potential efforts or costs associated with implementation. While the change may result in some reissuance restatements falling outside the reporting period, the Board believes that focusing on more current information will provide users with a more relevant metric.

¹⁵¹ Based on an internal evaluation of restatement patterns covering the period from Q1 2008 to Q2 2018 by the PCAOB's Office of Economic Risk and Analysis, 98% of restatements during this period were announced with a delay of approximately five years or less and about 80% of the restatements were announced with a delay of three years or less.

d. Engagement-level Reporting

The proposal stated that since restatements are disclosed in the financial statements, the Board was not proposing to require that firms report this metric at the engagement level. Commenters who expressed views on this aspect of the proposal agreed with this view stating that this information is already publicly available from the SEC. One firm supported engagement-level reporting of this metric explaining that it could lead to deeper accountability to assess the performance of audit teams by linking the restatements to the responsible engagement team, and it would result in promoting higher standards of audit quality. Taking into account commenter feedback, the Board continues to believe that reporting restatement information at the engagement level is unnecessary because it is already publicly available in a searchable format for any particular issuer through the SEC's EDGAR filing system. Conversely, for users to aggregate restatement information for all of a firm's issuer engagements could require significant time and effort, which is why the Board only adopted this metric at the firm level. Engagement-level reporting is not required under the final rules.

e. Other Commenter Feedback

Other commenter suggestions included:

- *Predecessor and successor auditor.* Under the proposal, the restatement metric would apply with respect to audit reports "initially issued by the firm." As a result, restatements would be included in the metric of the firm that issued the original audit report on the financial statements or on the audit of ICFR, regardless of whether the firm had itself identified the error or continued to serve as the issuer's auditor. Firms, in particular those that resign from the engagement or are otherwise replaced, would need to monitor whether previously-issued audited financial statements, reports on management's assessment of the effectiveness of ICFR, or both, are subsequently restated for at least three years. Two commenters that addressed this aspect of the metric agreed with the treatment provided under the proposal, and the Board adopted it as proposed.

- *Prospective reporting upon effective date.* Several commenters suggested that if the Board proceeded with the proposal to include revision restatements in the required reporting for this metric, prospective reporting upon implementation would be more practicable. As discussed above, under

QC 1000 firms are required to track restatement data in order to design engagement monitoring activities and determine whether engagement deficiencies exist, therefore firms will already have been tracking this information upon the effective date of the requirements in this rulemaking.

(See Exhibit A, “Restatement History.”)

Reporting

1. Thresholds for Required Reporting

The Board proposed to apply the same threshold for both firm-level and engagement-level reporting, focused on auditors and audit engagements for issuers that qualify as accelerated filers or large accelerated filers under SEC rules. The Board proposed that firm-level reporting would be required of every firm that audits at least one company that has self-identified as an accelerated filer or large accelerated filer by checking the box on an SEC filing (or, because Form 40–F does not contain such a check box, at least one Form 40–F filer that meets the criteria to be an accelerated filer or large accelerated filer under SEC rules)¹⁵² during the reporting period. The Board also proposed that engagement-level reporting would be required for every audit of such an accelerated or large accelerated filer.

The Board believes the proposed threshold would focus the reporting requirements on the firms and engagements in which investors and other stakeholders have the greatest interest in additional information, and that establishing the same threshold for firm- and engagement-level reporting would foster comparability across both issuers and firms and provide richer context for the evaluation of engagement-level information. The proposal also contemplated that firms that were not subject to the reporting requirements could choose to report voluntarily.

This approach excludes engagement-level information about audits of non-issuers, including broker-dealers, and of issuers that are not accelerated filers or large accelerated filers under SEC rules. These include, for example, investment

companies;¹⁵³ employee stock purchase, savings, and similar plans that are required to file reports with the SEC on Form 11–K;¹⁵⁴ and many smaller reporting companies.¹⁵⁵ It also excludes firm-level information about firms whose PCAOB practice was limited to such audits.¹⁵⁶

i. Firm- and Engagement-Level Reporting Thresholds

The Board solicited comment on whether the proposed reporting thresholds for firm- and engagement-level were appropriate. Investors and investor-related groups generally supported the proposed thresholds for both firm- and engagement-level reporting. They agreed that the proposed requirements would appropriately apply to the audits, and auditors, of companies that account for the majority of the U.S. public company market capitalization, and would capture the situations where investment and proxy voting decisions would be most likely to benefit from additional information about the audit and auditor. One firm-related group broadly agreed with the thresholds for both firm- and engagement-level reporting because it believes different reporting requirements are not warranted. Another firm-related group also agreed with the proposed reporting thresholds as appropriately targeting the largest companies having a significant impact on the market capitalization of issuers. Two commenters recommended extending the reporting requirements to all PCAOB-registered firms, either immediately or over time.

¹⁵³ Section 3(a)(1) of the Investment Company Act of 1940, 15 U.S.C. 80a–3(a)(1), defines an “investment company” as an issuer which (A) is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities; (B) is engaged or proposes to engage in the business of issuing face-amount certificates of the installment type, or has been engaged in such business and has any such certificate outstanding; or (C) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer’s total assets (exclusive of Government securities and cash items) on an unconsolidated basis. Audits of business development companies (BDCs) that met the criteria to be an accelerated filer or large accelerated filer would be included.

¹⁵⁴ See Exchange Act Rule 15d–21, 17 CFR 240.15d–21.

¹⁵⁵ See Regulation S–K, Item 10(f)(1), 17 CFR 229.10(f)(1).

¹⁵⁶ Firms that do themselves not serve as lead auditor for an accelerated filer or large accelerated filer but play a substantial role in audits led by other firms would also not be subject to the proposed reporting requirements. See PCAOB Rule 1001(p)(ii) for the definition of “play a substantial role in the preparation or furnishing of an audit report.”

On the other hand, all firms and a firm-related group that commented on the firm-level reporting threshold objected to it, generally suggesting instead that firm-level reporting should be required of firms that are annually inspected by the PCAOB, with some recommending voluntary reporting by smaller firms. One commenter suggested reporting only for annually inspected firms that audit at least one accelerated filer or large accelerated filer. Another commenter recommended that firm-level reporting should be required only of firms with 25 or more large accelerated and accelerated filer engagements, saying that firms with a small number of large accelerated and accelerated filer engagements would not produce meaningful metrics with sufficient anonymity as their metrics can be unduly influenced by a single engagement. Some of these commenters asserted that requiring reporting only from annually-inspected firms would balance scalability concerns with the need for investor protection, as it would still capture a large majority of the U.S. public company market capitalization. One commenter stated that the issuer portfolio at firms with less than 100 issuers is not sufficiently like those firms inspected by the PCAOB annually to provide valuable comparisons and another commenter expressed concern about issuers that frequently move above or below the accelerated or large accelerated filer thresholds.¹⁵⁷ One commenter added that there is precedent to use an alternative threshold based on firms that issue audit reports for more than 100 issuers, such as PCAOB’s annual inspection and QC 1000.18 requirements.

Several commenters also raised concerns about the cost of metrics reporting and stated that requiring reporting only from annually-inspected firms will better support the cost to comply with the proposed requirements and alleviate related unintended consequences, particularly greatly reducing the burden for smaller firms and firms in foreign jurisdictions.

Another commenter supported requiring reporting only from annually-inspected firms because it would alleviate concerns about privacy and confidentiality, particularly for firms

¹⁵⁷ Based on the PCAOB staff’s analysis performed on the data obtained from Audit Analytics, Standard & Poor’s, and publicly available data from the RASR, available at <https://rasr.pcaobus.org>. In the four-year period ended September 30, 2022, on average, approximately 4% of filers that reported on Form 10–K and Form 20–F and had not previously self-identified as either a large accelerated filer or accelerated filer newly self-identified as either a large accelerated or accelerated filer each year.

¹⁵² See Exchange Act Rule 12b–2, 17 CFR 240.12b–2. Generally, under Rule 12b–2, a large accelerated filer is an issuer that meets certain reporting conditions and has a public float (aggregate worldwide market value of voting and non-voting common equity held by nonaffiliates) of \$700 million or more. An accelerated filer is generally an issuer that meets the same reporting conditions; has a public float of \$75 million or more, but less than \$700 million; and had revenue of \$100 million or more in the most recent fiscal year for which audited financial statements are available.

outside the United States that issue a limited number of large accelerated or accelerated filer auditor reports annually and are subject to laws and regulations in those areas, because firm-level metrics may effectively result in the disclosure of engagement-level information. They further noted that such a threshold may avoid redundant reporting burdens for these firms and disclosure of confidential information of specific issuers, but still achieve the objectives of reporting firm level metrics as “firm-level reporting would consist only of summary data” as proposed.

For the engagement-level reporting threshold, because firms objected to any public reporting of engagement-level metrics, most firms did not comment further on the threshold for engagement-level reporting except for offering some other suggestions. See below for other comments received.

The Board adopted the thresholds for both firm-level and engagement-level reporting with one change. Firm-level reporting will be required of every firm that audits at least one company that has self-identified as an “accelerated filer” or “large accelerated filer” by checking the box on an SEC filing during the reporting period. Engagement-level reporting will be required for every audit of such an accelerated or large accelerated filer.

The final threshold does not refer to Form 40–F filers that meet the definition of “accelerated filer” or “large accelerated filer” under SEC rules, which were included in the proposal, based on the Board’s understanding that such companies are not regarded as accelerated filers or large accelerated filers. Companies that file both Form 40–F and another SEC annual reporting form, and that check the box to self-identify as an accelerated filer or large accelerated filer on that other form, will still be included.

The Board continues to believe that requiring reporting for auditors and audits of large accelerated filers and accelerated filers is the most appropriate approach. As stated in the proposal, the Board estimated that the firm-level reporting requirements will apply to approximately 210 firms,¹⁵⁸ including 22 of the top 25 U.S. firms by total firm

revenue,¹⁵⁹ and all of the 2022 PCAOB annually inspected firms that continue to audit issuers,¹⁶⁰ and that the proposed engagement-level reporting requirements would apply to approximately 3,400 issuer audits, representing 99% of the total market capitalization of issuers reporting on Form 10–K and Form 20–F.¹⁶¹

The Board analyzed the other reporting thresholds suggested by commenters based on the same data. Coverage would be significantly reduced if the Board required reporting only from annually inspected firms: 13 firms,¹⁶² including 12 of the top 25 U.S. firms by total revenue compared to 22 firms.¹⁶³ Similarly, if only annually inspected firms were required to provide engagement-level reporting, it would apply to approximately 2,700 issuer audits, representing 83% of the total market capitalization of issuers reporting on Form 10–K and Form 20–F. If only firms with 25 or more large accelerated or accelerated filers were required to report, then firm-level reporting would apply to 11 firms, including 9 of the top 25 U.S. firms by total revenue, and engagement-level reporting would apply to approximately 2,800 issuer audits, representing 84% of the total market capitalization of issuers reporting on Form 10–K and Form 20–F.

In addition to the significant coverage decreases, limiting metrics reporting to annually inspected firms would exclude

¹⁵⁹ See Accounting Today, *2024 Top 100 Firms + Accounting’s Regional Leaders* (March 2024), for a listing of the top 25 U.S. Firms. Based on staff analysis, the three firms in the top 25 firms that would be excluded from the reporting requirements are Aprio, LLP; Carr, Riggs & Ingram LLC; and Citrin Cooperman & Company, LLP.

¹⁶⁰ See the 14 firms listed as 2022 Annually Inspected Firms, available at <https://pcaobus.org/inspections/basics-of-inspections>. B F Borgers CPA PC was removed for the purpose of this analysis as its registration withdrawal is currently pending.

¹⁶¹ The data was obtained from Audit Analytics, Standard & Poor’s, and publicly available data from the RASR, available at <https://rasr.pcaobus.org>. Large accelerated filers and accelerated filers were included in this number. Large accelerated filer or accelerated filer status was based on the most recent quarterly or annual filing as of February 10, 2024. Market capitalization was calculated as of December 31, 2023. Because in some instances multiple audit reports were issued in the same year, the total number of audit reports issued during the same time period using the same data source would be approximately 3,500.

¹⁶² From the 14 firms listed as 2022 Annually Inspected Firms as described above, B F Borgers CPA PC was removed for the purpose of this analysis as its registration withdrawal is currently pending.

¹⁶³ See Accounting Today, *2024 Top 100 Firms + Accounting’s Regional Leaders* (March 2024), for a listing of the top 25 Firms. Based on staff analysis, two annually inspected firms (B F Borgers CPA PC and Cohen & Company, Ltd.) were not included in the top 25 firms.

non-US firms that audit a small number of non-US based issuers with substantial market capitalizations. If the Board ranks firms based on the market capitalization of the issuers they audit, the top 30 firms audited 94% of the total market capitalization of accelerated filer and large accelerated filer issuers. However, only five of these top 30 firms are annually inspected. The remaining 25 firms are all non-U.S., and all but one of them audited large accelerated filers averaging at least \$10 billion in market capitalization. Similarly, limiting metrics reporting to firms with 25 or more large accelerated or accelerated filers would result in only six of the top 30 firms (ranked based on the total market capitalization of the issuers firms audit) reporting the metrics, and would exclude most non-U.S. firms that audit non-U.S. based issuers with substantial market capitalizations.

The Board considered applying the reporting requirements to all registered firms, as one commenter suggested. However, the Board continues to believe that investors and other stakeholders have the greatest interest in additional information regarding large accelerated and accelerated filers and the firms that audit them, and the comments supporting the proposal that the Board received from investors and investor-related groups tend to confirm that view. For that reason, the Board believes that requiring metrics reporting for all registered firms could impose costs that are not justified in light of the anticipated benefits.

Regarding the concerns of privacy or possibly disclosing confidential or otherwise protected information, particularly for firms outside the United States, the Board is not aware of any specific issues and no commenter identified any particular requirements that would conflict with the disclosure of the metrics the Board adopted. See below for further discussion of privacy and confidentiality issues.

ii. Other Commenter Feedback

The Board solicited comment on whether smaller firms should have different reporting requirements than larger firms. In addition to comments described above, several commenters recommended having different reporting requirements for smaller firms than for larger firms.

In addition, two firms requested clarification or application guidance regarding the treatment of issuers that change filer status into an accelerated or large accelerated filer during the reporting period. These commenters recommended allowing these issuers to have one full year of implementation

¹⁵⁸ The data was obtained from Audit Analytics, Standard & Poor’s, and publicly available data from the RASR, available at <https://rasr.pcaobus.org>. Firms that issued audit opinions for issuers that met the large accelerated or accelerated filer definition in the 12 months ended September 30, 2023, were included in this number. Large accelerated filer or accelerated filer status was based on the most recently filed quarterly or annual report as of February 10, 2024.

period after the changes in filer status. The Board notes that firm-level reporting will be required of all firms that issued an audit report for at least one large accelerated filer or accelerated filer during the reporting period, and that engagement-level reporting will be required in connection with each audit report issued for a large accelerated filer or accelerated filer. Accordingly, the relevant date to determine large accelerated filer or accelerated filer status will be the date the audit report is issued. Because SEC requirements regarding becoming a large accelerated filer or accelerated filer include at least six months lag time,¹⁶⁴ the Board does not believe that an additional transition period would be necessary under the Board's rules.

The Board solicited comment on whether the Board should require engagement-level metrics for audits of investment companies (other than BDCs that are accelerated filers or large accelerated filers) or non-accelerated filers. Several commenters supported excluding one or more categories of such entities from metrics reporting because the proposed metrics would be less likely to assist in investment and voting decisions. On the other hand, one commenter recommended including publicly traded "closed end" investment companies, registered open end investment companies, and broker-dealers that are publicly traded on the basis that some mutual fund investors ratify the appointment of the auditor and audit committees presumably approve for the auditor for these companies.

As proposed, the Board is not requiring engagement-level reporting on these investment companies and non-accelerated filers. For audits of investment companies, the Board continues to believe that the arguments underpinning requests for additional information about audits and auditors will not apply, or apply with the same force, in these situations, where shareholder ratification of the appointment of the auditor may not be

typical and the metrics would be less likely to assist in investment and voting decisions. Regarding the reporting of non-accelerated filers, as discussed above, these issuers have significantly smaller market capitalization per issuer on average, and the Board is concerned that the benefits associated with such reporting would not justify the costs.

2. Reporting of Firm-Level Metrics (Form FM)

The Board proposed that firms report their firm-level metrics annually on a new Form FM, *Firm Metrics*. Of those commenters that support reporting firm-level metrics, some also explicitly expressed support for reporting annually on Form FM. One commenter recommended that Form FM be amended to explicitly include the definitions of the metrics and metric formulas to provide pertinent information to enhance the context and understandability for users.

The proposal asked whether, rather than reporting on Form FM, firms should report firm-level metrics, as of March 31 on Form 2, which is due on June 30. One commenter stated that the firm-level metrics could be reported on Form 2 to simplify the reporting for firms and consolidate the information. One commenter did not support reporting firm-level metrics on Form 2 stating that between issuer filings through March 31 and the performance of procedures on the first quarter filings through May, firms are exceptionally busy through the middle of May each calendar year. Another commenter questioned whether the information, being reported only annually, would be too old to assist decision-making.

Taking into account commenter feedback, the Board continues to believe that reporting firm-level metrics publicly on a new Form FM filed by November 30 will provide investors and other stakeholders with timely and useful information about auditors and will provide a basis of comparison for the engagement-level metrics, where applicable. The Board does not believe that Form 2 would be the appropriate place to report the firm-level metrics because the due date of Form 2, June 30, falls after the general timing of shareholder meetings (typically April through June for issuers with a calendar fiscal year) and this information would generally arrive too late to be considered in deciding how to vote on ratification of the appointment of the auditor. The Board believes audit committees would also benefit from having this information earlier, since it could be useful when determining whether to

reappoint the auditor.¹⁶⁵ While firm metrics would be reported only once a year, the Board believes that the information they convey would still be useful, both to investors (who otherwise have access to extremely limited information about the auditor) and to audit committees (who may benefit from standardized firm-wide information that helps put their engagement in context).

The information disclosed on Form FM will be available in a searchable database on the Board's website, similar to the Form AP database. As noted above, in addition to the required firm-level metrics, firms will have the option to provide a brief narrative to accompany each metric. In response to the commenter that emphasized the importance of including all definitions and metric formulas in Form FM, the Board has expanded Part III of Form FM, *Terminology*, to include all of the definitions used in the metrics, not just those used in multiple metrics. As proposed, the formula for each required metric is included in Part IV, *Metric Calculations, Reporting and Discussion* of Form FM.

The proposal provided that the reporting period for Form FM would generally be the 12-month period ended September 30 in each year¹⁶⁶ and filed on or before November 30, 61 days after the end of the reporting period.

Some commenters expressed support for the proposed reporting period ending on September 30. One of these commenters also suggested that consideration be given to allowing firms to pick a reporting period based on their firm's cycles. A few commenters expressed concern with the reporting date of September 30 and instead suggested firms be permitted to choose their own timing for Form FM. These commenters expressed the following views:

¹⁶⁵ See Letter from Center for Audit Quality (Aug. 1, 2024) at 3 ("The majority [59%] of audit committee members surveyed agree some standard information about auditors should be considered when making their selection and performing their oversight responsibilities").

¹⁶⁶ Exceptions to the proposed reporting period of firm-level metrics reported on Form FM included the proposed metrics for Quality Performance Ratings and Compensation and Audit Firms' Internal Monitoring. The proposal stated that "[these] proposed firm-level metrics relate to activities for which firms may already have defined periods or cycles that may not align with [the Board's] proposed reporting date. In these cases, [the Board] proposes that the time period covered by the metrics may be tailored to a firm's existing processes and procedures." Neither of these metrics are included in the metrics the Board adopted. However, the Board adopted a metric related to the Training Hours for Audit Personnel metric which will permit firms to use an already-established training calendar cycle for calculation and reporting of this metric, which may not align with the Form FM reporting period.

¹⁶⁴ Under the SEC definitions of "large accelerated filer" and "accelerated filer," the determination that an issuer has become a large accelerated filer or accelerated filer is generally based on the public float as of the end of the issuer's second fiscal quarter, to take effect as of the end of the fiscal year. See Exchange Act Rule 12b-2(3), 17 CFR 240.12b-2(3). The Board notes that issuers that are eligible to use the requirements for smaller reporting companies under the revenue test in paragraph (2) or (3)(iii)(B) of the SEC's "smaller reporting company" definition could cease to be accelerated filers based on a determination made at or after the fiscal year end. However, since metrics requirements would not apply in such a case, the Board does not believe any transition period is necessary.

- The reporting date for firm-level metrics should not matter to investors, therefore the PCAOB should consider firm input as to the date that best aligns with their internal processes.

- Concern about the amount of work firms will be required to do on this new form along with the QC 1000 requirements and the relationship with information reported on Form 2 on a different time period. This commenter suggested that the Board should undertake a comprehensive review of all reporting requirements, systems, reporting, and dates.

- Concern that small- and mid-sized firms will be particularly burdened with having to evaluate the quality control system under the newly adopted quality control standard, support the annual inspection, and assemble data for reporting in Form FM all at the same time.

The Board does not believe that permitting firms to choose their own timing for Form FM would ultimately serve the users of the metrics, because of the enhanced comparability that a common measurement date and measurement period provide. In particular, audit committees, who may seek to consider comparative metrics when determining which audit firm to appoint, would not be served by using potentially outdated or non-comparable data from a firm. The proposed reporting date aligns with the date the firm is required to evaluate its QC system under QC 1000, which was adopted by the Board and approved by the SEC on September 9, 2024. While the Board understands that this date will cause some firms to have additional PCAOB reporting responsibilities simultaneously, the Board continues to believe that this timing is preferable since it is prior to the calendar year end and the traditional busy period for many firms, which the Board believes would reduce potential resource or time constraints and further benefit firms.

Two commenters supported the proposed November 30 due date of Form FM. One commenter, who supported the proposed November 30 due date, specifically found it helpful that the date aligned with QC 1000. Some firms expressed concern that the proposed due date would create challenges going forward for firms to support their annual inspections, evaluate the quality control system, and assemble data for reporting in Form FM all at the same time. One commenter suggested that the due date for Form FM should be three months from the end of the reporting period, or December 31. Another commenter expressed concern that a 61-day period may not be

sufficient to allow firms to accurately and completely collect, assemble, and report the metrics and instead suggested that firms should be permitted to choose their own filing date. One commenter, who supported the proposed reporting date of September 30, suggested the PCAOB consider a longer period of time in which to submit Form FM in the initial years after the effective date.

The Board believes the 61-day period will provide sufficient time for firms to accumulate data and calculate the metrics and report to the PCAOB. In addition, as discussed above, the Board has reduced the scope of the following metric areas in particular: (i) Partner and Manager Involvement, Workload, and Allocation of Audit Hours, to include only large accelerated filer and accelerated filer engagements; and (ii) Industry Experience, to limit the reporting to those firms that issued five or more audit reports for accelerated filers and large accelerated filers, combined, during the reporting period. All of these changes should further reduce the reporting effort and help to address commenter concerns. A benefit of aligning the Form FM reporting period and filing deadline with QC 1000 is that some firms, if they choose, could also use these metrics in their monitoring and remediation process as part of the QC system, enabling the firm to use comparable information underlying both reporting obligations for Form QC and Form FM. Under the final rules, as proposed, reporting on Form FM is due on or before November 30, 61 days after the end of the reporting period. In addition, see discussion of the effective date below.

Form FM was adopted with the following modifications:

- Making conforming revisions to reflect the changes to metrics discussed above.
- Related to the optional narrative, (i) expanding the character limit to 1,000 characters and (ii) adding additional instructions for firms that elect to provide the optional narrative (discussed above).
- Rearranging instructional language within the form and expanding Part III of Form FM to include all terminology used in the metrics (discussed above).
- Removing references to 40-F filers (see above).

Together with new Form FM, the Board also proposed a new reporting rule, PCAOB Rule 2203C, which did not draw comment and was adopted substantially as proposed, and making conforming changes to Rules 2205 and 2206. The text of PCAOB Rule 2203C; Form FM, together with the form

instructions; and the conforming amendments are included below.

3. Reporting of Engagement-Level Metrics (Form AP)

The Board proposed to require firms to report engagement-level metrics on Form AP, along with the already required disclosure of the name of the engagement partner and information about other firms involved in the audit.¹⁶⁷ The Board believes that Form AP provides an established mechanism for conveying engagement-level information that is familiar to investors and other stakeholders.¹⁶⁸ Reporting on Form AP will allow access to the engagement-level metrics in a centralized location and will allow for the dissemination of the metrics through already established data channels. Form AP is also downloadable, which will provide users of the information the ability to perform comparisons across engagements, including analyses of the entire Form AP data set.

The Board proposed adding a new section to Form AP for firms to report the required metrics. As noted above, in addition to the specific engagement-level metrics, the Board proposed that the firm would be able to provide an optional narrative description to accompany each metric. As proposed, the firm would have been able to provide up to 500 characters as part of their narrative description to provide context to facilitate the reader's understanding of the metric. To reflect Form AP's broader content, the Board also proposed to rename it "Audit Participants and Metrics." The text of the Form AP amendments and the form instructions are included below.

Commenters who supported public reporting of engagement-level metrics generally agreed with reporting on Form AP. However, several commenters

¹⁶⁷ See PCAOB Rule 3211. PCAOB Rule 3211 requires the filing of a report on Form AP regarding an audit report the first time the audit report is included in a document filed with the SEC. In the event of any change to the audit report, including any change in the dating of the report, PCAOB Rule 3211 requires the filing of a new Form AP the first time the revised audit report is included in a document filed with the SEC. If the auditor's report is reissued and dual-dated, the firm is required to file a new Form AP that would reflect the most updated information of the proposed engagement-level metrics (e.g., total audit hours as of the latest audit report date based on the cumulative total audit hours). For most audits, Form AP is due within 35 days after an audit report is first included in an issuer SEC filing. The entire Form AP data set (updated daily) and data dictionary are available to download in CSV format under the section, "Download the entire data set," at <https://pcaobus.org/resources/auditorsearch>.

¹⁶⁸ Information related to usage statistics can be found on the PCAOB's website (<https://org/auditorsearch>).

disagreed with public reporting of engagement-level metrics. The Board has addressed these comments above. One commenter suggested that the reporting date should be changed to November to align to the audit committee's considerations of reapproving a firm and when considering the following year's audit plan. Additionally, one commenter voiced their concern that there is mixed evidence on the influence of Form AP disclosures on decision-making.

The Board adopted the requirement as set forth in the proposal to report engagement-level metrics on Form AP and rename the form Audit Participants and Metrics. Correspondingly, the Board has retitled PCAOB Rule 3211 as *Audit Participants and Metrics* and made a conforming amendment to AS 3101.20. The Board made certain amendments to the requirements for reporting on Form AP as follows:

- Conforming revisions to reflect the changes to include the metrics discussed above.
- Related to the optional narrative, (i) expanding the character limit to 1,000 characters and (ii) adding additional instructions for firms that elect to provide the optional narrative.

Form AP's deadline of 35 days after the issuance of the auditor's report already takes into account the timing of the proxy vote for most issuers.

4. Amendments to Form FM and Form AP

As is required for other PCAOB forms, the Board proposed that firms be required to amend Form FM or Form AP to correct inaccurate information or provide omitted information that should have been included.¹⁶⁹

Some commenters requested that the Board consider adopting some level of materiality or de minimis threshold for the proposed metrics reporting and specifically address how firms should consider whether to amend their reporting when differences arise. These commenters expressed the following views:

- Although a materiality concept, on its own, will not eliminate the challenges currently identified and those that are unknown, it may help reduce confusion to investors and other stakeholders resulting from the need to report amendments caused by

immaterial changes in estimates and unintentional errors and to help avoid unnecessary penalties for materially correct reporting.

- The risk of enforcement for minor, unintentional errors in reporting may also play a role in public accounting firms' decision to cease auditing public companies.

- Guidance would be essential for implementing any final standard effectively to balance the costs of compiling and reporting the information and this guidance should extend to the evaluation of differences that may arise in the disclosure of participating firms on Form AP.

- The proposal should be amended for the application of materiality thresholds based on reasonable assurance.

- The Board should consider revisions to PCAOB Rule 3211 to add materiality thresholds based on reasonable assurance and clarify whether the current guidance regarding amendments would extend to all metrics as well as how routine corrections and re-allocations of time entries and other matters affecting metrics reported on Forms FM are expected to be handled.

- If the PCAOB does not adopt a materiality threshold for Form FM, firms may need to consider which controls need to operate at a level of absolute assurance, which the firm stated would add significant effort and cost.

- The final rule should include a safe harbor for reporting that includes unintentional and immaterial deviations from an otherwise accurate reflection of a metric.

- The amendments should include a mechanism for revisions and a statute of limitations, such as reporting of time, should be included in the final rule. The Board believes that the reference to statute of limitations is intended to request a specified period after filing beyond which no amendments would be required for corrections.

One investor-related group indicated that they would not object if the PCAOB established a de minimis threshold for unintentional inaccuracy in reporting metrics. Another commenter recommended that the PCAOB establish a de minimis threshold for unintentional inaccuracy that applies to all firm reporting, not just in relation to the proposal.

The Board did not adopt a materiality or de minimis threshold in connection with the obligation to amend forms to correct information that was incorrect at the time the report was filed or to provide information that was omitted

from the report and was required to be provided at the time the report was filed. Historically, the Board has not established, and has not found necessary, materiality or de minimis thresholds in connection with form amendments. As a commenter acknowledged, a materiality or de minimis threshold will not necessarily eliminate challenges commenters have identified or those that have yet to be identified in connection with potential corrections. Indeed, the Board believes that implementing a materiality or de minimis threshold would introduce unnecessary complexity and uncertainty to the form amendment process and, further, would potentially threaten, or be perceived to threaten, the accuracy and reliability of reported information, thereby undermining the intended purpose of the amendments.

Similarly, the Board has not historically provided, or believed necessary, a safe harbor provision for unintentional errors and such a provision would potentially compromise the accuracy and reliability of reported information. Likewise, the Board has not historically provided, or believed necessary, a "statute of limitations" to limit the time period for which amendments would be necessary, and such a provision could potentially compromise the value of the forms in conducting historical research. In the inspection and enforcement context, the Board can exercise its discretion on a case-by-case basis.

Consistent with existing Form AP guidance, no amendments to Form FM or Form AP would be needed solely to reflect changes in the metrics that would result from differences between reasonably estimated data and actual data, in the event such information becomes available after the filing deadlines of the forms. As discussed above, in calculating both firm- and engagement-level metrics, actual data is required to be used, if available. If actual data is unavailable, firms may use a reasonable method to estimate such data. For example, if a firm used a reasonable method to estimate hours worked by partners and managers at the end of a reporting period, and those partners and managers subsequently submit timesheets for that period that include additional hours worked above the estimate used by the firm on Form FM or Form AP, the firm would not be expected to file an amended report for any deviations.

At present, the Board believes applying the existing Form AP guidance is appropriate and sufficient for the final rules. The Board will monitor for issues connected to form amendments and

¹⁶⁹ The requirements for amendment of Form FM are similar to those that apply to Form 2. See https://pcaobus.org/about/rules-rulemaking/rules/form_2; see also, e.g., Staff Questions and Answers Annual Reporting on Form 2, at Q34, available at https://assets.pcaobus.org/pcaob-dev/docs/default-source/registration/rasr/documents/staff_qa-annual_reporting.pdf?sfvrsn=5e7259ff_0.

consider updates to implementation guidance as appropriate. Addressing issues as they arise through implementation guidance—as opposed to establishing a materiality or de minimis threshold in the adopting release or through a rule amendment—will help ensure that any guidance is informed by, and better tailored to, issues raised by experience under the final rules rather than speculative concerns. The Board believes monitoring for the need for guidance is a better solution than implementing a materiality or de minimis threshold in the adopting release or through rule amendment.

Lastly, regarding the comment that the amendments should include a “mechanism for revisions,” the Board is not aware of any deficiencies in the current mechanism for amending forms and believes it suffices.

5. Inclusion of Metrics in the Audit Report

In addition to the proposed reporting on Form FM and Form AP, the Board solicited comment on whether some or all of the firm-level and engagement-level metrics, together with any additional narrative that the firm may choose to provide, should also be included in the audit reports the firm issues for audits of large accelerated filers and accelerated filers. While some commenters supported inclusion of the metrics in the audit report, many commenters disagreed with this approach citing that, for example, it could potentially detract from the clarity and purpose of the report, could result in delays in the issuance of audit reports, and amendments to the audit report for corrections to metrics could create unnecessary burden for issuers and confusion for investors.

Taking into account commenter feedback, including both the potential benefits and unintended consequences, the Board did not require inclusion of the metrics in the audit report at this time.

6. Confidential Treatment and Conflicts With Non-U.S. Law

i. Requests for Confidential Treatment Not Permitted

The primary objective of the Board’s rulemaking is to enhance public transparency regarding audits and auditors, which inherently involves the disclosure of new information. The Board did not propose to allow firms to request confidential treatment for the proposed metrics but requested comment on this approach and specifically requested that commenters

identify any laws that realistically might prevent a firm from disclosing the information required by the metrics. In response, firms and firm-related groups expressed general concern about the potential for conflicts or focused on the proposed disclosure of engagement-level metrics, such as hours worked per week on an engagement, engagement team tenure, and experience by industry, and the percentage of hours contributed by specialists and shared service centers. However, the Board disagrees with the assertion that all previously undisclosed information should be considered sensitive by default. The information called for by the metrics does not pertain to proprietary methodologies or operational strategies that could give competitive advantages if disclosed. Rather, the information called for is descriptive of the audit process itself. The Board believes that general claims of sensitivity, absent specific legal prohibitions or clear practical ramifications, are not sufficient to outweigh the benefits of increased transparency. The Board’s rulemaking is guided by the goal of deepening the public’s understanding of audit practices in audits of issuers, consistent with the Board’s statutory responsibilities.

Some firms and firm-related groups raised concerns regarding the potential antitrust implications of disclosing detailed metrics about engagement staffing and workload allocations. One of these commenters referenced the Supreme Court’s ruling in *United States v. Container Corporation of America*,¹⁷⁰ which highlights the competitive risks associated with the exchange of confidential information among competitors, particularly in concentrated industries. However, it is important to distinguish between the exchange of information directly among competitors—which may indeed raise antitrust issues—and this rulemaking’s mandate for public disclosure. The information that the PCAOB is requiring firms to disclose is not shared privately among competing firms but is made publicly available to all stakeholders, including investors, audit committees, and the general public. This type of disclosure is fundamentally different from the scenarios associated with anti-competitive behavior under antitrust laws.¹⁷¹ In light of these factors, the

Board believes the metrics do not contravene the antitrust laws, and the public benefit of these disclosures outweighs any theoretical competitive risks suggested by the commenters.

Two commenters raised concerns regarding Section 105(b)(5) of Sarbanes-Oxley, which protects information prepared or received by or specifically for the Board in connection with a PCAOB inspection or investigation. It is important to note that Section 105(b)(5) specifically protects only information that is prepared or received by or specifically for the Board in connection with a PCAOB inspection or investigation. The metrics the Board has required, however, are not prepared or received under such confidential circumstances. These metrics are intended for public disclosure to enhance transparency across the audits of issuers and to provide stakeholders—including investors, audit committees, and the general public—with important insights into audit practices. Therefore, requiring the public disclosure of these metrics does not violate the provisions of Section 105(b)(5).

Additionally, one firm and a firm-related group raised concerns regarding the AICPA Code of Professional Conduct,¹⁷² which provides that a member in public practice shall not disclose confidential client information without the specific consent of the client. It is important to differentiate the information required by the metrics from the client-specific confidential information covered under the AICPA Code. The metrics require information such as workload data, staffing allocations, and experience levels of personnel involved in audits of issuers. This information does not include confidential client information or specific details about client engagements that would be protected under the AICPA Code. Instead, it focuses on the operational aspects of registered firms and the audits they perform that are important for the public to understand and assess the audits of issuers. The objective of this rulemaking is to enhance transparency and accountability within the audits of

rather than to facilitate or enable competitive positioning among firms. Furthermore, the disclosure of such information by a regulatory authority for the purposes of transparency and accountability does not fall under the purview of antitrust concerns, as it does not facilitate collusion or the sharing of competitively secret information in a manner that would distort market dynamics. Instead, it ensures that all market participants and stakeholders have access to the same information.

¹⁷² See, e.g., AICPA Code of Professional Conduct 1.700.001 (“A member in public practice shall not disclose any confidential client information without the specific consent of the client”).

¹⁷⁰ 393 U.S. 333 (1969).

¹⁷¹ The purpose of these disclosures is to enhance transparency and accountability in the audits of issuers, allowing investors and other stakeholders to make informed decisions and hold auditors accountable. This aligns with the Board’s statutory mission to protect investors and the public interest,

issuers, and the information required by the metrics supports this goal without requiring auditors to breach their confidentiality obligations to clients.¹⁷³

Finally, although some firms raised generalized concerns about potential conflicts with foreign laws, they did not provide specific examples that would justify prohibiting the public disclosure of the information in the metrics or warranting its confidential treatment. As discussed more fully below, the Board does not believe that any law, whether foreign or domestic, provides a reasonable basis for withholding the information in the metrics from public disclosure.

As such, the Board did not permit firms to request confidential treatment for the metrics. This approach is consistent with the Board's belief that these metrics will provide valuable additional information, context, and perspective on audit firms and audit engagements, which can be used by investors, audit committees, and other stakeholders.

However, the Board is mindful of the Board's obligation to protect information that is confidential under applicable laws relating to the confidentiality of proprietary, personal, or other sensitive information. To balance these concerns, the final metrics have been specifically designed to exclude information that could reasonably qualify for confidential treatment protection, such as personally identifiable, methodological, or client-specific information. Additionally, the Board provides firms the option to include a narrative description with each metric to explain or contextualize the disclosures, allowing firms to clarify any potentially misleading information that could be viewed as sensitive.

By adopting this approach, the Board believes that prohibiting confidential treatment requests on Forms FM and AP will further the public interest while adhering to the Board's obligation to protect certain categories of firm information.

In light of the objectives of this rulemaking, the Board decided not to permit confidential treatment for the metrics required on Forms FM and AP.

ii. Assertions of Conflicts With Non-U.S. Law

The Board did not propose to allow firms the opportunity to assert conflicts with non-U.S. laws on either proposed Form FM or Form AP, as proposed to be amended. The proposal acknowledged that there may be certain limitations with respect to the data or information about a firm, its personnel, or the performance of the firm's engagements that a firm may communicate publicly because it may conflict with a non-U.S. law, and asked commenters to describe any such laws and the proposed metrics to which it was realistically foreseeable that they would apply.

Some commenters disagreed with the proposal not to allow firms to assert conflicts. One commenter strongly urged the Board to maintain the well-established rulemaking history that recognizes and respects non-U.S. firms' distinct legal obligations and preserves the right for firms to assert a conflict of law. The Board is committed to cooperation and reasonable accommodation in its oversight of registered non-U.S. firms, and in the past has generally provided non-U.S. firms the opportunity to at least preliminarily withhold some information from its existing forms on the basis of an asserted conflict with non-U.S. laws. However, the Board has not provided for firms to assert such a conflict with respect to all information required by those PCAOB forms. Moreover, the Board notes that the Board has never permitted such withholding of information for Form AP. In addition, even where the Board has allowed registered firms to assert legal conflicts in connection with other forms, that accommodation does not entail a right for a firm to continue to withhold the information if it is sufficiently important.¹⁷⁴

Other commenters suggested there were potential conflicts between reporting of the proposed metrics and current laws:

- One commenter strongly recommended the Board consult with others, including the International Forum of Independent Audit Regulators

(IFIAR), to determine whether any law would prohibit a firm from providing information requested in the proposal and further diminish comparability (or increase the risk of misuse) of affected metrics.

- A commenter also asserted that there are laws in various jurisdictions (e.g., France and Switzerland) that could have a significant impact on cross-border transfer of data and the comparability of such data.

- Other commenters stated that firms with a small number of relevant issuer engagements, for example, disclosure of certain engagement-level metrics may lead to breach of confidentiality for client information, issues with disclosure of commercially sensitive information (e.g., time spent) or disclosure of personal data in breach of regulations, and potentially violate laws and regulations within some non-U.S. jurisdictions. (e.g., General Data Protection Regulation ("GDPR")).¹⁷⁵

- A commenter stated that based on their understanding from non-U.S. firms (although the commenter firm itself is not a non-U.S. firm) some of the proposed new required disclosures go beyond what non-U.S. regulators require and may lead to violations of local laws resulting from disclosure of information that non-U.S. auditors are required to keep confidential under professional secrecy obligations and/or laws and regulations governing disclosure of personal information.

- Another commenter stated that the proposed expansion of mandatory disclosures directly increases the likelihood that a non-U.S. firm may be legally barred from providing the relevant information.

One commenter encouraged the Board to include a specific provision that acknowledges that any required disclosure by a firm would need to comply with applicable local laws and regulations, while another stated that allowing firms to assert conflicts with non-U.S. laws would still require those firms to obtain legal opinions to support withholding the information.

One of those commenters stated that information published where only one engagement is performed will be clearly identifiable to an individual engagement, which they asserted may breach personal data requirements

¹⁷³ Similarly, some firms raised concerns about optional narrative disclosures, particularly regarding the need to maintain client confidentiality and protect commercially sensitive information. The Board has carefully designed the required metrics to avoid such issues. The Board expects firms to tailor their optional narrative responses in a similar manner, should they choose to provide them. This will enable firms to meet the transparency objectives of Forms FM and AP without compromising client confidentiality or disclosing sensitive commercial information.

¹⁷⁴ See *Improving the Transparency of Audits: Rules to Require Disclosure of Certain Audit Participants on a New PCAOB Form and Related Amendments to Auditing Standards*, PCAOB Rel. No. 2015-008 at 37; PCAOB Rel. No. 2008-004 at 37-38 n.38 ("Rule 2207(e) preserves the Board's authority to obtain information by preserving the possibility that, in an appropriate case involving sufficiently important information that is not otherwise forthcoming (e.g., through cooperation with non-U.S. regulators), the Board can ultimately put the firm to the choice of providing the information or being subject to a sanction for violating the Board's rules.").

¹⁷⁵ See Regulation (EU) 2016/679. The GDPR was passed by the European Union and became effective on May 25, 2018. The complete text of the regulation is available at <https://eur-lex.europa.eu/eli/reg/2016/679/oj>. Section 1 of Article 2 of the GDPR applies to "processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system."

under legislation such as GDPR. However, neither this commenter nor any other articulated how any of the required metrics could reveal information allowing any individual to be directly or indirectly identified in contravention of GDPR or similar laws.

In considering whether to allow the opportunity to assert conflicts, the Board considered both whether it is realistically foreseeable that any law would prohibit providing the required information and, even if it were realistically foreseeable, whether allowing a firm preliminarily to withhold the information is consistent with the Board's broader responsibilities and the particular regulatory objective.¹⁷⁶ The comments provided on this subject have not identified with sufficient specificity a realistically foreseeable likelihood that a law would prohibit providing the required information. The concerns that were mentioned were expressed in very general and hypothetical terms. Moreover, with respect to the suggestion that the Board consult with IFIAR, the Board notes that PCAOB staff did advise a number of its non-U.S. counterparts regarding the proposal with a view to facilitating their participation in the Board's notice and comment process if they so chose, and none submitted comment letters.

In addition, the Board continues to believe that allowing a firm preliminarily to withhold the required information is inconsistent with the Board's broader responsibilities and the particular regulatory objective of this rulemaking, namely public transparency.¹⁷⁷ This is the case notwithstanding that firms, as a commenter observed, have to provide a legal opinion regarding a conflict of law under the Board's rules relating to asserted conflicts. Accordingly, the Board did not permit assertions of conflicts for Form AP or Form FM in the final amendments.¹⁷⁸

With respect to the commenter suggestion that the Board includes a specific provision that acknowledges that any required disclosure by a firm would need to comply with applicable local laws and regulations, the Board believes such a provision could be construed as tacit permission to

withhold information without complying even with the existing requirements under the Board's rules related to the assertion of conflicts. Given that this would be an even more permissive framework than currently exists for withholding information where assertions of conflicts are permitted under the Board's rules, the same analysis applies with more force to this suggestion.

The Board believes its notice and comment process, together with its oversight experience, sufficiently inform this policy choice.

7. Structure of Metrics Data

Several commenters suggested that data on Form AP and Form FM be filed using eXtensible Business Reporting Language ("XBRL") to be consistent with SEC registrant filings. The Board notes that the data on Form AP will continue to be downloadable and machine-readable. However, making a change to require reporting using XBRL would introduce additional costs for all firms that file Form AP. Therefore, reporting on Form AP and Form FM will be done using the same platform as the Board's other reporting forms (currently, the Board's web-based RASR system which uses XML and, in the future, potentially new means of information exchanges as the PCAOB continues to modernize its reporting technology aimed at simplifying and automating data collection, processing, and interoperability).

Documentation

For firm- and engagement-level metrics, the Board proposed that the firm would be required to retain documentation in sufficient detail to enable an experienced auditor, having no previous connection with the determination of the metrics, to understand the calculations, the data on which they are based, and the method used to estimate data when actual amounts were unavailable. This is similar to the "experienced auditor" threshold specified in AS 1215, *Audit Documentation*.

The Board solicited comment on whether the proposed documentation requirement was clear and appropriate. One commenter agreed that the documentation requirement was clear and appropriate, while another commenter recommended further clarifications. The commenter recommended explicitly referring to AS 1215 as the commenter believed there were no explicit documentation requirements within Proposed Rule 2203C and Form FM instructions related to firm-level metrics.

The Board adopted the proposed documentation requirement as proposed. The Board described the documentation requirement for Form FM in General Instruction 7 that the firm should retain documentation in sufficient detail to enable an experienced auditor, having no previous connection with the determination of the metrics, to understand the computations of amounts, the amounts on which they are based, and the method(s) used to estimate the amounts when actual amounts were unavailable.¹⁷⁹ The Board believes this is sufficient to introduce the concept of "experienced auditor" into the documentation requirement for Form FM, similar to the "experienced auditor" threshold specified in AS 1215. Existing Form AP included a similar documentation requirement and under the amendments to Form AP that the Board has adopted, this requirement appears in General Instruction 10, as amended.

Additional Firm and Engagement Metrics Considered

In addition to the firm and engagement metrics the Board adopted, the Board considered and solicited comment on a number of (i) proposed metrics included in Section III.B.2 of the proposal and (ii) potential additional metrics included in Section III.E of the proposal. The Board determined not to adopt these additional firm and engagement metrics at this time. The additional metrics are discussed below.

1. Proposed Firm and Engagement Metrics

i. Audit Resources—Use of Auditor's Specialists and Shared Service Centers

The proposal included metrics relating to the use of auditor's specialists¹⁸⁰ and shared service centers ("SSCs"),¹⁸¹ which were intended to

¹⁷⁹ Rule 2203C requires that firms file Form FM by following the instructions on Form FM.

¹⁸⁰ A specialist, as used in this context, includes both auditor-employed specialists, as defined in AS 1201.C1, and auditor-engaged specialists, as described in AS 1210.01. Under those definitions, a specialist is a person possessing special skill or knowledge in a particular field other than accounting or auditing. Specialists would generally not include members of the engagement team whose specialization is in the fields of either IT or income taxes (tax) because IT and tax are specialized areas of auditing and accounting. However, if IT or tax specialists are employed or engaged in a capacity other than specialized auditing and accounting as part of the issuer engagement, it may be appropriate to include them as specialists.

¹⁸¹ A shared service center is described as an associated entity of a firm, set up by a network of accounting firms, that, among other things, supplies those firms with personnel to assist in the performance of audits, and that is not itself an other

¹⁷⁶ See PCAOB Rel. No. 2015-008 at 37; PCAOB Rel. No. 2008-004 at 36.

¹⁷⁷ *Id.*

¹⁷⁸ If an actual conflict were to materialize, the Board would have tools to address it. For example, Section 106(c) of Sarbanes-Oxley authorizes the Board to, subject to the approval of the Commission, exempt any foreign public accounting firm, or any class of such firms, from any provision of the rules of the Board.

help users gain a greater understanding of the use of these audit resources, including the frequency with which firms use specialists and SSCs on their engagements at the firm level generally and, at the engagement level, to provide the context required to understand the extent of the use of auditor's specialists and SSCs on a particular issuer engagement.

At the firm level, the proposal set forth requirements for firms to provide the percentages of issuer engagements that used auditor's specialists and shared service centers, respectively. At the engagement level, the proposal provided that firms would report the percentage of total audit hours provided by auditor's specialists and by shared service centers for each audit the firm performed of an accelerated filer and large accelerated filer.

Commenters on the proposed use of audit resources metrics who generally opposed the disclosure of the metrics stated that the information was unlikely to be readily interpretable or useful because of comparability challenges. In contrast, one commenter found the proposed descriptions for the resource metrics to be appropriate. Some commenters who supported these metrics noted that challenges with comparability might be able to be overcome through use of the proposed voluntary narrative. Some commenters, who were not generally supportive of the proposed Audit Resources metrics, suggested that if they were adopted they should be limited to firms' issuer audit practices.

a. Use of Auditor's Specialists

Some commenters were generally supportive of the firm-level metric for specialists. One commenter stated it would be supportive of disclosure of the specialist metrics with modifications to disclose the percentage of hours incurred by specialists on issuer audit engagements. Another commenter suggested disaggregating time among independent specialists, auditor-affiliated specialists, and management-affiliated specialists, and breaking down the specialist metrics by industry.

Among the commenters that were not supportive of the specialist metrics, several concerns were raised including

concerns with the proposed method for calculating auditor-engaged specialists' hours when actual hours were not available, the lack of visibility to the hours incurred by specialists, the need to rely on information from other auditors, challenges with comparability and data collection, and the overall complexity of the proposed metrics. One commenter suggested that the engagement-level metric for specialists would be inconsistent with other Form AP instructions and may be misleading. Some commenters responded that the amount of specialist involvement on an engagement and overall at the firm level is highly contextual and the relationship to audit quality is not one dimensional. One commenter refuted the objective of providing investors a basis for discussion with management with respect to the use of specialists, stating that investors almost never take advantage of the opportunity to ask questions.

Alternative approaches for specialist metrics were also suggested by commenters. One suggested an alternative approach for engagement-level specialist metrics such as utilization metrics and qualitative descriptions, supported by narrative disclosures to provide necessary context and clarity. This commenter also suggested an alternative firm-level metric for specialists based on the average percentage of usage of specialists across all of the firm's engagements, potentially covering only engagements where specialist hours exceeded a minimum percentage of total audit hours. Two commenters suggested the Board add an additional metric disclosing the percentage of audit hours incurred by specialists on issuer audit engagements (as a percentage of the total audit hours on issuers). Another commenter also suggested that using hours worked rather than the number of engagements as the basis for the calculation would provide more useful information at the firm level. This commenter also suggested disclosure of the use of specialists, and their hours on a CAM-by-CAM basis, as well as overall.

Two commenters responded to the question in the Board's proposal about including thresholds for resource metrics. One stated that including de minimis amounts would result in implementation challenges. The second, however, made the opposite argument, stating that including all specialist and SSC hours in audit resource metrics without a threshold would ensure that the metric remains straightforward and inclusive of all relevant contributions and provide a more complete picture of a firm's audit processes and resource

utilization. Most commenters that responded to the question as to whether resource metrics should be further disaggregated, e.g., by industry, replied that this would be overly burdensome without added value. However, another commented that use of auditor specialists would be more helpful if broken down by industry.

b. Use of Shared Service Centers

Some commenters were supportive of SSC metrics. One of them stated that the use of SSCs was growing but not well understood, and that narrative context would be necessary.

Other commenters raised multiple questions with respect to SSCs. Several of these were in relation to the definition of an SSC, which was proposed to be consistent with the definition used in Form AP, stating that there are many different approaches to the use of other resources than what is encompassed in that definition, which could lead to misunderstanding and lack of comparability. One of these commenters stated that the work of SSCs is dependent on the structure and resources of each firm and its SSCs and the specific needs of the individual engagement. Another commenter stated that the definition proposed a shared service center encompassed only those centers that are set up by a "network" of accounting firms and would not encompass an outsourcing center set up by a single firm. This commenter suggested the definition be revised to encompass all services that are not under the direct supervision of the engagement partner. Some commenters were concerned that SSC metrics would be misinterpreted as indicating that greater SSC hours indicated lower quality. Some commenters supported evaluation of the use of SSCs at the engagement level, but did not support publicly disclosing this information. Another commenter said that, given that engagement team members routinely work remotely, there should not be a difference between that arrangement and SSCs and, as a result, the metric would not be meaningful. This commenter also stated that it would not be meaningful to provide an explanation of work performed at an SSC because it is all ultimately the responsibility of the audit partner.

The Board has taken commenter input, as well as observations from PCAOB oversight activities and the relevant academic literature, into account, and have determined not to adopt the proposed firm- and engagement-level audit resources metrics at this time. In doing so, the Board recognized, as discussed above,

accounting firm. See PCAOB, *Staff Guidance: Form AP, Auditor Reporting of Certain Audit Participants, and Related Voluntary Audit Report Disclosure Under AS 3101, The Auditor's Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion*, (updated July 1, 2024) ("Staff Guidance on Form AP"), at n. 24, available at https://assets.pcaobus.org/pcaob-dev/docs/default-source/standards/documents/07-01-2024-transparency-implementation-guidance.pdf?sfvrsn=b9753eb_2.

that several commenters suggested there would be challenges relative to comparability and data collection, and there would also be the potential for misunderstanding by users of the information. As the Board stated in the proposal, these are highly contextual measurements because the use of the work of specialists is generally performed to satisfy needs specific to an industry or issuer and the use of the work of SSCs is dependent on the structure and resources of both the firm and the SSC, as well as the specific needs of individual engagement teams. The Board acknowledges that the nature and uses of SSCs continue to expand. As they do, the Board expects to continue to study and focus inquiries in this area to better understand the impact of SSCs on audit quality, firm economics, and engagement staffing models. The Board anticipates these efforts will inform future consideration of whether additional guidance or other regulatory action is warranted.

ii. Audit Hours and Risk Areas

The proposed engagement-level metric would have required firms to calculate the time incurred by all partners and managers on the engagement team in auditing the areas of significant risks,¹⁸² critical accounting policies and practices,¹⁸³ and critical accounting estimates,¹⁸⁴ in aggregate, as a percentage of total audit hours incurred by partners and managers on the engagement team. Because a firm-level metric would have been heavily influenced by the mix of companies that a firm audits, the Board did not propose to require firms to report this metric at the firm level.

Two commenters supported this metric as proposed, while several other commenters generally supported this metric with revisions; suggestions included reporting the absolute number of audit hours as well as the percentage, and adding time spent on performing

fraud procedures. Another commenter, an investor-related group, supported this metric as proposed, but further suggested reporting the total audit hours incurred by staff on the engagement team in the areas of significant risks, critical accounting policies and practices, and critical accounting estimates because these areas are considered the most significant for the audit. This commenter also suggested reporting hours by specialists, senior professionals, and staff in connection with critical audit matters.

Many other commenters criticized the proposed metric. These commenters provided the following reasons as the basis for their decision not to support this metric:

- The metric does not consider the evolving role of technology in the audit and the use of technology can significantly contribute to audit effort.
- Risk assessment is an iterative process throughout the audit which means that identifying significant risks and critical accounting policies, practices, and accounting estimates may change during an audit, resulting in changes in how auditors track their time for reporting under this metric.
- An individual's hours charged to auditing a particular account balance may include work performed that is unrelated to an identified significant risk.
- The nature of the audit procedures performed could include overlap with other areas of the audit depending on discussions held and procedures performed.
- Tracking time at the granular level needed to accurately capture hours for significant risks and critical accounting policies, practices, and accounting estimates would require additional resources, including time and costs, that are not directly associated with audit quality.

- Reporting this information would require coordination across firms for audits involving other auditors, who may be using different systems to track the underlying information.

- Since the risk of management override of controls is a presumed risk in all audits, how should it be considered since the response is pervasive to the audit.

Several commenters, including firms, stated that firms are not currently tracking this information, or they believe that firms are not currently tracking this information. One commenter added that although they do not believe firms are currently tracking this information, it should be possible to extract this data from internal

monitoring systems with considerable time and complexity.

Commenter views were divided on whether the metric should be revised to also include engaged specialist hours given that, under the proposal, the definition of engagement team includes employed specialists, but not engaged specialists. Some commenters agreed that this metric should include engaged specialist hours, while other commenters did not.

Taking into account commenter feedback as well as the fact that firms' approach to identifying and classifying significant risks can vary greatly, the Board was concerned that the potential for misinterpretation of this metric and the costs associated with establishing systems to collect the necessary data may not be justified. The Board did not adopt the metric related to audit hours and risk areas at this time.

iii. Quality Performance Ratings and Compensation

The proposal set forth firm-level reporting requirements for firms to calculate (i) the distribution of quality performance ratings across partners and (ii) a comparison of average annual compensation adjustments (as a percentage of the average adjustment received by the highest rated group) for partners in each quality performance rating category over a one-year period.

Overall, some commenters supported this metric area, agreeing with the proposed rationale that comparing the relationship between internal firm quality performance ratings and changes in compensation levels could provide evidence of the extent of any correlation between quality performance ratings and compensation, and thereby provide an important signal of the value of a quality commitment for the firm.

However, other commenters did not support this metric area or expressed concerns because of the number of difficulties in reporting and using the metric. Commenters raised the possibility of a lack of comparability or consistency (e.g., differences in firm's structure, strategies and systems used in performance evaluations, and definition of compensation, and inclusion of non-equity partner and directors in the calculation), resulting in potential misuse of the metrics or providing no or limited value to stakeholders. Many also pointed to variability in firms' quality performance rating systems both across firms and within the firm over time. Some commenters also indicated that there are many factors that firms consider in determining compensation, and that firms use mechanisms to drive accountability of partners that would

¹⁸² As defined in paragraph .A5 of AS 2110, *Identifying and Assessing Risks of Material Misstatement* ("risk of material misstatement that requires special audit consideration").

¹⁸³ As defined in AS 1301.A4 ("A company's accounting policies and practices that are both most important to the portrayal of the company's financial condition and results, and require management's most difficult, subjective, or complex judgments, often as a result of the need to make estimates about the effects of matters that are inherently uncertain.").

¹⁸⁴ As defined in AS 1301.A3 ("An accounting estimate where (a) the nature of the estimate is material due to the levels of subjectivity and judgment necessary to account for highly uncertain matters or the susceptibility of such matters to change and (b) the impact of the estimate on financial condition or operating performance is material.").

not be taken into account in the metrics calculation, resulting in no direct one-on-one relationship between the compensation adjustments and performance ratings. Some commenters expressed a number of concerns about the definition of compensation, as well as the treatment of non-equity partners.

Several commenters expressed concerns about confidential information. One commenter specifically cited the risk of disclosing confidential business information that is proprietary and protected from disclosure under Sarbanes-Oxley Section 102(e). Another commenter indicated (i) the possibility of identifying specific partners' compensation at smaller firms and (ii) the disclosure of this metric area may be prohibited by laws and regulations outside of the United States. A commenter also said that PCAOB registered firms are for-profit entities that should have flexibility in designing a compensation strategy that is tailored to their business model and needs.

Instead of the proposed metrics, several commenters suggested disclosing firms' policies related to partner compensation and performance ratings, including how partner audit quality is measured and how that measurement influences compensation. Some of these commenters said that disclosing these policies would demonstrate the firms' quality commitment and the value it places on quality while alleviating the comparability and confidentiality concerns and meeting the objective of this proposed metric. Some commenters stated that qualitative disclosures related to performance management and compensation policies are already disclosed in the firms' annual transparency reports. One commenter indicated the complexity of the performance measurement goes beyond mechanical calculation. Another commenter indicated that the metric is not useful as it is an unambiguous indicator of audit quality and likely focuses on matters unrelated to audit quality.

Two commenters explicitly supported the exemption granted to firms that are not within the scope of the SEC's partner rotation rule. One commenter questioned whether this metric would relate to all issuer audit engagements or all audit engagements and another indicated that combining issuer and non-issuer information would conflict with proposed PCAOB Rule 2400. Furthermore, a commenter indicated that this metric encompasses all partners of the firm and would not be useful when the issuer audit practice is

a small portion of the overall firm operations.

While there was some support from commenters, the Board did not adopt this metric area at this time, primarily due to the challenges described by commenters (e.g., lack of comparability and variability in establishing a firm's quality rating system) and the ambiguity in relation to audit quality, which may be difficult to overcome for this metric area to be meaningful for stakeholders. Because this rulemaking project is focused on requiring certain firms to report certain quantitative metrics that will foster comparability, the Board is also did not adopt the alternatives suggested by various commenters that the firms disclose policies regarding the partner compensation and performance ratings.

iv. Audit Firms' Internal Monitoring

The proposal set forth firm-level requirements for firms to calculate the percentage of issuer engagements that were selected for internal monitoring in the firm's most recently completed cycle (i.e., the number of completed issuer engagements internally monitored, divided by the number of total issuer engagements) and the percentage of those issuer engagements with engagement deficiencies.¹⁸⁵

At the engagement level, the proposal set forth requirements for firms to disclose whether a previous engagement was selected for internal monitoring in the most recently completed monitoring cycle, the year-end date of the engagement subject to review, whether any engagement deficiencies were identified, and the nature of those deficiencies. The nature of the engagement deficiencies would be one of the following: (i) financial statement line item, (ii) disclosure, or (iii) other noncompliance with applicable professional or legal requirements.¹⁸⁶ The Board also proposed that certain details be provided about the engagement deficiency, including the area of noncompliance and the type of deficiency.

Some commenters, primarily investor-related, expressed support for both the proposed firm- and engagement-level metrics. One investor-related commenter suggested that Part I.A

deficiencies be included separately in addition to the proposed requirements. Other commenters stated the proposed metrics would provide useful information into understanding firms' monitoring procedures and outcomes, facilitating comparisons regarding the quantity and types of engagement deficiencies detected, while one commenter stated that the monitoring and remediation process was an essential component of firms' quality management systems and agreed that providing a certain level of transparency in this area could be useful for interested stakeholders.

The firm-level metric was generally supported by some firm and firm-related commenters. One noted that it reports certain of this information in its transparency reports. Another highlighted that its internal monitoring was broader in scope, including targeted monitoring of its team's use of certain tools or technologies, adding that may be inconsistent with the PCAOB's intent with respect to firm-level reporting. Some of these commenters suggested reducing the scope by requiring reporting of only PCAOB Inspection Report Part I.A inspection findings. Another suggested reporting the percentage of compliant internal reviews rather than deficient engagements.

Conversely, several firm commenters were opposed to the proposed internal monitoring metrics at the firm level. The concerns raised by these commenters included noting that differences in monitoring programs would render the information provided inconsistent and uninformative and also that it could be disadvantageous to smaller firms that may have more variability in their internal monitoring year over year. In addition, several firm and firm-related commenters disagreed with the deficiencies required to be disclosed in the proposed firm-level metrics being aligned to QC 1000. One stated that presentation of such a broad range of deficiencies into a single metric without distinction could lead a user to inappropriately conclude that the firm had significant quality issues, which could in turn negatively impact their confidence in the reliability of the firm's audit reports. Another commenter expressed their belief that firm-level public reporting of internal inspection findings could be a disincentive for finding deficiencies. This commenter also stated that firms should be allowed to request confidential treatment for metrics related to internal monitoring.

At the engagement level, virtually all firm commenters objected to the proposed internal monitoring metrics.

¹⁸⁵ The term "engagement deficiency" as used in the proposal is defined in QC 1000.A4 ("An instance of noncompliance with applicable professional and legal requirements by the firm, firm personnel, or other participants with respect to an engagement of the firm, or by the firm or firm personnel with respect to an engagement of another firm").

¹⁸⁶ The term "applicable professional and legal requirements," as used in this rulemaking, has the same meaning as defined in QC 1000.A2.

Specific objections raised included those related to confidentiality concerns, comparability challenges, and the potential for confusion or misunderstanding. Several commenters expressed concerns that the proposed metrics risked undermining internal inspection programs if they cause firms to move from broad monitoring processes to align more closely with PCAOB inspections in response to the proposed requirements. One commenter stated that once these metrics become public, firms could come under pressure from various constituencies to report results that are within a perceived acceptable range. Another commenter voiced concern that firms could be incentivized to alter their internal monitoring processes in a manner inconsistent with the objectives of the proposal. Some commenters suggested that an alternative could be to require communication with an issuer's audit committee.

Taking commenter input into account, the Board determined not to adopt the proposed firm- and engagement-level internal monitoring metrics at this time.

2. Potential Additional Firm and Engagement Metrics

In the Board's proposal, it discussed three particular areas—training, access to technical resources, and investment in audit infrastructure—that it did not propose to require for reporting but, in light of the significance of these areas, for which the Board solicited specific commenter input.

All of these potential metrics related to aspects of a firm's ongoing investment in audit quality, which the Board believes is critically important. However, in working to develop metrics in these areas, the Board encountered challenges in defining what to measure and how to measure it, questions about whether metrics would be informative and appropriately free from bias, and concerns about potential unintended consequences. After considering commenter feedback, the Board adopted a modified metric related to training, which is discussed in detail above. However, the Board did not adopt metrics in the areas of access to technical resources or investments in audit infrastructure, as discussed further below.

In addition to the metrics the Board considered, as noted above, some commenters on the proposal suggested a metric for PCAOB Part I.A deficiencies. The Board's response to this suggestion is discussed further below.

i. Access to Technical Resources

The Board solicited comment on possible firm-level metrics relating to the relative size of a firm's central personnel (or other resources engaged by the firm) available to provide engagement teams with advice on complex, unusual, or unfamiliar issues and the extent to which such resources were used in the firms' engagements. Metrics that were considered at the engagement level focused on consultations that were performed with professionals outside of the engagement team on difficult or contentious matters.

Commenters who responded to questions about the potential metric for access to technical resources largely agreed with the considerations and conclusions in the proposal. Some of those commenters replied that the metrics would not be useful, be difficult to measure, not be comparable, and could be seen as being biased towards larger firms. One commenter mentioned that arguments could be made for or against many metrics, but they broadly agreed access to [technical] resources should be dropped. One commenter expressed that it would be difficult to define national office in a way that was meaningful.

After considering these comments, and in light of the Board's original analysis, the Board did not adopt a metric related to access to technical resources.

ii. Investment in Audit Infrastructure

Metrics the Board considered in relation to investment in audit infrastructure were primarily at the firm level and were focused on the expenditures that firms self-identified as being in support of audit quality either in total or on a per headcount basis.

Commenters generally stated that such a metric would be very facts and circumstances dependent, such that meaningful comparisons could not be made. One commenter suggested that investment in infrastructure was best discussed with an in-depth understanding of the circumstances to obtain appropriate context. Another suggested that the data would be stale by the time it was reported, adding to its lack of usefulness. One commenter mentioned that arguments could be made for or against many metrics, but they broadly agreed investment in audit infrastructure should be dropped. However, one commenter stated that they would support a metric that provides the percentage of firm revenues invested in technology accessible by audit teams. Similarly, another commenter supported including

a metric that provides the percentage of firm revenues invested in technology and stated they believe this metric could offer useful information to investors about the firm's ability to adapt to future challenges.

After considering commenter feedback, the Board did not adopt a requirement to disclose a metric on investment in audit infrastructure.

The Board considered the commenters that supported a metric related to revenue invested in technology, but weighing the challenges presented by doing so, specifically with respect to comparability and concerns in potential bias with respect to smaller firms, the Board continues to believe the unintended consequences and the costs would not be justified by the benefits such a metric might provide.

iii. PCAOB Part I.A Deficiencies

Some commenters recommended requiring a metric which the Board did not include as a potential additional metric in the proposal—a percentage of the PCAOB Part I.A deficiencies relative to “the total inspections.” The commenters acknowledged that this information is already publicly available. However, they suggested that including this percentage with other required metrics would highlight its importance and provide valuable information. One of the commenters went on to state that increasing the visibility of the PCAOB's inspection results would increase the importance of the results of the inspection process to audit firms, which they believe will lead to an improvement in overall audit quality.

After considering commenter feedback, the Board did not adopt a requirement to disclose a metric for PCAOB Part I.A deficiencies. Principally, the Board has concerns that the time lag implicit in such a metric would be potentially confusing. The other metrics would report as of September 30 or for the 12 months then ended, but a metric based on PCAOB inspection results would relate to audits conducted one or more years previously and may reflect issues that have long since been remediated.¹⁸⁷ In the Board's view, presenting data on inspection findings from previous years together with a suite of other metrics that all relate to the current period may confuse users. Of course, inspection reports, including discussion of Part I.A.

¹⁸⁷ The PCAOB inspects audits completed in the prior year, and the ensuing reports have historically been released a year or more after the inspection is completed.

deficiencies, will continue to be available on the PCAOB website.¹⁸⁸

Effective Date

For firm-level metrics, the Board proposed an effective date beginning October 1 of the year after approval by the SEC, with the first reporting period ending the following September 30. The Board also proposed a phased implementation period:

- Firms that issued audit reports with respect to more than 100 issuers in the calendar year preceding the effective date would begin reporting firm-level metrics in the first year; and
- All other firms would begin reporting firm-level metrics one year later.

For engagement-level metrics, the Board also proposed a phased implementation period:

- Firms that issued audit reports with respect to more than 100 issuers in the calendar year preceding the effective date—for audits of companies with fiscal years beginning on or after October 1 of the year after the year in which SEC approval is obtained; and
- All other firms—for audits of companies with fiscal years beginning on or after October 1 two years after the year in which SEC approval is obtained.

The Board solicited comment on whether the proposed effective date would provide challenges for auditors and how these challenges should be addressed. The Board also solicited comment on whether the phased implementation period would be appropriate and whether the phased implementation should be based on the number of issuer audit reports issued or some other basis.

One investor-related group suggested that extending the implementation period would allow smaller firms to adapt incrementally, ensuring they are not disproportionately affected by the new requirements. This commenter further suggested that the Board could identify and make certain metrics optional for smaller firms without making all the metrics optional.

Primarily, firms and firm-related groups recommended extending the proposed effective date. While many firms did not provide a specific implementation time period, other than stating that more time is needed, other firms recommended an effective date at least three years after the SEC's approval, and others recommended at least two years after the SEC's approval. Some commenters specifically stated that additional time (*i.e.*, one more year) would be needed for smaller firms. Another commenter recommended an effective date of at least three years after the SEC's approval, if adopted as proposed, or shorter if engagement-level metrics will be communicated to the audit committee, rather than reported publicly, as proposed. These commenters provided reasons for extending the implementation period including more time to implement systems or system changes, develop processes, train professionals, and accumulate and test data and calculations. Some commenters specifically emphasized the need for more time to make changes in the global network firms or other firms who are participating in the audit that may or may not have the same systems or policies. Other commenters stated that more time would be needed to implement this rulemaking because of other recently adopted standards.

The Board considered these comments and provided additional time before the reporting rules become effective. The final rules will become effective beginning October 1 of two years after approval by the SEC, with the first reporting period ending the following September 30 with a phased implementation period:

- Firms that issued audit reports with respect to more than 100 issuers in the calendar year in which the effective date occurs will begin reporting firm-level metrics in the first year reporting is required; and
- All other firms would begin reporting firm-level metrics one year later.

If approved by the SEC, the effective date of the firm-level metrics will be October 1, 2027. For firms that issued audit reports with respect to more than 100 issuers in 2027, the first reporting period would end on September 30, 2028, with the first Form FM due by November 30, 2028. For all other firms, the first reporting period would end on September 30, 2029, with the first Form FM due by November 30, 2029.

For engagement-level metrics, the Board is also adopting a phased implementation period:

- Firms that issued audit reports with respect to more than 100 issuers in the calendar year preceding the effective date—for audits of companies with fiscal years beginning on or after October 1 of two years after the approval by the SEC; and

- All other firms—for audits of companies with fiscal years beginning on or after October 1 of three years after the approval by the SEC.

If approved by the SEC, reporting of engagement-level metrics would start for firms that issue audit reports with respect to more than 100 issuers in 2026 for the audits of companies with fiscal years beginning on or after October 1, 2027. For other firms, it will start with audits of companies with fiscal years beginning on or after October 1, 2028. The reporting will be on Form AP, which is generally due 35 days after the issuance of the auditor's report.

As discussed in earlier sections, the Board adopted a smaller number of firm- and engagement-level metrics than proposed. Specifically, the Board adopted [ten] eight metrics areas (as opposed to 11 proposed metric areas), which should reduce the administrative burden and cost of calculating and reporting the metrics. Therefore, the Board believes that the smaller number of metrics, the extension of the effective date, and the phased implementation should provide sufficient time for firms, including smaller firms, to implement new or enhanced systems and processes, train professionals, and conduct internal testing and reporting before reporting of the metrics.

D. Economic Considerations and Application to Audits of Emerging Growth Companies

The Board is mindful of the economic impacts of its standard setting. This economic analysis describes the economic baseline, need, and expected economic impacts of the final rules, as well as alternative approaches considered. Because there are limited data to quantitatively estimate the economic impacts of the final rules, much of the Board's economic analysis is qualitative. However, where feasible, the economic analysis incorporates quantitative information, including analysis of internal PCAOB data, publicly available data, and results from academic literature.

Baseline

This section establishes the economic baseline against which the impact of the final rules can be considered. Important components of the baseline, specifically a discussion of current firm- and engagement-level disclosure

¹⁸⁸ See, e.g., PCAOB charts illustrating much of the data in the U.S. global network firms ("GNFs") and U.S. annual non-affiliated firms ("NAFs") inspection reports, available at <https://pcaobus.org/oversight/inspections/global-network-firms-inspection-data> and <https://pcaobus.org/oversight/inspections/non-affiliated-firms-inspection-data>, respectively. GNPs are the member firms of the six global accounting firm networks (BDO International Ltd., Deloitte Touche Tohmatsu Ltd., Ernst & Young Global Ltd., Grant Thornton International Ltd., KPMG International Ltd., and PricewaterhouseCoopers International Ltd.). NAFs are both U.S. and non-U.S. accounting firms registered with the Board that are not GNPs. Some of the NAFs belong to international networks.

requirements, voluntary reporting practices, and actions in other jurisdictions relevant to the final rules are described above. Below, the Board highlights information presented above most relevant to the economic baseline and provides additional academic references and statistics.

Current PCAOB rules and standards do not require registered firms to publicly disclose firm or engagement-level information like the final metrics. As discussed above, firms are currently required to publicly disclose some information related to the firm and its engagements in a variety of PCAOB forms (e.g., Form AP, Form 2).¹⁸⁹ Usage statistics suggest that the public actively seeks out the information contained in these forms. For example, PCAOB usage statistics show that during calendar year 2023, there were close to 7.4 million page views, and just over 23,000 unique visitors, for PCAOB's RASR Web service that provides public access to firm filings, including Forms 1, 2, 3, 4, and AP.¹⁹⁰ Additionally, in 2023 there were over 333,000 unique searches performed on AuditorSearch, the PCAOB's online search tool, and the Form AP data set was downloaded over 2,000 times.¹⁹¹

In addition to the information that the firm makes public through required form filings, the PCAOB provides firm-level public disclosure through firm inspection reports.¹⁹² For the 2023 calendar year, firm inspection reports were downloaded approximately 113,000 times. Academic research suggests that audit committees use the information contained in PCAOB inspection reports.¹⁹³ Additionally, some academic research suggests that PCAOB inspection reports provide useful information to investors.¹⁹⁴

However, some research suggests that institutional investors may not be aware of or find value in PCAOB inspection reports.¹⁹⁵ One commenter noted that the proposal did not provide information on who was accessing the website information or why they were accessing it. The PCAOB does not collect information on who is accessing the website information (e.g., IP addresses) or why they are accessing it.

In addition to PCAOB information, investors and audit committees may be able to obtain information related to audit quality from auditor legal proceedings—e.g., pursuant to SEC enforcement actions.¹⁹⁶ However, due to the investigation and litigation process, engagement-specific information may be publicly available only after a substantial lag. Furthermore, academic researchers have also used a variety of publicly available firm and engagement-level proxies for audit quality including audit firm size, issuer restatements, and industry specialization.¹⁹⁷ One commenter noted that the auditor's tenure with the company is available in the auditor's report and audit fee information is available in the company's proxy statement.

As discussed above, some large U.S. audit firms voluntarily publicly disclose

certain firm-level information through their firm transparency reports—e.g., general discussions of turnover rates, independence policies and practices, or aggregated staff headcounts. PCAOB staff reviewed the most recent audit quality report for each of the eight firms considered in the CAQ Report. As these firms' audit quality reports generally do not provide quantitative engagement-level information, the PCAOB staff's analysis focused on whether they provide quantitative firm-level information substantially similar to the final firm-level metrics.

Overall, the PCAOB staff's analysis indicates that voluntary firm reporting addresses many of the areas included in the final metrics, though in most instances more narrowly. The reports generally provide quantitative information related to staff training and retention, which the Board believes is substantially similar to the final metrics for Training Hours for Audit Personnel and Retention of Audit Personnel, respectively. However, the Board notes that the reports that include a retention metric define it in different ways and report it at different levels of aggregation. The reports generally provide quantitative information related to staffing leverage. However, the quantitative information is generally at the head-count level and no report accounts for audit hours, as the final Partner and Manager Involvement metrics require. Half of the reports provide quantitative information related to the frequency of restatements which are similar to the final Restatement History metric. However, in these cases, the reports do not indicate whether the reported restatements include reissuance restatements, revision restatements, or both. Some other reports provide quantitative information related to the frequency of restatements associated with PCAOB-inspected engagements only. Half of the reports provide quantitative information related to years of experience. However, the quantitative information does not include managers' experience as the final Experience of Audit Personnel metric requires. Some reports provide metrics similar to the final Workload metric. However, in these cases, the calculations may differ from the final Workload metric in important ways (e.g., they are limited to the busy season only or include more staff than required) and it is unclear whether the calculations include the same types of hours required under the final rules (e.g., PTO hours). The reports generally do not provide quantitative information related to the allocation of audit hours

¹⁸⁹ The Board concurrently adopted new reporting requirements for registered firms. See PCAOB Rel. No. 2024–013.

¹⁹⁰ The RASR database can be found on the PCAOB's website (<https://rasr.pcaobus.org.aspx>). The usage statistics underestimate actual public interest because investors, researchers, auditors, audit committees, and issuer management may source PCAOB information through external third-party data service providers—such as Ideagen's Audit Analytics. However, they also overestimate actual public interest to some extent because the usage statistics include internal PCAOB users.

¹⁹¹ Information related to usage statistics can be found on the PCAOB's website (<https://pcaobus.org/resources/auditorsearch/>).

¹⁹² Firm inspection reports can be found on the PCAOB's website (<https://pcaobus.org/oversight/inspections/firm-inspection-reports/>).

¹⁹³ See, e.g., Daniel Aobdia, *The Impact of the PCAOB Individual Engagement Inspection Process—Preliminary Evidence*, 93 *The Accounting Review* 53 (2018) (finding that “the client is more likely to switch auditor” when offices or partners receive a Part I auditing deficiency).

¹⁹⁴ See, e.g., Andrew Acito, Amir Amel-Zadeh, James Anderson, William L. Anderson, Daniel

Aobdia, Francois Brochet, Huaizhi Chen, Jonathan T. Fluharty-Jaidee, Martin Schmalz, Manyun Tang, and Scott Jinzhiyang Wang, *Market-Based Incentives for Optimal Audit Quality*, SSRN Electronic Journal (2024) (finding that when PCAOB inspection reports can be easily linked to the issuer being audited, issuers whose audit was not found to be deficient significantly outperform issuers whose audit was found to be deficient); Nemit Shroff, *Real Effects of PCAOB International Inspections*, 95 *The Accounting Review* 399 (2020) (finding, using a sample of foreign companies, that companies enjoy greater access to capital when their auditor's PCAOB inspection report does not include Part I deficiencies). The Board notes that SSRN does not peer review its submissions.

¹⁹⁵ See, e.g., Center for Audit Quality, *Perspectives on Corporate Reporting, the Audit, and Regulatory Environment Institutional Investor Research Findings*, (Nov. 2023) (“CAQ 2023 Survey”) (finding that most institutional investors interviewed were unaware of PCAOB inspections reports, and to the extent investors were aware, found the report results to be expected) and Clive Lennox and Jeffrey Pittman, *Auditing the Auditors: Evidence on the Recent Reforms to the External Monitoring of Audit Firms*, 49 *Journal of Accounting and Economics* 84 (2010) (finding that companies do not perceive that the PCAOB's disclosed inspection reports are valuable for signaling audit quality).

¹⁹⁶ See, e.g., the SEC's *Accounting and Auditing Enforcement Releases* available at <https://www.sec.gov/divisions/enforce/friactions>.

¹⁹⁷ See, e.g., Daniel Aobdia, Do Practitioner Assessments Agree with Academic Proxies for Audit Quality? Evidence from PCAOB and Internal Inspections, 67 *Journal of Accounting and Economics* 144 (2019); Jere R. Francis, A Framework for Understanding and Researching Audit Quality, 30 *AUDITING: A Journal of Practice & Theory* 125 (2011); and DeFond and Zhang, A Review of Archival Auditing Research.

and no report provides quantitative information related to industry experience. However, the Board notes that these firms generally provide information related to the industries they serve on their websites which is similar to the component of the firm-level industry expertise metric that identifies the five top industries of the firm's audit practice.

One commenter said that, though only a small portion of firms voluntarily disclose metrics, these firms cover most U.S. public companies. The Board acknowledges that this point implies that most audit committees and investors have some information about topics covered by the final metrics. However, PCAOB staff found that the existing disclosures are not uniform or comparable across firms. Furthermore, PCAOB staff found that firms generally do not voluntarily publicly report engagement-level metrics and one investor group said that the firms' transparency reports are seen as marketing material rather than investor information. One commenter emphasized that firms already publish transparency reports and urged the PCAOB to analyze firms' current transparency reporting practices and solicit feedback from investors, audit committees, and other stakeholders on their contents. The Board performed such an analysis as described above and has addressed comments on the economic baseline that the Board received from stakeholders as part of the Board's notice and comment process. The limitations of voluntary firm transparency reports, along with the related academic literature, are further discussed below.

Audit committees can receive other information through sources not available to the public. Auditing standards and PCAOB and SEC rules require specific communications from auditors to audit committees regarding a variety of matters related to the audit engagement. For example, under AS 1301, the auditor is required to communicate to the audit committee *inter alia* (i) all critical accounting policies and practices to be used; (ii) a description of the process management used to develop critical accounting estimates; and (iii) significant risks identified during the auditor's risk assessment process.¹⁹⁸ Moreover, audit committees may obtain information under other disclosure requirements—e.g., reporting under Section 10A of the

Exchange Act, where the auditor must report to the issuer's board of directors, in certain situations, related to illegal acts at an issuer.¹⁹⁹ In exercising their oversight responsibilities, audit committees may also request more firm- or engagement-specific information from their auditor. For example, audit committees may seek information from the auditor about PCAOB inspections, including information not contained in the PCAOB's public inspection reports.²⁰⁰ Audit committees may also request information from other audit firms as part of a request for proposal if they are considering engaging a new auditor.

Audit firms, partners, and engagement teams have developed reputations based on the public and non-public information discussed above, as well as audit committees' direct experience with them. Through surveys and interviews with audit committee members, one study concluded that the firm's reputation for industry experience and the audit partner's accessibility, ability to address accounting issues on a timely basis, and ability to liaise with the firm's national office are the key characteristics that audit committees consider when selecting an auditor.²⁰¹ This finding suggests that audit committees currently receive and use information like some of the final metrics (e.g., Industry Experience and Workload).

The Board believes many firms internally track some information related to the final metrics. One commenter on the Concept Release stated that they believe that many firms are using the 28 AQIs identified in the Concept Release at some level to (i) manage the firm and (ii) manage the quality of audits at the office level and at the engagement level. Three U.S. GNFs stated in their comments on the Concept Release that they track some of the proposed metrics discussed in the Concept Release for monitoring purposes. Information gathered by PCAOB staff in 2018 and 2019 pursuant to PCAOB oversight activities indicate that U.S. GNFs generally had identified and were tracking performance metrics at both the firm and engagement level. At the firm level, U.S. GNFs generally tracked PCAOB inspection history, restatements, voluntary turnover rates/

retention rates, partner to staff ratios/ professionals by level, average partner workload, and investment in audit quality. At the engagement level, U.S. GNFs generally tracked distribution of engagement hours during the year, partner workload and utilization, partner years of experience (by industry, level, or issuer), engagement leverage, engagement milestone compliance, involvement in pre-issuance review programs, and use of IT and other specialists. One firm tracked audit hours performed at SSCs. However, several commenters representing firms and firm-related groups explained that they do not currently track information in a form that will be required for several of the metrics. For example, one commenter said that firms have no internal tracking of personnel's total experience prior to joining the firm. One commenter said that smaller and medium-sized firms do not track the industry experience of audit personnel. Though this information suggests that a significant amount of information is collected by the U.S. GNFs at both the firm and engagement levels, one academic study suggests that partners seldom use metrics related to audit quality when evaluating the quality of their work or the work of their colleagues.²⁰²

Commenters noted that the PCAOB already has access to information about audit firms. One commenter suggested that the Board describe the information currently requested from firms. The PCAOB requests a variety of information from firms to inform its inspections process, which focuses on evaluating whether firms are in compliance with PCAOB standards. Some of the information is related to some of the final metrics. However, the information is generally not comparable across firms, engagements, and time; the quality of the information is inconsistent; and the information is generally not available for all firms and engagements.²⁰³

To better understand the adequacy of currently available information or need for additional disclosures, one commenter suggested that the Board consider data on: (i) attendance at annual shareholder meetings; (ii) votes on auditor ratification; or (iii) passive

²⁰² See, Marion Brivot, Mélanie Roussy, and Maryse Mayer, *Conventions of Audit Quality: The Perspective of Public and Private Company Audit Partners*, 37 *Auditing: A Journal of Practice & Theory* 51, 68 (2018).

²⁰³ The Board believes this is driven, in part, by variation in firms' approaches to quality control and how they record information. The Board notes that, under Section 105(b)(5) of Sarbanes-Oxley, this information is only available for PCAOB regulatory use.

¹⁹⁸ See above for additional discussion related to auditor communications with audit committees. See also Section 10A(k) of the Exchange Act, 15 U.S.C. 78j-1(k) and 17 CFR 210.2-07.

¹⁹⁹ See, e.g., Section 10A of the Exchange Act, 15 U.S.C. 78j-1.

²⁰⁰ See Information for Audit Committees About The PCAOB Inspection Process, PCAOB Rel. No. 2012-003 (Aug. 1, 2012).

²⁰¹ See Elizabeth D. Almer, Donna R. Philbrick, and Kathleen H. Rupley, *What Drives Auditor Selection?*, 8 *Current Issues in Auditing* A26, A27 (2014).

versus active investors. The Board was unable to identify any data sources regarding attendance at annual meetings. However, the Board notes that shareholder votes are typically cast electronically by proxy and not in-person at annual meetings.²⁰⁴ Moreover, anecdotal evidence suggests that attendance, particularly among retail investors, is generally low.²⁰⁵ This may reflect the fact that material information relevant to investor decision-making is typically provided through the proxy statement and annual report, rather than being newly disclosed at the annual meeting. The Board does not believe this provides strong evidence for or against the adequacy of currently available data or investors' information preferences. Regarding votes on auditor ratification, the Board's economic analysis is informed by and cites several academic studies on shareholder voting to ratify the appointment of the auditor. Additionally, data from Audit Analytics suggests that the proportion of investors opposing ratification, while still infrequent, has been increasing.²⁰⁶ Overall, the research suggests that investors, primarily institutional investors, use information related to audit performance. In cases where they do not, the Board believes this is more likely driven by the costs of gathering and understanding the information rather than a lack of demand.²⁰⁷ Regarding passive versus active investors, research suggests that household direct holdings comprise roughly 50% of U.S. equity capital with the remaining 50% held by ETFs, passive mutual funds, active mutual funds, or hedge funds.²⁰⁸ Among funds, roughly 50% are actively managed.²⁰⁹ Based on the Board's review of academic literature and the Board's consideration of costs, the Board

believes that individual retail investors will be less likely to use the final metrics than institutional investors.²¹⁰ Therefore, this research suggests that investors who are more likely to use the final metrics will use the final metrics to inform their capital allocation decision-making own or manage roughly 25% of U.S. equity capital. However, the Board notes that, by investing in proportion to the market value of a company, passive investors freeride on the decisions of the active investors, thus amplifying the effects of improved decision-making of the more active investors who are more likely to use the final metrics.²¹¹ Also, one audit committee chair said at the September 26, 2024 IAG meeting ("September 2024 IAG meeting") that passive investors take corporate governance very seriously. Similarly, an investor group commenter said that passive portfolio managers' stewardship counterparts will use the information in their voting decisions. As such, in contrast to capital allocation decision-making, the final metrics may inform passive funds' governance-related decision-making.

One commenter suggested that the prevalence of Part I.A deficiencies is an important reason for the proposal and recommended that the Board provide an analysis of the causes of Part I.A deficiencies to help stakeholders assess the benefits of the final rules. Part I.A deficiency trends are available in PCAOB Rel. No. 2024-005.²¹² Firms have recently indicated to PCAOB staff that unusually high staff turnover and use of less experienced staff may have contributed to rising auditing deficiencies. PCAOB inspection staff also found that utilization of individuals with specialized skill or knowledge and significant, timely, and detailed supervision and review were good practices.²¹³ The final metrics will reflect several of these aspects of the audit (e.g., Partner and Manager Involvement). However, based in part on other comments the Board received on the proposal, the Board is not

adopting metrics related to the use of specialists.²¹⁴

One commenter said that to the extent investors need additional information to inform their voting decisions, the audit committee has the ability to provide that information in their report in the proxy statement, including a summary of the metrics they used to assess the auditor. However, another commenter said that proxy statements provide little information to shareholders on which they can base their decision to ratify the appointment of the auditor and no information related to the quality of the audit or the audit firm is required to be disclosed on the proxy statement.

One commenter said that several Form AP studies were excluded from the Board's baseline.²¹⁵ The Board recognizes that some of these analyses detect little impact of prior PCAOB disclosure rules. The Board notes that Section IV.C.1.i. of the proposal described how the benefits of prior PCAOB disclosure rules vary by rule and analysis. Referring to an academic article, the same commenter suggested that the baseline section had not provided ample research to show that investors would use the proposed metrics.²¹⁶ The proposal and the discussion below refer to the article cited by the commenter as well as several others regarding how investors may respond to the metrics.

Lastly, as discussed above, PCAOB staff estimates that approximately 210 firms will be subject to the final firm-level disclosure requirements, including 22 of the top 25 U.S. firms by 2023 total firm revenue and all of the 2022 annually inspected firms that continue to audit issuers. Approximately 50 firms will be required to report the final firm-level Industry Experience metrics. Approximately 3,400 issuer audits will be subject to the final engagement-level disclosures, covering approximately 99% of the total market capitalization of issuers reporting on Form 10-K and Form 20-F.

Need

This section discusses the economic problem to be addressed and explains how the final rules address it. In general, two observations suggest that there is an economic need for the final rules:

²¹⁴ See above for additional discussion on the Board's decision not to adopt the proposed use of auditor's specialists metric.

²¹⁵ The Board discussed this comment including the studies referred to below.

²¹⁶ See J. Owen Brown and Velina K. Popova, *How Do Investors Respond to Disclosure of Audit Quality Indicators?*, 38 AUDITING: A Journal of Practice & Theory 31, 47 (2019).

²⁰⁴ See, e.g., Broadridge, *2023 Proxy Season Key Stats and Performance Ratings*, (2023) (reporting that, of the votes Broadridge processed, 97% of shares were voted electronically by retail and institutional shareholders).

²⁰⁵ See, e.g., Yaron Nili and Megan Wischmeier Shaner, *Virtual Annual Meetings: A Path Toward Shareholder Democracy and Stakeholder Engagement*, SSRN Electronic Journal (2022) (discussing how "[m]eaningful participation at the yearly gathering of corporate shareholders has become a relic of the mid-twentieth century" and "[l]ow retail investor attendance and participation is a well-documented problem in public corporations") and cites therein. The Board notes that SSRN does not peer review its submissions.

²⁰⁶ See WSJ, *Investor Votes Against Big Companies' Auditors Climb*, (June 18, 2024).

²⁰⁷ See below for additional discussion.

²⁰⁸ See Nicolae Garleanu and Lasse Heje Pedersen, *Active and Passive Investing: Understanding Samuelson's Dictum*, 12 The Review of Asset Pricing Studies 389 (2020).

²⁰⁹ See John Rekenhaller, *Index Funds Have Officially Won*, Morningstar (Feb. 13, 2024).

²¹⁰ See below.

²¹¹ See, e.g., Jeffrey L. Coles, Davidson Heath, and Matthew C. Ringgenberg, *On Index Investing*, 145 Journal of Financial Economics 665 (2022) (discussing how "[p]assive investors are necessarily freeriding on the research and effort exerted by active managers") and Ruggero Jappelli, *Dynamic Asset Pricing with Passive Investing*, unpublished working paper (2024) (finding that "the effect of standardized unexpected earnings on abnormal returns is significantly amplified by the wealth passively tracking the stock").

²¹² See PCAOB Rel. No. 2024-005, at 315.

²¹³ See Spotlight: Staff Update and Preview of 2022 Inspection Observations (July 2023) ("2022 Inspection Observations Preview"), at 4, available at <https://pcaobus.org/resources/staff-publications>.

• Investors and audit committees cannot easily observe the services performed by auditors. This restricts (i) audit committees' ability to more efficiently and effectively monitor and select auditors as well as (ii) investors' ability to more efficiently and effectively ratify the appointment of the auditor and allocate capital. As a result, there is a risk that auditors will not supply an efficient level of assurance to the market.²¹⁷

• Furthermore, there are currently insufficient incentives for firms to fully meet the market demand for accurate, standardized, and decision-relevant information.²¹⁸ There is also a challenge coordinating firms on a system of comparable disclosures. As a result of the lack of incentives and coordination challenges, the Board believes auditors are not supplying the market with additional information even when doing so would be efficient. Indeed, information about audit engagements and firms that would allow (i) audit committees to more efficiently and effectively monitor and select auditors and (ii) investors to more efficiently and effectively ratify the appointment of the auditor and allocate capital, as sought by the market, is often limited or difficult to obtain.

The final rules will help address these problems in two primary ways:

• First, the final rules will require certain firms to publicly report specified metrics relating to certain audits and their audit practices. Through this disclosure, the final metrics will aid investor and audit committee decision-making.

• Second, the final rules will impose standardized calculations and require regular public reporting of those metrics. The resulting comparability will further aid investor and audit committee decision-making.

Importantly, the Board notes that the final metrics are not intended to be used in isolation to ascertain audit quality at an audit firm or for an audit engagement because audit quality is driven by a complex array of factors beyond those that can be addressed by metrics. The Board believes investors' and audit committees' ability to use the metrics is likely to increase over time as users are

able to aggregate multiple data points, make comparisons, and observe trends.

1. Problem To Be Addressed

i. Allocative Inefficiency in the Market for Audit Services

The auditor has a responsibility to obtain reasonable assurance about whether the issuer's financial statements are free of material misstatement. Reliable financial statements help investors evaluate issuers' performance and monitor management's stewardship of investor capital. However, because audits possess many of the attributes of a credence good, investors find it challenging to evaluate the quality of the services provided by auditors.²¹⁹ As a result, the lack of transparency into the audit process could enable auditors to act on their private incentives and under-audit (*i.e.*, deploy insufficient auditor resources) or over-audit (*i.e.*, undertake procedures that do not efficiently contribute to forming an opinion on the financial statements).²²⁰ In effect, there is a risk that auditors will not supply an efficient level of service to the market. While the Board acknowledges that audit quality is difficult to observe, the PCAOB is able to obtain insights into audit quality through inspection of firms' compliance with auditing standards. The results of recent PCAOB inspections indicate that room for improvement exists.²²¹

²¹⁹ See Daniel Aobdia, Saad Siddiqui, and Andres Vinelli, *Heterogeneity in Expertise in a Credence Goods Setting: Evidence from Audit Partners*, 26 Review of Accounting Studies 693 (2021) (finding evidence consistent with audits being credence goods).

²²⁰ See, *e.g.*, Monika Causholli and W. Robert Knechel, *An Examination of the Credence Attributes of an Audit*, 26 Accounting Horizons 631, 632, 633 (2012) (discussing how audits have attributes of a credence good, namely the outcome of an audit is unobservable and the auditor is best informed regarding how much effort is necessary to perform the audit).

²²¹ See, *e.g.*, *Spotlight Staff Update and Preview of 2022 Inspection Observations* (July 2023), available at <https://pcaobus.org/resources/staff-publications> (discussing the "concerning trend" in "the percentage of audit engagements reviewed that are expected to be included in Part I.A of an inspection report"). One commenter said that many audit quality studies reveal that audit quality is improving, deficiencies are narrowly focused, and financial statement restatements are down. The Board notes that the commenter did not provide support for these assertions. By contrast, and as stated here and in the proposal, the PCAOB has pointed to a concerning trend in auditing deficiencies. Indeed, the trend appears to be continuing in the aggregate. See, *e.g.*, *Spotlight Staff Update on 2023 Inspection Activities* (Aug. 2024), available at <https://pcaobus.org/resources/staff-publications>. Furthermore, while the incidence of restatements has been decreasing since 2013, there was an uptick in 2022. See, *e.g.*, Center for Audit Quality, *Financial Restatement Trends in the United States: 2013–2022*, (June 2024). The Board

One commenter agreed with the characterization of the audit as a credence good. Several commenters agreed that investors and other stakeholders cannot easily observe services performed by auditors, which limits their ability to make informed decisions about investing capital, ratifying the selection of auditors, and voting for members of the board of directors, including directors who serve on the audit committee. Several commenters said that the audit has become commodified and that firms compete primarily on cost due to a lack of information on audit quality. One commenter said that this results in audit firms "squeezing" professional staff for productivity.

The issuer's board of directors is generally required to establish an audit committee that is statutorily entrusted to appoint, compensate, and oversee the work of the auditor.²²² One commenter said that audit committees of accelerated and large accelerated filers are composed entirely of independent directors.²²³ However, similar to investors—though to a lesser degree—audit committees cannot easily observe the services performed by auditors. Moreover, audit committees may focus on the interests of current shareholders rather than the broader public interest (*e.g.*, market confidence, potential future shareholders, or investors in other issuers). Furthermore, there are risks that the audit committee may not monitor the auditor effectively. For example, the auditor may seek to satisfy the interests of management rather than investors if management is able to exercise influence over the audit committee's supervision of the auditor.²²⁴ One commenter said that

notes that the uptick in restatements could increase further because some financial statements that have not yet restated may do so in the future.

²²² Companies whose securities are listed on national securities exchanges are generally required to constitute an audit committee. See Section 301 of Sarbanes-Oxley; Section 10A(m)(2) of the Exchange Act. As an additional safeguard, the auditor is also required to be independent of the audit client. See 17 CFR 210.2–01; see also PCAOB Rule 3520, *Auditor Independence*.

²²³ Pursuant to Exchange Act Section 10A(m)(1) and Exchange Act Rule 10A–3, the listing rules of national securities exchanges generally require that all members of a listed company's audit committee be independent. See, *e.g.*, New York Stock Exchange Listing Manual Section 303a.06; Nasdaq Rule 5605(c). Companies that do not have securities listed on an exchange are not subject to such a requirement.

²²⁴ See, *e.g.*, Joshua Ronen, *Corporate Audits and How to Fix Them*, 24 Journal of Economic Perspectives 189 (2010) (explaining that audit committee members are paid by the company and can be dependent on top company management for a variety of benefits, including referrals as a possible member on the board of directors and audit

Continued

²¹⁷ An efficient allocation of resources occurs when total surplus is maximized. Total surplus is maximized when the good or service in question is supplied until the marginal benefit is equal to the marginal cost. See N. Gregory Mankiw, *Principles of Economics* 146–148 (6th edition 2008).

²¹⁸ Given the considerations discussed below, it appears reasonable to assume that this lack of incentive for firms to provide such information is likely to cause the apparent undersupply of information, rather than the cost of providing the information being greater than the social benefit.

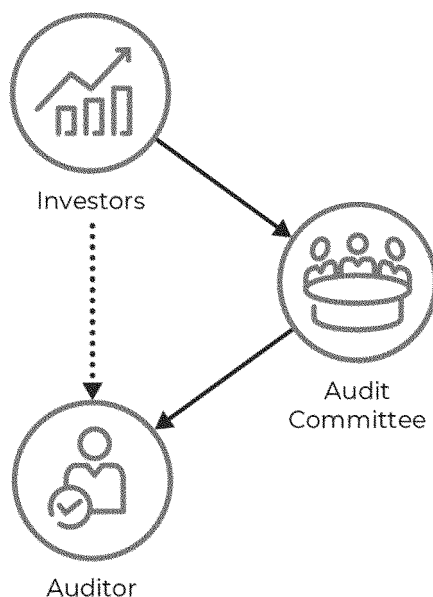
audit committee members are incentivized to ingratiate themselves to management and that this does not serve investors who need to hold the audit committee accountable. Such circumstances can lead to a *de facto* principal-agent relationship between company management and the auditor. Also, as one panelist said during the September 2024 IAG, there is a wide range of financial expertise among audit committees and audit committee chairs.

As a result, investors have an important, albeit indirect, role overseeing the work of both the auditor and the audit committee. Indeed, while

the audit committee more directly oversees the auditor, most publicly traded companies allow investors to vote to ratify the appointment of the auditor. This mechanism allows investors to voice their preferences on auditor selection.²²⁵ At the September 2024 IAG meeting, one investor said that shareholders have an important role holding both auditors and audit committees to account. By contrast, another IAG member said that investors should not oversee the audit because that is the role of the audit committee and one commenter said that the proposal would challenge the legal

structure of corporate governance. However, a lack of transparency into the audit process may leave investors unable to make well-informed decisions when voting on selections made by the audit committee or on re-election of audit committee members to the board of directors.²²⁶ Figure 5 illustrates oversight relationships pertinent to the final rules. The dotted line indicates that investors' oversight relationship with the auditor is less direct than the audit committee's oversight relationship.

Figure 5. Oversight Relationships Pertinent to the Final Rules



committees of other companies); Liesbeth Bruynseels and Eddy Cardinaels, *The Audit Committee: Management Watchdog or Personal Friend of the CEO?*, 89 *The Accounting Review* 113 (2014) (finding that companies whose audit committees have “friendship” ties to the CEO purchase fewer audit services and engage more in earnings management); Cory A. Cassell, Linda A. Myers, Roy Schmardebeck, and Jian Zhou, *The Monitoring Effectiveness of Co-Opted Audit Committees*, 35 *Contemporary Accounting Research* 1732 (2018) (finding that the likelihood of a financial statement misstatement is higher and that absolute discretionary accruals are larger when audit committee co-option, as measured by the proportion of audit committees who joined the board of directors after the current CEO’s appointment, is higher); and Nathan Berglund, Michelle Draeger, and Mikhail Sterin, *Management’s Undue Influence over Audit Committee Members: Evidence from Auditor Reporting and Opinion Shopping*, 41 *AUDITING: A Journal of Practice & Theory* 49 (2022) (finding that greater management influence over audit committee members is associated with a lower propensity of the auditor to issue a modified going concern opinion to a distressed company under audit and with increased opinion shopping behavior).

²²⁵ Shareholder ratification of the appointment of the auditor is not statutorily required in the U.S.

and in many cases the ratification vote is non-binding. One commenter agreed with this point. The commenter also suggested that it is rare for shareholders to not ratify the audit committee’s selection. However, according to Audit Analytics, accessed on Mar. 1, 2024, in 2023, ratification votes were held by 2,802 distinct companies included in the Russell 3000 index, which comports with other estimates that indicate between 80 and 95 percent of companies hold votes on ratification proposals as part of their proxy voting process. *See also* ACAP Final Report, at VIII.20 (finding that 95 percent of S&P 500 companies and 70–80 percent of smaller companies put ratification proposals to an annual shareholder vote) and Lauren M. Cunningham, *Auditor Ratification: Can’t Get No (Dis)Satisfaction*, 31 *Accounting Horizons* 159, 161 (2017) (finding that more than 90 percent of a sample of Russell 3000 companies voluntarily include a ratification vote on the ballot). The Board notes that broker discretionary voting is permitted on ratification proposals and ratification proposals may be used as a mechanism by some companies to achieve a quorum to conduct an annual meeting as a result of brokers exercising discretionary votes. Although the ratification vote is in many cases non-binding, it can still be impactful as it sends a signal of shareholder views. Academic studies show that non-binding votes in other settings can pressure boards to reconsider its policies and are considered

by proxy advisors in setting their recommendation for board members. *See, e.g.,* Yonca Ertimur, Fabrizio Ferri, and Stephen R. Stubben, *Board of Directors’ Responsiveness to Shareholders: Evidence from Shareholder Proposals*, 16 *Journal of Corporate Finance* 53 (2010) (finding a “positive relation between the percentage of votes cast in favor of the [non-binding] proposal and the likelihood of implementation.”); and Aiysha Dey, Austin Starkweather, and Joshua White, *Proxy Advisory Firms and Corporate Shareholder Engagement*, 37 *Review of Financial Studies* (3877 (2024) (showing that when non-binding Say-On-Pay voting support falls below 70 percent, managers respond by increasing shareholder engagement). The ability to vote on ratification of the appointment of the auditor is recognized by investor groups as an important element of corporate governance. *See, e.g.,* Council of Institutional Investors, *Policies on Corporate Governance*, (Sept. 11, 2023) at 2.13f available at https://www.cii.org/corp_gov_policies.

²²⁶ The IAG indicated in their comment letter regarding proposed QC 1000 that investors need information to make better decisions when voting to ratify the appointment of the auditor and the election to the board of directors of the Chair or members of the audit committee.

ii. The Market for Information Related to Auditors and Their Engagements is Inefficient

Supply-Side Problems

Some basic economic theories suggest that high-quality firms should have an incentive to voluntarily disclose information to the extent it allows them to differentiate themselves from low-quality competitors.²²⁷ However, economic theory also suggests that there may be countervailing incentives that limit voluntary disclosure in practice. For example, firms may be deterred by the costs they would incur privately, such as how their competitors could leverage the disclosures to capture market share.²²⁸ There may also be no mechanism for firms to credibly disclose certain non-verifiable or difficult to verify information, which can lead to the failure of such information markets to exist entirely.²²⁹ There could also be a status-quo bias whereby a firm prefers to continue a non-disclosure policy despite investors' calls for additional information.²³⁰ Limited competition for the largest issuers could also reduce the largest firms' incentives to voluntarily disclose information. Finally, firms may tend to underprovide information due to: (i) the positive externalities²³¹ conferred by comparable and uniform public disclosures (i.e., firms may not directly benefit from some of the value provided to investors and audit committees); and (ii) the challenges of coordinating on a single comparable and uniform reporting framework.²³²

²²⁷ See, e.g., Kip W. Viscusi, *A Note on "Lemons" Markets with Quality Certification*, 9 *The Bell Journal of Economics* 277 (1978).

²²⁸ See, e.g., *id.*; Oliver Board, *Competition and Disclosure*, 57 *The Journal of Industrial Economics* 197 (2009) (finding that companies may be reluctant to voluntarily disclose in competitive markets); and Daniel A. Bens, Philip G. Berger, and Steven J. Monahan, *Discretionary Disclosure in Financial Reporting: An Examination Comparing Internal Firm Data to Externally Reported Segment Data*, 86 *The Accounting Review* 417 (2011) (finding that companies provide fewer segment disclosures due to proprietary costs or competitive concerns).

²²⁹ See Akerlof, *The Market for "Lemons."*

²³⁰ There are a variety of reasons why individuals may choose the *status quo* outcome in lieu of an unknown outcome, including aversion to the uncertainty inherent in moving from the *status quo* to another option. For additional discussion on status quo bias, see William Samuelson and Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 *Journal of Risk and Uncertainty* 7 (1988).

²³¹ See Mankiw, *Principles of Economics* 196 ("An externality arises when a person engages in an activity that influences the well-being of a bystander but neither pays nor receives any compensation for that effect If it is beneficial, it is called a positive externality.").

²³² See, e.g., Anat R. Admati and Paul Pfleiderer, *Forcing Firms to Talk: Financial Disclosure Regulation and Externalities*, 13 *The Review of Financial Studies* 479 (2000) (discussing how

Auditors could in principle supply information to investors and audit committees individually depending on their unique preferences. However, the costs to the firm to do so would grow with the number of interested investors and audit committees and the extent of information they would request. By contrast, under the final rules, the costs to produce the final metrics will not grow with the number of interested users.

Demand-Side Problems

While investors may seek to acquire information from the issuer, they could incur significant private costs in doing so.²³³ At the September 2024 IAG meeting, one investor said that her asset management firm is generally denied meetings with audit committee chairs of U.S. issuers. Further, the company may need to publicly disclose information provided on a selective basis.²³⁴ Indeed, at the September 2024 IAG meeting, several audit committee chairs said audit committees are reluctant to meet with shareholders individually due to the risk of violating disclosure laws. Hence the potential benefits of the information to an individual investor would be dissipated because all other investors would have the same information and any informational advantage would be lost. This would further reduce individual investors' incentives to obtain the information. A free-rider problem thus exists among investors in which the costs incurred by one or more investors to convince firms to disclose information would not be shared by all investors who benefit from the disclosure.²³⁵ As a result, economic theory suggests there should be an under-provision of such information relevant to investors.

As discussed above, audit committees are already privy to certain information about their auditors beyond what is publicly available. In particular, audit committees could request the final metrics from their auditors or other tendering auditors. However, that

individual firms "internalize less than fully the social value of the information they release") and George Loewenstein, Cass R. Sunstein, and Russell Golman, *Disclosure: Psychology Changes Everything*, 6 *Annual Review of Economics* 391, 397 (2014).

²³³ See, e.g., Nikolay Gantchev, *The Costs of Shareholder Activism: Evidence from a Sequential Decision Model*, 107 *Journal of Financial Economics* 610 (2013).

²³⁴ See Regulation Fair Disclosure, 17 CFR 243.100(b)(1)(iv).

²³⁵ See Mankiw, *Principles of Economics* 220 and 222 ("A free rider is a person who receives the benefit of a good but avoids paying for it A free-rider problem arises when the number of beneficiaries is large and exclusion of any one of them is impossible.").

information would not necessarily be comparable with other engagements or other firms. Requesting comparable information from multiple auditors could be burdensome or even impracticable. As a result, while the audit committee can use information from their auditor to better understand their current engagements, the audit committee likely has a limited view as to how other engagements—such as those of their peers—might be conducted. Furthermore, less effective audit committees may not be aware of the information and therefore would not request it in the first instance. If audit committees were aware of the information and made such a request, some audit firms may resist providing it to avoid the costs of gathering the information and potential negative reputational effects. Firms could also manipulate the information. As one commenter said, the audit committee's principal tool is that of inquiry, not observation, and inquiry, in audit parlance, is the weakest form of audit evidence.

Evidence

Due in part to the problems discussed above, there is currently limited information available to investors specifically related to audit engagements. Indeed, investors know the least about the audit engagement, as they are less involved in the issuer's operations compared to management, the board of directors, and the audit committee—and are even further removed from the audit process. Over the last decade and a half, there have been sustained requests from investors for increased transparency into the audit process. As discussed above, investor-related groups have requested increased disclosures at the firm and engagement levels—notably in the form of easily accessible and quantifiable metrics, potentially with accompanying context provided by the auditor. Furthermore, the ACAP Final Report recommended that the PCAOB, in consultation with auditors, investors, public companies, audit committees, boards of directors, academics, and others, "determine the feasibility of developing key indicators of audit quality and effectiveness and requiring auditing firms to publicly disclose those indicators." ²³⁶

There would likely be a significant cost to investors to conduct an exhaustive search of all existing publicly available information related to audit performance. For example, gathering the information could require an investor to process various types of

²³⁶ See ACAP Final Report, at VIII:14.

data from various sources. Only the largest institutional investors likely have the economies of scale to profitably gather this information.²³⁷ Further still, the presence of significant block holdings by diversified, passive investment-style funds, which often do not hold board seats, means that such information may not be provided by audit firms to a significant control group in cases where the fund managers do not hold a board seat.²³⁸ Even proxy advisors rely upon relatively limited publicly available information in making voting recommendations, which investors may then rely upon in their own decision-making.²³⁹ Due to the lack of information currently available, it may be several financial reporting cycles before audit committees and investors accumulate enough information (e.g., through restatements, CAMs, audit committee communications, other public events bearing on the auditor's reputation) to be able to effectively judge the auditor's performance and act accordingly. Compared to investors, audit committees are better able to accumulate information in less time due to their ability to more easily request and receive information from their auditor.

As described in the baseline, a small group of auditors voluntarily disclose some firm-level information through firm transparency reports.²⁴⁰ However, many smaller firms do not voluntarily release transparency reports and for those that do provide such information, the metrics are not uniform or comparable across firms.²⁴¹ One

commenter provided several examples of how firms' voluntary reporting is not comparable across firms. Furthermore, PCAOB staff found that firms generally do not voluntarily report engagement-level metrics publicly. Some research on audit firm transparency reporting in foreign jurisdictions suggests that the information is not useful while other research finds that disclosure requirements improve audit quality for impacted firms.²⁴² Some academic studies find that, because the information contained in transparency reports is relatively unregulated, the disclosures and contextual discussion lack uniformity and comparability across or within audit firms.²⁴³ Pointedly, audit firms could alter the methodology and construction of any metric they voluntarily choose to disclose. A lack of uniformity means that the voluntary disclosures have limited comparative value, inhibiting their usefulness in allowing investors to evaluate the efficacy of their auditors.

Two commenters said that the proposal cited no studies demonstrating that there is a lack of information about auditors and their engagements or evidence that the market is seeking additional information. One commenter said that without sufficient dialogue with investors, audit committees, and firms, it is unclear whether there are information gaps in what is already provided and whether there is any opportunity to expand or enhance what is already done today to meet their expectations. The proposal discussed

disclosures are required. See, e.g., Thomas Bourveau, Maliha Chowdhury, Anthony Le, and Ethan Rouen, *Human Capital Disclosures*, SSRN Electronic Journal (2023) (finding that, after the SEC adopted principles-based human capital disclosure requirements in 2020, the resulting human-capital disclosures lacked comparability). The Board notes that SSRN does not peer review its submissions.

²⁴² See, e.g., FRC, *Transparency Reporting: AQR Thematic Review*, (Sept. 2019) (finding that surveyed investors and audit committee chairs are either unaware of or perceive limited use in audit firm transparency reporting in the U.K.) Rogier Deumes, Caren Schelleman, Heidi V. Bauwhede, and Ann Vanstraelen, *Audit Firm Governance: Do Transparency Reports Reveal Audit Quality?*, 31 AUDITING: A Journal of Practice & Theory 193, 194 (2012) (finding that EU audit firm transparency reporting is not associated with proxies for audit quality); and Shireenjit K. Johl, Mohammad Badrul Muttakin, Dessalegn Getie Mihret, Samuel Chung, and Nathan Gioffre, *Audit Firm Transparency Disclosures and Audit Quality*, 25 International Journal of Auditing 508 (2021) (finding that a requirement for audit firm transparency reporting in Australia led to an improvement in audit quality for the impacted entities).

²⁴³ See, e.g., Sakshi Girdhar and Kim Klarskov Jeppesen, *Practice Variation in Big-4 Transparency Reports*, 31 Accounting, Auditing & Accountability Journal 261 (2018) (finding that "the content of transparency reports is inconsistent and the transparency reporting practice is not uniform within the Big-4 networks").

evidence related to the lack of information despite a market demand, including several studies related to the decision-relevance of current voluntary firm transparency reporting.²⁴⁴ The proposal also discussed the demand from various investor groups for additional information related to the quality of firms and their engagements.²⁴⁵ Investor-related groups' support for the proposal provides additional evidence that there is an information gap and demand for information like the final metrics. Indeed, one commenter said that existing information, including firms' transparency reports, is insufficient and largely unused by the investment community because it is seen as marketing material rather than substantive, actionable data. According to the commenter, the lack of information leads audit committee members to prefer Big 4 auditors to protect or validate their decision-making in an environment where the audit and auditor are credence goods. The Board notes that transparency reports may also be unused because the information lacks standardization.

One commenter said that the proposal appeared to acknowledge that there is a lack of market demand for the proposed metrics. To the contrary, as discussed in the proposal and again above, given the considerations of benefits discussed below, the Board believes the lack of incentive for firms to provide such information is likely the cause of the apparent undersupply of information rather than a lack of market demand.²⁴⁶ That is, the Board believes the limited availability of information is more likely due to the supply and demand-side problems discussed above rather than a lack of market demand. By contrast, two commenters agreed that certain aspects of the market create limited incentives to provide sufficient information to users of the financial statements regarding audit quality. One commenter said that some research suggests that investors want more information on the inputs to audit production.²⁴⁷

2. How the Final Rules Address the Need

i. Mandatory Disclosure of Metrics

The final rules address the need by requiring mandatory public disclosure of metrics relating to auditors and audit

²⁴⁴ See Proposing Release at 132–134.

²⁴⁵ See Proposing Release at Section IV.B.1.

²⁴⁶ See Proposing Release at n. 212.

²⁴⁷ See Brant E. Christensen, Steven M. Glover, Thomas C. Omer, and Marjorie K. Shelley, *Understanding Audit Quality: Insights from Audit Professionals and Investors*, 33 Contemporary Accounting Research 1648 (2016).

²³⁷ Some research suggests that institutional investors are better-informed than retail investors. See, e.g., Cory A. Cassell, Tyler J. Kleppe, and Jonathan E. Shipman, *Retail Shareholders and the Efficacy of Proxy Voting: Evidence from Auditor Ratification*, Review of Accounting Studies 75 (2022) and cites therein.

²³⁸ See, e.g., Amir Amel-Zadeh, Fiona Kasperk, and Martin C. Schmalz, *Mavericks, Universal, and Common Owners—The Largest Shareholders of U.S. Public Firms*, SSRN Electronic Journal, (2022). The Board notes that SSRN does not peer review its submissions.

²³⁹ See, e.g., Cunningham, Auditor Ratification 163.

²⁴⁰ Audit firm transparency reports are voluntary and unregulated disclosures, as they are not required by PCAOB standards or applicable U.S. law. Consequently, audit firms can disclose metrics of their own choosing and construction. In practice, as discussed in above, audit firms that do publish transparency reports include the disclosure of metrics that are required in reports pursuant to disclosure rules in other jurisdictions, such as in the European Union (i.e., EU—No 537/2014 Article 13), or similarly adopted domestic requirements in the U.K. under the FRC's authority (i.e., the Companies Act of 2006, and Statutory Auditors and Third Country Auditors Regulations of 2016).

²⁴¹ Some research suggests that lack of comparability can be a problem even when

engagements. Under the final rules, auditors will have the opportunity to discuss the context of their metrics. The final rules could thus reduce opacity in the audit market and reduce frictions in the information market, thereby enhancing (i) audit committees' ability to efficiently and effectively monitor and select auditors as well as (ii) investors' ability to efficiently and effectively make decisions about ratifying the appointment of their auditors and allocating capital. The final metrics will quantify various aspects of firms' audit practice as a whole and engagements performed. As described above, the collective history of these final metrics will be publicly available. Moreover, as noted above, the final metrics will be subject to requirements designed to ensure their accuracy, including certification by the firm and specific quality control requirements.

Investors and audit committees could use the final metrics to better understand how their auditor has conducted their engagement and how that compares to how other engagements were conducted.²⁴⁸ This should improve their decision-making. Some commenters agreed that the information about auditors and their engagements required by the metrics would provide value to the decision-making process for stakeholders. For example, the final metrics should help audit committees engage in active discussions with their current auditors regarding the audit process and interview candidate auditors when or if a replacement auditor is desired.²⁴⁹ Audit committee disclosures indicate that some audit committees consider a variety of public and nonpublic information when engaging their auditor.²⁵⁰ The Board believes the information could also inform investors' auditor appointment ratification decisions. Research finds that investors are more likely to challenge auditor appointments when they have access to information that calls into question the quality or independence of the firm, which suggests that, in some cases,

investors will use standardized information across firms and over time to make better decisions.²⁵¹ Referring to academic research, one commenter said that investors do react to audit outcomes, audit behavior, and regulatory-induced disclosures in the audit report. However, the commenter also noted that: (i) the results are nuanced and context-specific; and (ii) mixed for non-professional investors.²⁵²

²⁵¹ See, e.g., Paul Tanyi, Dasaratha Rama, and Kannan Raghunandan, *Shareholder Ratification of Auditors after PCAOB Censures*, SSRN Electronic Journal (2021) (finding that first-time PCAOB censures of the largest accounting firms are associated with a higher percentage of shareholders not voting to ratify the appointment of the firm after the censure); Suchismita Mishra, K. Raghunandan, and Dasaratha V. Rama, *Do Investors' Perceptions Vary with Types of Nonaudit Fees? Evidence from Auditor Ratification Voting*, 24 *Auditing: A Journal of Practice and Theory* 9 (2005) (finding that the SEC's requirement for companies to disclose partitioned information about tax and other non-audit fees paid to a company's independent audit firm had a positive association with the proportion of votes against ratifying the appointment of the firm in 2003); Paul N. Tanyi, Dasaratha V. Rama, and K. Raghunandan, *Auditor Tenure Disclosure and Shareholder Ratification Voting*, 35 *Accounting Horizons* 167 (2021) (finding that in the case of companies with long [short] auditor tenure, the proportion of shareholder votes against ratifying the appointment of the auditor increased [decreased] after PCAOB mandated public disclosure of auditor tenure). The Board notes that research also indicates that retail investors may not necessarily use information regarding an audit firm in their decisions to vote on a proposal to ratify the appointment of the firm. See, e.g., Cassell, et al., *Retail Shareholders* (finding that, on average, shareholder votes against ratifying the appointment of the firm are not associated with audit failures but are associated with investment performance). However, the same study also suggests that non-retail investors are relatively better informed. One commenter said it would be useful to know whether the PCAOB had found any evidence of shareholders responding to the persistently high rates of Part I.A deficiencies. One study finds some evidence that shareholders vote against auditor ratification when their auditors receive unfavorable PCAOB inspection reports. However, the study finds the relationship only for the subset of companies where corporate governance is weak. See Myungsoo Son, Hakjoo Song, and Youngkyun Park, *PCAOB Inspection Reports and Shareholder Ratification of the Auditor*, 17 *Accounting and the Public Interest* 107 (2017). The Board notes that SSRN does not peer review its submissions.

²⁵² See Robert W. Knechel, Gopal V. Krishnan, Mikhail Pevzner, Lori B. Shefchik, and Uma K. Velury, *Audit Quality: Insights From the Academic Literature*, 32 *Auditing: A Journal of Practice & Theory* 385, 387–388 (2013); DeFond and Zhang, *A Review of Archival Auditing Research*; Peter Carey and Roger Simnett, *Audit Partner Tenure and Audit Quality*, 81 *The Accounting Review* 653 (2006); Allison K. Beck, Robert M. Fuller, Leah Muriel, and Colin D. Reid, *Audit Fees and Investor Perceptions of Audit Characteristics*, 25 *Behavioral Research in Accounting* 71 (2013); W. Brooke Elliott, Jessen L. Hobson, and Brian J. White, *Earnings Metrics, Information Processing, and Price Efficiency in Laboratory Markets*, 53 *Journal of Accounting Research* 555 (2015); Christensen, et al., *Understanding Audit Quality*; Eric T. Rapley, Jesse C. Robertson, and Jason L. Smith, *The Effects of Disclosing Critical Audit Matters and Auditor Tenure on Nonprofessional Investors' Judgments*,

Furthermore, investor-related groups have indicated that they use the information contained in Form AP. This suggests that they are familiar with Form AP and may be interested in reviewing additional information provided there. However, citing academic research, one commenter noted that the influence of Form AP on investor decision-making is mixed.²⁵³

By making the final metrics public and therefore available to all potential beneficiaries, the final rules should help ameliorate the positive externality problem associated with public disclosure.²⁵⁴ Moreover, because these final metrics will be public, the increased reputational risk they bring for auditors may, in turn, create incremental incentives for auditors that will be subject to the final requirements to maintain their reputation, or face a loss of business, thereby increasing accountability.²⁵⁵ Public disclosure also addresses investors' free-rider problem by eliminating the need for a private actor to force firms to disclose.²⁵⁶ One commenter said there are several mechanisms already in place to hold auditors accountable and questioned whether accountability could be further improved. The Board acknowledges that such mechanisms are in place (e.g., PCAOB inspections). However, the Board believes the final rules will complement existing accountability mechanisms. For example, the final rules may enhance the PCAOB inspections approach.²⁵⁷ Another

40 *Journal of Accounting and Public Policy* 106847 (2021); and Sarah Judge, Brian M. Goodson, and Chad M. Stefaniak, *Audit Firm Tenure Disclosure and Nonprofessional Investors' Perceptions of Auditor Independence: The Mitigating Effect of Partner Rotation Disclosure*, 41 *Contemporary Accounting Research* 1284 (2024).

²⁵³ See Jenna J. Burke, Rani Hoitash, and Udi Hoitash, *Audit Partner Identification and Characteristics: Evidence from US Form AP Filings*, 38 *Auditing: A Journal of Practice & Theory* 71 (2019); Lauren M. Cunningham, Chan Li, Sarah E. Stein, and Nicole S. Wright, *What's in a Name? Initial Evidence of US Audit Partner Identification Using Difference-in-Differences Analyses*, 94 *The Accounting Review* 139 (2019); Marcus M. Doxey, James G. Lawson, Thomas J. Lopez, and Quinn T. Swanquist, *Do Investors Care Who Did the Audit? Evidence from Form AP*, 59 *Journal of Accounting Research* 1741 (2021); Jeffrey Pittman, Sarah E. Stein, and Delia F. Valentine, *The Importance of Audit Partners' Risk Tolerance to Audit Quality*, 40 *Contemporary Accounting Research* 2512 (2023).

²⁵⁴ See discussion above.

²⁵⁵ Two investor groups generally agreed with this benefit.

²⁵⁶ For additional discussion of the role of mandatory disclosure as a regulatory tool, see, e.g., Admati and Pfleiderer, *Forcing Firms to Talk*; and John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 *Virginia Law Review* 717 (1984).

²⁵⁷ See below for additional discussion on the benefits to the PCAOB's inspection program.

²⁴⁸ See, e.g., Christensen, et al. *Understanding Audit Quality* (finding that surveyed investors believe information similar to several of the final metrics [i.e., the sufficiency of engagement team staffing, having well-trained auditors on the engagement team, having auditors on the engagement team with appropriate expertise, and the lack of financial statement restatements] impacts audit quality).

²⁴⁹ See, e.g., AICPA, *Hiring a Quality Auditor* 9, (2018) (discussing how audit committees should obtain all necessary information from the auditor).

²⁵⁰ See, e.g., CAQ, *2023 Audit Committee Transparency Barometer*, 15–18 (2023) (presenting examples of audit committee disclosures that summarize the information the audit committee considered when appointing the auditor).

commenter suggested that the Board consider firm incentives related to legal liability, damage to reputation through restatement and deficiencies, and PCAOB sanctions. The Board acknowledges that these forces create some incentive for firms to keep audit quality above a certain threshold. However, restatements are relatively rare events and PCAOB sanctions are sporadic. Furthermore, PCAOB inspections are constrained by existing PCAOB rules and standards. One commenter said that while enforcement actions and inspection reports provide valuable data, their extended delays often diminish their relevance for key stakeholders.

Several commenters said that investors are not making use of existing information that is similar to the proposed metrics, suggesting that they would not make use of the proposed metrics either. As support, two commenters referred to comments made during the November 2, 2022 meeting of the PCAOB SEIAG.²⁵⁸ Citing a survey of institutional investors, another commenter said that most institutional investors are either unfamiliar with or unaware of firms' current audit quality reports.²⁵⁹ Another commenter questioned whether investors who are not fully utilizing the information contained in inspection reports would also not use the proposed metrics. Citing a market research report, one commenter noted that shareholders play a limited role in practice when ratifying the appointment of the auditor.²⁶⁰ At the September 2024 IAG meeting, one investor said that the average investor is not engaging with the audit process or audit committees.

The Board appreciates these statements and research findings and notes that they are consistent with some of the research cited in the proposal and

above.²⁶¹ However, the Board notes that the CAQ 2023 Survey also finds that almost all surveyed institutional investors assess audit quality by considering the firm's reputation, years of experience, people, and technological resources. Apart from technological resources, the final metrics will provide investors with related information.²⁶² The surveyed institutional investors also expressed an interest in learning more about auditor communications to audit committees through disclosures. The Board believes audit committee members likely do occasionally request information like the final metrics from their auditor. Indeed, one audit committee chair said at the September 2024 IAG meeting that he requested information on industry specialization from his auditor. A majority of the surveyed institutional investors indicated that metrics related to the lead engagement partner's background, engagement team tenure, and specialist experience or related information would be useful. The survey also states that engagement-level metrics were of greater interest to the surveyed institutional investors than firm-level metrics because they are specific to a company, objective, and measurable. The final metrics will provide investors with engagement-level metrics. Collectively, the Board believes this information supports the Board's view that investors, particularly institutional investors, will find the final metrics useful and indeed an improvement in the quality of information over the limited information currently available.

One commenter suggested that the PCAOB consider how much information investors will have about auditors compared to the amount of information they will have about issuers. The Board does not believe that such a comparison is relevant to the economic analysis and the commenter did not explain how it would be relevant. The Board acknowledges that, in some cases, the final metrics could provide investors information about certain aspects of audit firms and their engagements that they might not have about issuers. However, the Board notes that, on balance, there is considerably more public disclosure available regarding issuers than audit firms.

Many commenters representing firm or industry groups were skeptical that investors could effectively use the information. One commenter said that publication of metrics alone does not

guarantee that investors will use or be aware of them. Two commenters said that the metrics' relationship to audit quality may not be clear. Several commenters noted that, unlike audit committees, investors would not be able to have a two-way conversation directly with auditors to appreciate the full context of the firm and its audit. One commenter questioned whether investors or audit committees would find the information useful. One commenter noted some of the proposed firm-level metrics (e.g., Partner and Manager Involvement, Workload) would be useful to audit committees but expressed doubt that others (e.g., Use of Auditor's Specialists, Allocation of Audit Hours, Experience of Audit Personnel) would be useful. However, the commenter believed some of the proposed metrics (e.g., Experience of Audit Personnel, Industry Experience) could be useful at the engagement level. Several commenters suggested that some or all of the proposed metrics would be useless without context. Citing academic research that was also cited in the proposal, one commenter said that retail investors would rely on the proposed metrics only if they were clearly trending over time.²⁶³ One commenter expressed concern that investors and audit committees could have trouble utilizing the proposed metrics because there is a lack of benchmarks, and it will be unclear to them how the proposed metrics relate to audit quality. Two commenters said that tracking metrics would become a compliance exercise and therefore would not transmit useful information for stakeholders. One commenter said that there are qualitative benefits of being a part of a GNF that cannot be properly captured or measured through the proposed metrics.

While most investors will not have the same context as audit committees, the Board believes that many investors, particularly institutional investors, do have sufficient context to make effective use of the final metrics. Indeed, investors have access to much of the contextual information that some commenters felt was critical, such as the firm's size, the issuer's size, network membership, or the issuer's industry. Many companies have robust shareholder engagement programs, where managers and/or board members communicate directly with shareholders.²⁶⁴ These programs could

²⁵⁸ One commenter referred to a discussant on the panel who made the following statement: "My experience has been that investors don't read the firm-level [PCAOB inspection] report. A lot of them don't know they necessarily exist, right." Another commenter did not refer to a specific discussant and referred to the Nov. 2, 2023 meeting of the PCAOB SEIAG. However, the Board believes the commenter intended to refer to the Nov. 2, 2022 PCAOB SEIAG meeting because firm and engagement metrics were not a topic of discussion during the Nov. 2, 2023 meeting.

²⁵⁹ See CAQ 2023 Survey. The survey was comprised in interviews with 38 institutional investors working at companies with a minimum of \$500M in assets under management. The participants were portfolio managers or investment analysts at buy side firms or research directors or similar roles at sell side firms. The survey did not describe how the participants were found or the questions that were asked.

²⁶⁰ See Glass Lewis, *2024 Benchmark Policy Guidelines—United States*, (2024).

²⁶¹ See Proposing Release at Section IV.B.2.

²⁶² See below for a discussion of alternative metrics considered related to the use of technical resources.

²⁶³ See Brown and Popova, *How do Investors Respond*.

²⁶⁴ See, e.g., Ali Kakhbod, Uliana Loginova, Andrey Malenko, and Nadya Malenko, *Advising the Management: A Theory of Shareholder*

raise investors' awareness of the metrics, provide an opportunity for two-way conversation, and encourage them to vote on corporate governance matters or raise concerns outside of the voting process. Furthermore, even if investors decline to participate in outreach efforts or no shareholder engagement program exists, proxy advisory firms can use the information to inform their voting recommendations on both auditor ratification and audit committee members.²⁶⁵ Thus, the final metrics can still inform shareholder voting.²⁶⁶ Two investor groups agreed with the Board's view that investors would use the proposed metrics to make better decisions about ratifying the appointment of their audit firm and allocating capital. Several other commenters said that the metrics would be beneficial to investors and other users of the audit report.

The Board also notes that auditors will be able to provide investors with context through optional narrative disclosure. Commenters had mixed views on the usefulness of the proposed narrative disclosure. Some commenters believed the narrative disclosure would allow firms to provide context necessary for appropriate understanding and would allow firms to communicate critical context that may be beneficial. However, several commenters believed it would not be sufficient. The Board recognizes that the optional narrative disclosures may not capture all relevant context. In such cases, firms could provide additional voluntary disclosure (e.g., through their transparency or quality reports).²⁶⁷

One commenter suggested the Board had ignored significant work conducted by the CAQ over the past decade regarding AQIs. The commenter referred specifically to three reports published by the CAQ (the "2014 CAQ Report," "2016 CAQ Report," and "2023 CAQ

Report").²⁶⁸ The Board has reviewed each report. The 2014 CAQ Report and 2016 CAQ Report summarize the results of stakeholder outreach and therefore inform the Board's understanding of the need for standard setting and how the final metrics address the need. The 2023 CAQ Report opines on transparency reporting best practices.

Based on outreach to various stakeholders, the 2014 CAQ Report expresses optimism that AQIs can be useful to audit committees and help promote audit quality. For example, the report concludes that communication of engagement-level AQIs can help the audit committee evaluate the actions taken or untaken by their auditor and help maintain or increase audit quality. This is consistent with the benefits related to audit committee monitoring of their auditor discussed below. It also emphasizes the importance of context, which the Board acknowledged in the proposal and discuss below in this subsection. The report suggests a flexible approach to the communication of metrics. The Board acknowledges this suggestion is in tension with the adopted approach that specifies calculations for each metric.²⁶⁹ However, for the reasons discussed in this subsection and highlighted below, the Board believes that the current voluntary or flexible approach would not sufficiently address the need for comparable information.

In the 2016 CAQ Report, the CAQ expressed a belief that reliable, quantitative metrics related to the audit can: (i) inform audit committees about matters that may contribute to the quality of an audit and (ii) help audit committees make decisions related to auditor appointment or reappointment as well as the selection of lead engagement partners. Based on the result of a pilot study with audit committees, and in addition to the findings summarized by the commenter, the report found that participants: (i)

generally supported discussion of AQIs with the engagement team; (ii) felt that key aspects of audit quality cannot be quantified such as professional skepticism; (iii) acknowledge growing interest from investors regarding how audit committees are fulfilling their responsibilities; and (iv) recognized that AQIs can help audit committees oversee the quality of the external audit.

The Board's economic analysis is largely consistent with these views, in particular the Board's discussion of improved monitoring of both the auditor and the audit committees below. However, participants in the CAQ's pilot study also: (i) expressed a preference for a flexible approach to AQI communication; (ii) noted that they already have access to the information they need; and (iii) cautioned that public disclosure of engagement-level metrics could lead to unintended consequences such as benchmarking behavior or excessive focus on measurable metrics. The Board acknowledges that there may be some benefits to a more flexible approach to audit committee communications. However, the Board believes a completely flexible approach could result in audit committees having insufficient information or information with limited utility, limit PCAOB oversight, limit comparability of metrics, and exacerbate other unintended effects (e.g., manipulation of the metrics).²⁷⁰ The proposal acknowledged that audit committees can already seek to obtain information like the final metrics from their incumbent auditors and the Board acknowledges this again below. Several commenters agreed that audit committees already have access to information about auditors and their engagements. Finally, the Board notes that the proposal also discussed the potential unintended consequences raised by participants in the pilot study, and the Board discussed them again below.

Two factors limit the relevance of the 2014 CAQ Report and 2016 CAQ Report. First, the reports contemplate voluntary communications by auditors to audit committees rather than mandatory public disclosure. Second, the auditing environment has evolved significantly since then. For example, investors and audit committees now have access to Form AP information and CAMs.

One commenter suggested that audit committees have access to relevant

Engagement, 36 Review of Financial Studies 1319 4 (2023) and cites therein (discussing how communication between management and shareholders has become increasingly prevalent).

²⁶⁵ Proxy voting guidelines do not currently appear to reference audit quality, but do refer to poor accounting practices. See, e.g., ISS, *United States Proxy Voting Guidelines Benchmark Policy Recommendations*, (Jan. 2024), 16 (listing "poor accounting practices" as a factor influencing its voting recommendations on members of the audit committee.)

²⁶⁶ Research shows that proxy advisor recommendations influence shareholder voting outcomes. See, e.g., Nadya Malenko, and Yao Shen, *The Role of Proxy Advisory Firms: Evidence from a Regression-Discontinuity Design*, 29 Review of Financial Studies 3394 (2016) (finding "that the recommendations of proxy advisory firms are a major factor affecting shareholder votes.").

²⁶⁷ See above for a discussion on the optional narrative disclosure, including commenters' views and how the final rules address commenters' views.

²⁶⁸ See Center for Audit Quality, *Approaches to Audit Quality Indicators*, (Apr. 2014) ("2014 CAQ Report"); Center for Audit Quality, *Audit Quality Indicators: The Journey and Path Ahead*, (Jan. 2016) ("2016 CAQ Report"); and Center for Audit Quality, *Audit Quality Disclosure Framework (Update)*, (June 2023) ("2023 CAQ Report"). By "AQI," the 2014 CAQ Report and 2016 CAQ Report are referring to measures that may provide further insight into audit quality, as outlined in a PCAOB briefing paper presented to the PCAOB's Standing Advisory Group Meeting on May 15–16, 2013. See PCAOB, *Discussion—Audit Quality Indicators* (May 15–16, 2013), available at https://pcaobus.org/news/events/documents/05152013_sagmeeting/audit_quality_indicators.pdf. Most of the final metrics are very similar to an AQI discussed therein.

²⁶⁹ See below for additional discussion on the Board's decision to standardize the calculation of the metrics.

²⁷⁰ See below for additional discussions on the Board's decision to standardize the calculation of the metrics and on the potential for auditors to manipulate their metrics.

comparable data by reference to information firms are already currently required to disclose pursuant to PCAOB rules (e.g., Form 2). The proposal acknowledged the availability of this information and the Board acknowledges it again above. However, as described above and discussed further below, the final metrics will make new relevant information available in a way that is much more accessible and comparable than existing information sources. The commenter also said that audit committees can seek relevant data from potential new audit firms. The proposal acknowledged this and the Board discussed this topic again below. Importantly, the Board notes that audit committees may have trouble obtaining comparable information from potential new auditors. One commenter suggested that audit committees would likely prefer to obtain information through conversation with their auditor directly rather than refer to a database of metrics. Under the final rules, audit committees will be free to request the final metrics or any other related information from their auditor directly.

One commenter performed a survey of audit committee chairs of large U.S. public companies. The commenter did not indicate the number of participants, how participants were selected, demographic information, or the questions they were asked. The participants said that they already receive or have access to most of the information in the proposal as part of the audit process and any other information would likely not be valuable to them. The Board discussed this limitation along with important caveats in the proposal and discusses it again below. The Board also notes that, at the same time, participants also expressed desire for additional information on artificial intelligence.²⁷¹ Participants also opined on the extent to which investors would use the information. First, some participants said information like the proposed metrics is rarely requested by or discussed with investors. The Board discussed in the proposal and above the challenges investors face obtaining information through this channel. The Board also discussed above how investors may be less vocal because they do not believe it is possible to obtain useful information in the current environment. The Board also notes that commenters representing a broad array of investors, investment managers,

investor advocates, and other financial reporting experts said that the metrics would be useful. Second, some participants noted that the information would only be available to investors annually and therefore would be stale. The Board acknowledges that investors will have access to the metrics on an annual basis. The Board believes that requiring firms to disclose the metrics on a more continuous basis would require a significantly greater investment in time and resources by the firms. The Board also notes that a broad range of commenters generally agreed that audit committees will find most or all of the information useful, especially engagement-level metrics.

One commenter representing a firm-related group performed a survey of audit committee members by way of its member firms. The same commenter also commissioned a third party to perform an investor survey.²⁷² Each survey provides information related to the need for and potential benefit of the proposed metrics. The Board discussed each survey below.

The audit committee members survey involved 242 participants. The participating audit committee members sit on audit committees of a range of companies by size and industry sector. The commenter did not completely describe the basis on which audit committees were invited to participate in the survey. The commenter did provide the survey questions. Fifty-nine percent of participants said the information available to them to fulfill their external auditor oversight responsibilities meets all of their needs. Thirty-six percent said the information meets most of their needs and the remaining 5% said the information meets less than most of their needs. These results suggest that most audit committees believe the current information environment is sufficient. However, the results do not imply that additional information cannot be useful to audit committee members. Indeed, 27% of the surveyed audit committee members seek more information about how their audit engagement is being performed, about the audit firm, or about other audit firms. Furthermore, some participants may have been reluctant to say that the information available to them to fulfill their responsibilities does not meet most or all of their needs because it would imply they are not fulfilling their responsibilities. Other results of the survey are largely consistent with

information presented in the proposal and above. For example, 78% of participants agreed that there could be unintended consequences and 73% said there would be challenges interpreting the proposed metrics. Eighty-two percent of participants said they had concerns about data specific to their audit being available publicly; however, the specific concerns were not raised and, by contrast, only 40% were concerned that the proposed mandatory reporting could increase director liability. Fifty-nine percent of participants agreed that some standard information about auditors should be considered. Eighty percent of participants said they rarely or never use PCAOB Form AP and 78% said they rarely or never use PCAOB registrations data; rather, the quality of conversation with the auditor is the top way audit committees evaluate the quality and reliability of the audit. Finally, 90% of participants said that PCAOB standards and rules are well-suited or have mostly kept up with change. Use of technology in the audit was more commonly ranked than firm and engagement metrics as an area where the audit committee would like to see the PCAOB modernize its auditing standards. The Board notes that the PCAOB recently adopted amendments to auditing standards related to auditors' use of technology-assisted analysis and recently proposed a standard related to auditors' use of substantive analytical procedures.²⁷³ The Board also notes that, while informative to the PCAOB generally, such comparisons are less relevant to the economic analysis of the final rules.

The investor survey involved 100 participants. Participants were screened to ensure they are professional institutional investors employed at companies that manage at least \$500 million in assets and have at least five years of experience and serve at the director level or higher. Besides these requirements, the participating investors cover a variety of job levels, experience levels, and ages, cover both genders, and primarily (80%) focus on both large accelerated filers and accelerated filers. The commenter did not completely describe the basis on which investors were invited to participate in the

²⁷³ See *Amendments Related to Aspects of Designing and Performing Audit Procedures that Involve Technology-Assisted Analysis of Information in Electronic Form*, PCAOB Rel. No. 2024-007 (June 12, 2024); *Proposed Auditing Standard—Designing and Performing Substantive Analytical Procedures and Amendments to Other PCAOB Standards*, PCAOB Rel. No. 2024-006 (June 12, 2024). The SEC approved the PCAOB's amendments to auditing standards related to auditors' use of technology-assisted analysis on Aug. 20, 2024.

²⁷¹ The Board's decision not to include a metric related to the use of technical resources is explained in Section IV.D.3.iv.d of the proposal and below.

²⁷² See Letter from Center for Audit Quality (Aug. 1, 2024) available at <https://pcaobus.org/about/rules-rulemaking/rulemaking-dockets/docket-041>.

survey. The commenter did provide the survey questions. Eighty-six percent of the participants work for banks or credit unions, 13% for other types of funds, and 1% for family offices.

Fifty-three percent of participating investors indicate they trust the audit of public company financial statements completely and 40% trust them a great deal. Furthermore, 57% of participating investors feel the information available to assess the quality of the audit meets all their needs and 35% feel it meets most of their needs. However, the Board believes the respondents may be focusing on whether information currently available permits them to fulfill their fiduciary responsibilities narrowly defined, similar to the audit committee members. First, just 17% of participating investors said they do not want to see any additional information about the audit to evaluate its quality. All others wanted additional information about the auditing process, team specifics, qualifications, and more generally, other information. The final metrics will provide such information. Second, almost all of the proposed metrics were indicated as being extremely helpful by between 30% and 50% of participated investors. The commenter did not indicate whether the survey allowed less favorable responses and, if so, what the participants' responses were.

The commenter noted that there were variances between these percentages and the portion of participating investors who said they would likely seek out the information on the PCAOB website. The commenter interpreted these variances as being consistent with their view that understanding how investors would use the information is necessary. The Board agrees that understanding how investors would use the information is important. Indeed, the Board discussed through the economic analysis how the Board believes investors will use the information. However, the Board believes these variances are difficult to interpret because it is unclear what the practical difference is between finding a metric helpful and being likely to proactively seek it out. Therefore, the variances may be driven by confusion among respondents.

Notably, despite broad agreement that engagement-level metrics would be helpful and 83% wanting some additional information about audit quality in the companies they invest in, 83% of surveyed investors somewhat or strongly agreed with the statement that mandated public disclosure of engagement-level performance metrics could lead to unintended consequences

and as such should be voluntary. The survey did not indicate what unintended consequences the surveyed investors thought might occur or whether they were aware that the final rules would permit firms to provide an optional narrative disclosure along with each metric.²⁷⁴

Other results of the investor survey are largely consistent with information presented in the proposal and above. For example, investors use a variety of publicly available information to assess audit quality (e.g., audit quality reports, inspection reports, reputation and the auditor's opinion and ICFR evaluation, PCAOB website). Investors also agree that context would be important for understanding the proposed metrics.

The Board notes that the views of participating investors were different from the views of audit committee members in two important ways. First, investors are more optimistic that the proposed metrics would be useful to audit committees. Indeed, 30% of participating investors strongly agree that audit committees lack access to the information they need to make informed decisions about selecting an auditor (39% somewhat agree) and 34% strongly agree that mandatory and standardized firm and engagement metrics are necessary for company management and audit committees to uphold fiduciary responsibilities to shareholders (47% somewhat agree). Second, investors more strongly believe that PCAOB standards and rules are in need of updating. Where 90% of surveyed audit committee members said that PCAOB standards and rules are well-suited or have mostly kept pace with change, just 26% of surveyed investors said PCAOB standards and regulations are well-suited for their intended purpose and 42% believed they had mostly kept up with change. More specifically, where 17% of surveyed audit committee chairs cited firm and engagement areas among the top three areas they would like to see the PCAOB modernize auditing standards, 28% of surveyed investors cited it among their top three areas.

A commenter representing an investor-related group pointed to another survey of investors.²⁷⁵ This survey was conducted by the commenter in July 2017. The survey was limited to members of the commenter's group and targeted

primarily buy-side portfolio managers and research analysts, sell-side analysts, credit analysts, and corporate financial analysts. There were 284 initial respondents. The commenter did not completely describe the basis on which investors were invited to participate in the survey. The commenter did provide the questions asked. The survey's finding, as highlighted by the commenter, underscores that (i) the quality of information communicated to investors, including AQIs, is very important to how investors perceive the value of an audit and (ii) developing and monitoring AQIs is a high standard-setting priority for investors.²⁷⁶ According to the commenter, the results of the survey suggest that firm and engagement metrics are a priority for investors, a viewpoint with which the Board agrees and that accords with other investor feedback the Board has received over the course of this project. The Board notes that survey respondents rated information like the final metrics (e.g., restatement of company financials, industry expertise of audit personnel, training and accreditation of audit personnel, tenure of engagement partner, number of audit staff per audit partner, audit firm recruitment and retention practices) between 2.71 and 3.66 in importance (one being "not important" and four being "very important.").

While the Board believes the final metrics will help reduce opacity in the audit market and reduce frictions in the information market, the Board notes that the final metrics will not be direct measures of audit quality. Audit quality is an abstract concept, and there is no single comprehensive measure of audit quality. Audit quality is a concept designed to describe the characteristics of, and participants in, audit engagements in which the auditors are more likely to identify and report material misstatements. Or, more broadly, audit quality reflects all of the components of the audit that align with desirable outcomes.²⁷⁷ The desired outcomes of the framework depend (to some extent) upon the stakeholders involved, even if there are certain consistent areas of focus. As a result, the final metrics cannot directly measure audit quality. And they are not intended to do so, as—without additional context—it is unlikely they can be interpreted directly as measurements of audit quality. The final metrics are not

²⁷⁴ See above for a discussion on the limitations of voluntary auditor reporting.

²⁷⁵ See CFA Institute, *CFA Institute Member Survey Report: Audit Value, Quality, and Priorities*, (July 2017) ("2017 CFA Institute Survey"), available at <https://rpc.cfainstitute.org/en/research/surveys/audit-value-quality-priorities-survey-report>.

²⁷⁶ *Id.* at Table 1. The Board notes that the 2017 CFA Institute Survey did not define "AQI."

²⁷⁷ For a review of various definitions and discussions of the latent attributes of audit quality, see, Knechel, et al., *Audit Quality*.

intended to imply that an increase (decrease) in a particular metric, or a group of metrics, necessarily relates to an increase (decrease) in audit quality. Lastly, the Board does not believe that the final metrics, individually or taken together, could be appropriately used in isolation to ascertain audit quality at an audit firm or for an audit engagement. For example, some of the most important elements of a high-quality audit, such as application of due care and professional skepticism, are not capable of being entirely measured and quantified directly.

Two commenters agreed that no single metric can be viewed as having a causal relationship to audit quality. Several other commenters agreed that the correlation between the proposed metrics and audit quality is far from perfect. However, two commenters interpreted this caveat regarding the relationship between the proposed metrics and audit quality to imply that the proposed metrics cannot be decision-relevant to investors and audit committees. The Board does not believe this to be the case. The Board continues to believe that certain aspects of audit quality cannot be measured. However, the Board does not believe this implies that the final metrics will be irrelevant to investors and audit committees. To the contrary, as said by one commenter, the Board believes certain aspects of the audit can be measured.

One commenter said that the purpose and use of the metrics are not consistently correlated with stakeholders' needs because the proposal lacked an explicit definition of audit quality. The Board does not believe a definition of audit quality is necessary for the metrics to be correlated with stakeholders' needs. Investors' and audit committees' information needs are explicitly stated above. The Board believes the arguments made in this subsection, in conjunction with the discussion of benefits below, establish a correlation between the final metrics and stakeholders' needs.

ii. Uniform and Comparable Metrics

In addition to mandating disclosure, the final rules will also specify the data sources and calculations for each final metric and require their disclosure in PCAOB forms in an electronic, structured data format. Collecting and reporting information in this manner will likely enhance the usefulness of the information to investors and audit committees by allowing them to more easily access the information and compare firms and engagements. Regular annual reporting should also

allow investors and audit committees to form judgments regarding the quality of their auditor sooner (e.g., compared to restatements which may take several years to occur or PCAOB inspection reports which may be released several years after an audit engagement was performed).

Commenters' views on comparability are discussed above. Overall, commenters questioned whether the engagement-level metrics would be comparable due to the importance of company-specific context, which in their view is necessary for understanding the metrics. Two commenters suggested that even firm-level metrics are not comparable. One commenter said that differences in the centralization or complexity of issuers' IT infrastructures could be a reason for cross-sectional differences in the engagement-level metrics rather than differences in the audit. One commenter suggested that comparability would improve if the metrics would account for firm size, issuer size, and industry. One commenter suggested that the standardized calculations, rather than facilitate comparability, could reduce it because they would not be appropriate for every firm. Several commenters suggested that the standardized calculations would not be flexible enough to evolve over time as the auditing environment changes. Relatedly, one commenter suggested that the PCAOB revisit in the future the appropriate calculations. One commenter said the proposed metrics would be meaningless without sufficient context. By contrast, one commenter said that investors are aware that the metrics will not be perfectly comparable and that they are trained to analyze this type of information.

The Board agrees that context could be important to understanding any individual metrics. As discussed above in this subsection, the Board believes that no set of metrics, individually or collectively, can completely measure audit quality. Accordingly, the Board has provided auditors the opportunity to disclose additional context for each metric. The Board acknowledges that firm size, issuer size, and industry could be important context when interpreting a metric. However, the Board notes that this information about issuers is already available to the public, and the Board believes that stakeholders will be better served by a rule that permits them to consider this information alongside the metrics as they see fit rather than by prescribing how they should be accounted for. The Board also notes that, under the final rules, firms will be free to provide additional information

voluntarily to their stakeholders (e.g. through audit quality or firm transparency reporting) that they believe better captures the changing environment. The Board recognizes that the standardized calculations will not explicitly account for all relevant facts and circumstances for each firm.

However, notwithstanding the potential importance of context for understanding any individual metric, the comparability of information about firms and their engagements will be improved overall compared to the current largely voluntary state by mandating specific metrics and calculations. The Board discussed a potential post-implementation review (PIR) below.

Economic Impacts

This section discusses the expected benefits, costs, and potential unintended consequences of the final rules. The magnitudes of the benefits and costs are likely to be affected by the degree to which firms have already voluntarily adopted disclosure practices that are similar to those required under the final rules or produce similar metrics for non-public purposes. As discussed above, as of the 2018 and 2019 inspection years, the U.S. GNFs already track some metrics like those being adopted. Though their practices may have evolved since then, the Board believes they will need to gather additional information or adjust their calculations. The magnitude of the impacts may also vary by stakeholder depending on how useful the metrics are for the decisions they face. Stakeholders who find the final metrics more useful will be more likely to incur the costs and benefits of integrating the final metrics into their decision-making. The Board believes the final rules will have a greater impact on smaller firms which likely have less developed practices in this area.

Several commenters suggested that the PCAOB should consider the cumulative effects of the reporting requirements in this rulemaking along with other rules and standards that have recently been proposed or adopted. One commenter reported results of a survey of audit committee member respondents in which 76 percent of 145 respondents indicated concern about the cumulative impact of PCAOB standard-setting and rulemaking on audit quality and 24 percent indicated no concern.²⁷⁸ Consistent with long-standing practice and the PCAOB's staff guidance on economic analysis, the Board's economic analysis for each rulemaking

²⁷⁸ The survey is discussed in greater detail above.

considers the incremental benefit and costs for the specific rule—*i.e.*, the benefits and costs stemming from that rule compared with the baseline.²⁷⁹ There could be implementation activities for certain provisions of other rules and standards that overlap in time with implementation of the final rules, which may impose costs on resource constrained firms affected by multiple rules. This may be particularly true for smaller and mid-sized firms with more limited resources. In determining effective dates and implementation periods, the Board considered the benefits of rules as well as the costs of delayed implementation periods and potential overlapping implementation periods. The Board also considered that in some cases, overlapping implementation periods may have benefits because firms will not need to revise or redo previous process or system changes where rules interact with each other. For example, firms could benefit in this regard by implementing the final rules while also implementing QC 1000 and, if approved by the SEC, the PCAOB's Firm Reporting rules because all three rulemakings address external reporting.

Several investor group commenters stated they believe the benefits of the proposal would exceed the costs. In contrast, other commenters stated they believe the costs of the proposed metrics will not be proportionate to the benefits. One commenter said there was a lack of academic evidence about whether the benefits exceed the costs. One reason that academic evidence related directly to whether the benefits of the proposal exceed the costs is limited is likely that, for the reasons discussed above, the necessary data do not exist. However, the economic analysis incorporates where appropriate academic evidence related to certain impacts of the proposal. Furthermore, as described above, the Board has quantified certain impacts to the extent feasible. One commenter suggested that a more complete economic analysis of the proposal would reveal that the costs exceed the potential benefits. The commenter did not indicate a data source or methodology that would allow for a quantitative analysis of all benefits and costs. The commenter also did not indicate how they know what the results of such an analysis would be. One commenter suggested that the PCAOB expand the proposal to consider

whether the benefits outweigh the costs. Another commenter said that they saw no indication that the Board had addressed whether investors and other stakeholders would place greater weight on the asserted benefits against increased audit fees. The economic analysis separately analyzes benefits and costs, and as stated above, the Board is not able to quantify all relevant benefits and costs due to data limitations. However, the Board notes that one commenter representing an investor-related group said that investors recognize they ultimately bear the cost of creating such information and metrics and are generally willing to pay for information and metrics.

1. Benefits

As discussed above, the final metrics could enhance (i) audit committees' ability to efficiently and effectively monitor and select auditors as well as (ii) investors' ability to efficiently and effectively make decisions about ratifying the appointment of their auditors and allocating capital. Moreover, there will likely be improvements to the PCAOB's oversight programs (*i.e.*, selection of firms, engagements, and focus areas for review), as well as to policy research. As an important indirect benefit, the final rules could further spur competition to the benefit of investors. Thus, while the metrics do not represent a comprehensive measure of audit quality, stakeholders may use the metrics in ways that could improve audit quality.²⁸⁰ Several investor-related groups generally agreed with these benefits. One commenter said that reporting of proposed metrics would improve audit quality across the profession.

Auditors have a responsibility to obtain reasonable assurance about whether the financial statements are free of material misstatement. If use of the metrics leads to higher audit quality, it could increase the likelihood that the auditor will discover a material misstatement or will qualify its audit opinion when a material misstatement exists and is not corrected by management.

²⁸⁰ While some of the most important elements of high-quality audit, such as the application of due care and professional skepticism, cannot be fully measured or quantified, the final metrics provide proxies for certain aspects of audit quality, such as years of experience, auditor workload, and the percentage of audit hours attributable to senior members of the audit team. These proxies, while not a complete measure of audit quality, offer important information about auditors and the engagements they lead, which stakeholders can use to inform their decisions.

The SEC does not consider the requirements for audited or certified financial statements in Rule 2–02(b) of Regulation S–X to be met when the auditor's report is qualified. Furthermore, a qualified audit opinion may evoke negative market reactions. For these reasons, higher audit quality could incentivize issuers to take steps to ensure their financial statements are free of material misstatement. Issuers could take these steps proactively, prior to the audit, or in response to adjustments requested by the auditor. Financial statements that are free of material misstatement are of higher quality and more useful to investors.²⁸¹ An investor-related group said that investors demand high-quality audits because reliable audited financial statement are critical to investors in making informed decisions.

In the following discussion, the Board discussed the direct benefits related to enhancing the information available to investors, audit committees, and other stakeholders and follow up with a discussion of the potential indirect benefits. The Board then reviews the extant literature related to the final metrics and examine how each final metric could contribute to achieving the final rules' intended benefits.

i. Direct Benefits to Investors, Audit Committees, and the PCAOB

The direct benefits of the final rules relate to (i) improved investor and audit committee monitoring, (ii) improved

²⁸¹ The Board notes several caveats. First, some theoretical research finds that changes to auditing standards can have counterintuitive effects on audit quality. For example, some research finds that increased precision in auditing standards can reduce audit quality. See Marleen Willekens and Dan A. Simunic, *Precision in Auditing Standards: Effects on Auditor and Director Liability and the Supply and Demand for Audit Services*, 37 Accounting and Business Research 217 (2007). Other research finds that setting a higher minimum bar can reduce audit quality. See Pingyang Gao and Gaoqing Zhang, *Auditing Standards, Professional Judgment, and Audit Quality*, 94 The Accounting Review 201 (2019). The Board acknowledges that these studies examine the impacts of audit performance standards. By contrast, the Board adopted a disclosure standard. This may limit the relevance of these studies to the final rules. The Board is also unaware of empirical evidence that directly tests these theories. Second, the conclusion that financial statements that are free of material misstatement are more useful to investors hinges on the assumption that investors value compliance with the applicable financial reporting framework (*e.g.*, U.S. GAAP). The various market reactions to restatements that have been documented in academic literature suggests that this is the case. Third, the conclusion that improved audit quality would improve financial reporting quality assumes that issuers would not switch to sufficiently lower quality auditors in sufficient number as a result of the final rules. Finally, one commenter said, and the Board agrees, that the proposed metrics cannot be viewed as the only proxy for measuring financial reporting quality.

²⁷⁹ See Staff Guidance on Economic Analysis in PCAOB Standard-Setting (Feb. 14, 2024) ("Staff Guidance on Economic Analysis"), available at https://pcaobus.org/oversight/standards/economic-analysis/05152014_guidance.

auditor selection, and (iii) improved PCAOB oversight and scholarly auditing research. The Board believes these benefits will arise because the final metrics will significantly augment the information set available to stakeholders and thereby enhance their decision-making.

Each of the final metrics and how they would enhance decision-making is discussed in detail above. To summarize, the final metrics relate broadly to audit personnel, allocation of audit hours, and audit outcomes. The final metrics related to audit personnel will provide information on the audit team's involvement and workload (*i.e.*, Partner and Manager Involvement, and Workload), turnover (*i.e.*, Retention of Audit Personnel), experience (*i.e.*, Experience of Audit Personnel), industry specialization (*i.e.*, Industry Experience), and training (*i.e.*, Training Hours for Audit Personnel). The final metrics related to the allocation of audit hours will provide information on the allocation of audit hours prior to the issuer's year end (*i.e.*, Allocation of Audit Hours). The final metrics related to outcomes will provide information on restatement trends (*i.e.*, Restatement History).

These metrics could enhance decision-making by helping stakeholders assess whether auditors are appropriately staffing their engagements, budgeting their time, and achieving desirable outcomes. As the following examples illustrate, stakeholders will likely make these judgments based primarily on their experience and by comparison to similar firms or engagements and in conjunction with other information available to them (*e.g.*, the other metrics, issuer's unique facts and circumstances, or research).²⁸² These examples are meant as illustrations only; investors and audit committee members may interpret the final metrics differently depending on specific circumstances.

- An investor may observe that one issuer's auditor has more industry experience than a comparable issuer's auditor. Depending on the magnitude of the difference and other information available to the investor, the investor may take this as a sign regarding the relative reliability of the audit and, consequently, the issuer's financial statements. This could influence the investor's voting or capital allocation decisions.

- An audit committee member may observe that an engagement's partners

and managers were more involved than the audit committee member expected based on their experience. While the audit committee member may believe partner and manager involvement is, as a general matter, a sign of good quality control, the audit committee member may, depending on the facts and circumstances, suspect there was a problem that required the partner's attention. As a result, the audit committee member may request additional information from the auditor.

- An investor may observe that the auditor's retention metric is a low outlier compared to prior years. This may lead the investor to question the auditor's ability to gather sufficient appropriate audit evidence and, depending on other information available, may inform the investor's vote on ratification of the auditor or re-election of audit committee members to the board of directors.

- An audit committee member may observe that the auditor's allocation of audit hours prior to the year's end indicates, based on academic research, an elevated risk of audit deficiency and restatement. As a result, the audit committee member may work with the auditor to find ways to improve the planning of a future audit.

The Board notes that the benefits of mandatory disclosure are well-studied and have been measured in other markets such as credit ratings, health care, and financial reporting.²⁸³

²⁸³ For example, in the context of credit ratings, research has found that the introduction of additional credit ratings information into the market leads relatively higher quality borrowers to obtain lower borrowing costs by 20 basis points. See Tony Tang, *Information Asymmetry and Firms' Credit Market Access: Evidence from Moody's Credit Rating Format Refinement*, 92 *Journal of Financial Economics* 325 (2009). The Board notes that the relevance of this finding is limited by the fact that the studied disclosure relates to the quantity of information provided by the credit rating agency rather than the quality of service provided by the credit ratings agency. In the context of nursing home care, one study finds that mandatory disclosure of quality indices leads to improvement in two of the five indices. See Dana B. Mukamel, David L. Weimer, William D. Spector, Heather Ladd, and Jacqueline S. Zinn, *Publication of Quality Report Cards and Trends in Reported Quality Measures in Nursing Homes*, 43 *Health Services Research* 1244 (2008). For a discussion of potential benefits of mandatory financial reporting quality as well as potential unintended consequences, see Christian Leuz and Peter D. Wysocki, *The Economics of Disclosure and Financial Reporting Regulation: Evidence and Suggestions for Future Research*, 54 *Journal of Accounting Research* 525 (2016) and cites therein. However, some research also finds that mandatory disclosure can have little effect. For example, in the context of HMOs, one study finds that, following the introduction of public disclosure of six quality scores, only one—customer satisfaction—subsequently drove HMO market share and the effect was most pronounced in markets where true quality varied the most. See Leemore Dafny and

Likewise, the benefits of comparable information have been observed in financial reporting.²⁸⁴ There are important similarities between the markets for credit ratings, health care, and financial reporting and the audit market. For example, credit ratings services, like audit services, are opaque and operate under an "issuer-pays" business model. Therefore, the impacts of disclosure observed in those markets provide some indication of the potential impacts the final rules could have on the audit market. However, there are also significant differences. For example, the quality of health care services may, in some cases, be more visible than the quality of audit services. These differences limit the relevance of these studies. The disclosures studied in these markets may also not be directly comparable to the final metrics and therefore are less relevant.

The Board also notes that the benefits of prior PCAOB disclosure rules vary by rule and analysis.²⁸⁵ Citing academic research, one commenter said studies show that, while the information contained in Form AP may improve the perception of auditors and financial reporting, Form AP is not influencing investors' decision-making. Referring to research discussed above and in the

David Dranove, *Do Report Cards Tell Consumers Anything They Don't Already Know? The Case of Medicare HMOs*, 39 *The Rand Journal of Economics* 790 (2008).

²⁸⁴ See, *e.g.*, Mark L. DeFond, Xuesong Hu, Mingyu Hung, and Siqi Li, *The Impact of Mandatory IFRS Adoption on Foreign Mutual Fund Ownership: The Role of Comparability*, 51 *Journal of Accounting and Economics* 240, 241 (2011) (finding that greater financial reporting comparability leads to greater investment); Luigi Zingales, *The Future of Securities Regulation*, 47 *Journal of Accounting Research* 395 (2009) (concluding that a more subtle benefit of disclosure regulation is the standardization it entails); and Bingyi Chen, Ahmet C. Kurt, and Irene Gunnan Wang, *Accounting Comparability and the Value Relevance of Earnings and Book Value*, 31 *Journal of Corporate Accounting & Finance* 82 (2020) (finding that "accounting comparability increases the value relevance of earnings, but not book value").

²⁸⁵ See, *e.g.*, Michael J. Gurbutt and Wei-Kang Shih, *Staff White Paper: Econometric Analysis on the Initial Implementation of CAM Requirements*, Public Company Accounting Oversight Board 4 (2020) (discussing how PCAOB staff did not find "systematic evidence that investors respond to the information contents in CAMs" but nevertheless did find that "some investors are reading CAMs and find the information beneficial."); Kose John and Min Liu, *Does the Disclosure of an Audit Engagement Partner's Name Improve the Audit Quality? A Difference-in-difference Analysis*, 14 *Journal of Risk and Financial Management* 1 (2021) (suggesting that there was an increase in audit quality and audits costs as a result of PCAOB Rule 3211); and Cunningham, et al., *What's in a Name?* (finding evidence that any immediate impact of PCAOB Rule 3211 on audit quality or audit fees is limited to specific dimensions of audit quality, specific control groups, and/or specific company characteristics).

²⁸² Academic literature on how various proxies for the final metrics relate to various proxies for audit quality is summarized below.

proposal, the commenter also said that CAMs are not driving decision-making by investors.²⁸⁶ By contrast, a recent survey finds that institutional investors generally rely on CAMs when making investment decisions and read the CAMs section in the Form 10-K.²⁸⁷ Approximately half said that additional information would be even more beneficial. There are important similarities between these disclosure rules and the final rules. For example, CAM reporting and Form AP reporting requirements were significant changes in auditor reporting and the final engagement-level disclosures will be reported on Form AP. Therefore, the results of these studies provide some indication of how the final metrics could impact the audit market. However, there are also significant differences between prior PCAOB disclosure rules and the final rules. For example, the final rules will likely require firms to gather more engagement-level information than CAM and Form AP reporting requirements do. These differences limit the relevance of these studies.

One commenter suggested that the benefits of the proposed metrics would be limited by the fact that they are focused on the past and therefore may have limited value predicting future performance. The Board recognizes that the metrics will be computed using historic data and the Board believes this is a natural limit. The Board also disagrees with the premise that historic information, by definition, cannot have value predicting future performance. Historical metrics can inform future-oriented decisions by increasing the reliability of the data investors and audit committees use to form their expectations.

One commenter suggested that benefits would only accrue to data aggregators, the plaintiff's bar, and academics and not to investors. The Board agrees that data aggregators may aggregate and resell the information. However, the Board notes that the existence of such a market would be evidence that there is a market demand

for the final metrics. Data aggregators may also allow retail investors to benefit more from the final metrics by making them even more accessible. Similarly, to the extent there is future reliance on the metrics by academics and plaintiffs' lawyers, it would serve as evidence of their information value and, by extension, their relevance to investors. Pointing to pages 135 and 168 of the proposal, the same commenter stated that the proposal acknowledged that the required metrics are not likely to be decision-useful to retail investors. In fact, the proposal states on page 135 that "[r]esearch also indicates that retail investors may not necessarily use information regarding an audit firm in their decisions to vote on a proposal to ratify the appointment of the firm." The proposal states at p. 168 that "[d]ue to economies of scale, the Board believes institutional investors would be more likely to incur these costs than retail investors." To be clear, the Board believes that institutional investors are more likely to use the final metrics than retail investors.

One commenter suggested that all the metrics must help retail investors make informed decisions. The Board considered the benefits and costs to all stakeholders, not just retail investors. As such, the Board does not believe that a metric should be excluded on the basis that it may not help retail investors make informed decisions because doing so could deprive other stakeholders of useful information. Subject to this caveat, the Board believes some retail investors will use the metrics, albeit likely less so than institutional investors. Furthermore, as discussed in above, the Board believes more passive retail investors may indirectly benefit from the improved decision-making of more active institutional investors.

a. Improved Monitoring

The final rules will increase the set of information available to audit committees and investors regarding their auditor. This should improve both investors' and audit committees' ability to monitor their auditors.²⁸⁸ For example, an audit committee could engage in more meaningful discussions with their auditor regarding the

auditor's performance.²⁸⁹ In response to improved monitoring, auditors may improve audit efficiency as well as audit outcomes as they become more responsive to investors' and audit committees' audit service needs.²⁹⁰ The final rules could also reduce costs related to information gathering that are incurred by investors and audit committees when monitoring their auditor. Some of the cost reductions could reflect reductions in duplicative work to the extent that various investors or audit committees collect the same information.

One commenter suggested that the PCAOB should not focus on over-auditing or audit inefficiencies. Another commenter was concerned by the suggestion that investors should be expected to ratify auditor selection or make decisions related to capital allocation on the basis of auditor efficiency (e.g., by reviewing auditors' allocation of time or resources). Consistent with the PCAOB's staff guidance on economic analysis, the Board considered the most likely impacts. As discussed in the proposal, the Board believes that some reduction in over-auditing or some improvement in auditing efficiency could result from

²⁸⁹ One study reviewed the comment letters to the Concept Release and found that audit firms agreed with the notion that audit committees may benefit from enhanced dialog between the auditor and the audit committee. See Kathleen M. Harris, and L. Tyler Williams, *Audit Quality Indicators: Perspectives from Non-Big Four Audit Firms and Small Company Audit Committees*, 50 *Advances in Accounting* 1 (2020).

²⁹⁰ See, e.g., Bengt Holmström, *Moral Hazard and Observability*, *The Bell Journal of Economics* 74 (1979) (finding that efficiency improves when contractible information about an agent's performance is available to the agent's principal) and Mai Dao, K. Raghunandan, and Dasaratha V. Rama, *Shareholder Voting on Auditor Selection, Audit Fees, and Audit Quality*, 87 *The Accounting Review* 168 (2012) (finding evidence that shareholder involvement in firm selection is associated with higher audit fees and improved audit quality). Some research suggests that audit committees with financial expertise are more effective monitors (i.e., financial reporting quality improves). To the extent that providing additional information to audit committees is analogous to increasing their expertise, this suggests that the final rules could lead to more effective audit committee monitoring. See Dina El Mahdy, Jia Hao, and Yu Cong, *Audit Committee Financial Expertise and Information Asymmetry*, *Journal of Financial Reporting and Accounting* (2022). In principle, improved monitoring could lead to a reduction in the overall quality of audit services. For example, some issuers may seek lower audit fees at the expense of audit quality. As the final disclosures will be public, the Board believes, in most cases, this would be less likely. See Section below for additional discussion. Some issuers may have very strong financial reporting quality independent of their auditor (e.g., they have a lender with strong oversight). In these cases, the most suitable auditor may not necessarily be the "highest quality" auditor and over-auditing may be more of a concern than under-auditing.

²⁸⁶ See Doxey, et al., *Do Investors Care; Candice T. Hux, How Does Disclosure of Component Auditor Use Affect Nonprofessional Investors' Perceptions and Behavior?*, 40 *Auditing: A Journal of Practice & Theory* 35 (2021); Gurbutt and Shih, *Econometric Analysis on the Initial Implementation of CAM Requirements*; Jenna J. Burke, Rani Hoitash, Udi Hoitash, and Summer Xiao, *The Disclosure and Consequences of US Critical Audit Matters*, 98 *The Accounting Review* 59 (2023). Referring to a U.K. auditor disclosure requirement similar to CAMs, another commenter said that the extent and quality of dialogue between investors and audit committees was not as expected.

²⁸⁷ See Center for Audit Quality, *Critical Audit Matters Survey* (July 2024).

²⁸⁸ For a discussion of the same principle, but in the context of issuer financial reporting, see, e.g., Leuz and Wysocki, *The Economics of Disclosure and Financial Reporting Regulation* (explaining that the disclosure of operating performance and governance arrangements by public companies can lower the cost of monitoring by providing investors with useful benchmarks that help investors evaluate other companies' managerial efficiency or potential agency conflicts).

the final rules. However, the Board does not believe they will be central benefits and the Board has emphasized other benefits accordingly.

Two caveats could limit the extent to which improved investor and audit committee monitoring and reduced monitoring costs will lead to improved audit performance. First, the Board notes that improvements in audit performance will be limited by the fact that audit committees are able to request information like the final metrics from their auditor. Indeed, one survey of audit committee members from smaller public companies, including audit committee members of accelerated filers, reports that most of the survey participants believed there were no “gaps” in the information they were receiving from their audit firms.²⁹¹ Furthermore, at the September 2024 IAG meeting, one audit committee chair said that he has unfettered access to his auditor, has requested information related to industry expertise from his auditor in the past, and has never been denied access to information requested. As discussed above, one commenter provided a survey suggesting that most audit committees believe the current information environment is sufficient. However, the Board believes that, by making these disclosures mandatory and standardized across firms and engagements, the final rules will increase the accessibility, reliability, and comparability of information about auditors and their engagements. For example, audit committees will be better able to compare their auditors to peers. Moreover, at the September 2024 IAG meeting one audit committee chair described how their auditor can be reluctant to provide information deemed confidential by the auditor. Second, the benefit of improved monitoring of auditors could also vary depending on the abilities of the audit committee. As one IAG member said, audit committee members that do not have a background in accounting may not know what questions to ask their auditor. For example, more proactive audit committees with greater financial or audit expertise may be able to make better use of the final metrics than other audit committees. However, under the final rules, investors considering votes for election to the board of audit committee members could consider whether they expect candidates to be able to effectively use the final metrics when executing their oversight responsibilities.

In addition to helping investors monitor the auditor’s performance, the final metrics may assist investors in monitoring and evaluating the performance of the audit committee. For example, investors could observe audit committee performance and express any potential concerns through open dialogues with the board of directors or election of board and audit committee members. The audit committee is responsible for overseeing the auditor and the final metrics may assist investors in determining whether the audit committee was effective in this capacity (e.g., whether the audit committee continues to delay replacing the auditor despite the presence of metrics that suggest potential concerns about audit performance).²⁹² This improved monitoring could improve audit committee effectiveness (e.g., more effective monitoring of the auditors, better selection of auditors, etc.)²⁹³

One commenter supported the view that the metrics will help investors hold audit committees accountable. However, another commenter suggested that audit

committees that currently execute their statutory mandate with an insufficient level of interest and attention will continue to do so despite the availability of the final metrics. Another commenter suggested that metrics were an inappropriate way for investors to oversee audit committees and would override the gatekeeping function of audit committees. The Board acknowledges that the final rules’ impact may vary by audit committee. However, for the reasons discussed above, the Board believes that the final rules will, on average, lead to a valuable improvement in investors’ ability to monitor audit committees and, by extension, audit committee performance. The Board does not believe the final rules will supplant audit committees’ gatekeeper function. Rather, audit committees will continue to play a critical corporate governance function. Indeed, by enabling investors to better monitor and evaluate audit committees, the Board believes the final metrics will enhance the audit committee’s role and reinforce its effectiveness in overseeing auditors.

One commenter suggested that interaction between investors and directors is unlikely and directed us to industry research suggesting that engagement between directors of large issuers and their investors is decreasing.²⁹⁴ The Board acknowledges that direct interaction may occur more for institutional investors. However, the Board notes that the survey cited by the commenter notes that the decline between 2022 and 2023 was “slight” overall but larger for the largest companies (75% to 58%). The cited survey also says that “directors are regularly engaging with shareholders and the vast majority consider those interactions ‘productive.’” Moreover, as discussed in greater detail above, the Board notes that many public companies have robust investor outreach programs, some of which target retail investors. Academic research on the frequency of shareholder outreach programs shows they are increasing over time.²⁹⁵ Therefore, the Board believes there is no strong evidence supporting the comment that director engagement with shareholders is unlikely to occur.

Mandatory disclosure of the final metrics could also improve audit firms’ internal monitoring of their (i) audit

²⁹² See above for a discussion on how the final metrics could assist decision-making.

²⁹³ Some academic research suggests that audit committee effectiveness is associated with audit committee incentives. See, e.g., Jeffrey Cohen, Ganesh Krishnamoorthy, and Arnold M. Wright, *The Corporate Governance Mosaic and Financial Reporting Quality*, 23 *Journal of Accounting Literature* 87 (2004) and cites therein. Some research suggests that investors are willing to pay for audit committee effectiveness and hold audit committees accountable for negative audit quality. See, e.g., Ellen Engel, Rachel M. Hayes, and Xue Wang, *Audit Committee Compensation and the Demand for Monitoring of the Financial Reporting Process*, 49 *Journal of Accounting and Economics* 136, 138 (2010) (suggesting a willingness by companies to deviate from the historically prevalent one-size-fits-all approach to director pay in response to increased demands on audit committees and differential director expertise) and Suraj Srinivasan, *Consequences of Financial Reporting Failure for Outside Directors: Evidence from Accounting Restatements and Audit Committee Members*, 43 *Journal of Accounting Research* 291 (2005) (concluding that audit committee members bear reputational costs for financial reporting failure). Some research suggests that audit committee members without Big 4 audit experience are more likely to favor auditors that are rated as “attractive.” See, e.g., Baugh, Matthew, Nicholas J. Hallman, and Steven J. Kachelmeier, *A Matter of Appearances: How Does Auditing Expertise Benefit Audit Committees When Selecting Auditors?*, 39 *Contemporary Accounting Research* 234 (2022). Together, this research suggests that audit committee effectiveness could respond to improved investor monitoring. Other research suggests that audit committee effectiveness is positively associated with proxies for audit quality. See, e.g., Brian Bratten, Monika Causholli, and Valbona Sulcaj, *Overseeing the External Audit Function: Evidence from Audit Committees’ Reported Activities*, 41 *Auditing: A Journal of Practice & Theory* 1 (2022) (finding that the strength of audit committee oversight, as implied by audit committee disclosures, is positively associated with proxies for audit quality).

²⁹⁴ See PriceWaterhouseCoopers, *2023 Annual Corporate Directors Survey*.

²⁹⁵ See Dey et al., *Proxy Advisory Firms and Corporate Shareholder Engagement*, Figure 2 (showing a monotonic increase in the proportion of sampled firms reporting shareholder engagement in their proxy statement from 5.5% in 2011 to 36.3% in 2019.)

²⁹¹ See Harris and Williams, *Audit Quality Indicators* Table 6.

practices and related system of quality control, and (ii) individual engagements. This could improve governance, accountability, and overall quality control within the audit firm. The final metrics may also help auditors identify efficiencies or room for improvement in their audit approach by comparing their final metrics to their competitors. One commenter noted that the proposal recognized that firms may not find the certain metrics useful in monitoring their quality control systems. While the Board continues to believe that the final metrics could improve audit firms' internal monitoring, the Board acknowledges that some firms, due to their unique facts and circumstances, may find some metrics less useful than others.

b. Improved Selection

The final rules may also enhance auditor selection to the extent that the rules improve the ability of investors and audit committees to compare their current auditor to an alternative auditor.²⁹⁶ When considering an alternative auditor, audit committees may find the auditor's engagement-level metrics for similar engagements (e.g., an issuer of similar size and/or within the same industry to the audit committee's issuer) most useful. As discussed above, investors and audit committees could electronically search for firm-level metrics and download engagement-level metrics when constructing rosters of candidate auditors. Moreover, audit committees will benefit to the extent that they are able to engage in more meaningful discussions and interviews with candidate auditors during the selection process—improving the efficiency of auditor-issuer matching.²⁹⁷ For example, the final metrics (e.g., Industry Experience and Workload) could help audit committees select an auditor that has the capacity to perform the audit.²⁹⁸ Requiring mandatory,

comparable, and uniform disclosure of the final metrics—across engagement teams and audit firms, and over time—should further enhance this benefit by helping audit committees to compare auditors on a common basis.²⁹⁹ The final rules may also improve investors' decision-making regarding auditor ratification and appointment of board members.³⁰⁰ For instance, investors may decide that a particular final metric is especially important to their views on the auditor's efficacy and the quality of the financial statements.³⁰¹ Investors that rely on proxy advisors for these decisions may also benefit from the final disclosures because proxy advisors could use the information in their recommendations.

Improved auditor selection could improve audit efficiency as well as audit outcomes as incoming auditors may be better equipped to meet investors' and audit committees' audit service needs.³⁰² The final rules could also reduce costs related to information gathering incurred by audit committees when selecting their auditor and by investors when voting to ratify the appointment of the auditor.³⁰³ Some of the cost reductions could reflect reductions in duplicative work to the extent that various investors or audit committees collect the same information. Improved investor decision-making regarding voting for members of the board of directors, including directors who serve on the

audit committee, could improve audit committee performance as incoming board members may be better equipped to meet investors' expectations regarding auditor oversight. One commenter said that the proposed metrics have the capacity to make investors' vote on ratification of the auditor and the vote on audit committee members substantially more meaningful.

Two caveats could limit the potential benefit of improved auditor selection and the reduction in the associated information gathering costs. First, the Board notes that the impact will be limited by the fact that audit committees could in principle request information like the final metrics from alternative auditors. However, auditors may not be willing to voluntarily provide an audit committee with engagement-level metrics regarding their engagements with other issuers, information that may be particularly useful to audit committees in selecting an auditor. Furthermore, while audit committees can currently request tailored metrics, this approach imposes substantial collective costs and limits comparability across firms. The Board believes that, by making these disclosures mandatory and standardized, the final rules will increase the accessibility, reliability, and comparability of information available and therefore help audit committees. Second, the Board notes that, to the extent that benefits are derived from the ability to readily switch between auditors based on an evaluation of the auditors' metrics, those benefits could be limited due to stickiness in existing auditor-audited company relationships which creates switching costs. Furthermore, large multinational issuers may, as a practical matter, need a GNF auditor, which limits the pool of available alternatives—which may be in turn further limited by auditor geographic/industry specialization (e.g., a need for financial services expertise in a particular office/city), or by auditor independence rules (e.g., the existence of an independence-impairing financial or consulting relationship between the issuer and a potential alternative auditor).³⁰⁴ Therefore, the benefit of improved auditor selection could be more limited for the largest issuers. However, the Board believes that the final metrics could also help the audit committees of the largest issuers select

Auditing: A Journal of Practice & Theory 119 (2013).

²⁹⁹ See above for discussion of academic literature related to the benefits of comparability in financial reporting.

³⁰⁰ Some research suggests that more informed shareholders make better audit ratification decisions (e.g., auditor ratification decisions are more closely associated with public signals of audit failure). See, e.g., Cassell, et al., *Retail Shareholders* and cites therein.

³⁰¹ Some experimental research suggests that investors are less likely to support auditor ratification if metrics like those discussed in the Concept Release are trending downward. See, e.g., Brown and Popova, *How do Investors Respond*.

³⁰² In principle, improved auditor selection could lead to a reduction in the overall quality of audit services. For example, some issuers may seek lower audit fees at the expense of audit quality. Due to the fact that the final disclosures will be public, the Board believes, in most cases, this would be less likely. See below for additional discussion. Some issuers may have very strong financial reporting quality independent of their auditor (e.g., they have a lender with strong oversight). In these cases, the most suitable auditor may not necessarily be the "highest quality."

³⁰³ Although investor voting on auditor ratification is non-binding, it could be a meaningful mechanism for expressing views on audit-related issues. If investors are dissatisfied with auditor selection, they can also vote against the re-election of board members, including those who serve on the audit committee, to potentially influence future auditor oversight.

²⁹⁶ One recent experimental study finds that participants playing the role of CFO, director, or individual investors strongly prefer auditors that have stronger metrics and are willing to pay more for those auditors. See Dennis Ahn, Radhika Lunawat, and Patricia Wellmeyer, *Firm and Engagement Performance Metrics and Auditor Contracting Decisions*, SSRN Electronic Journal, at Table 1 and Table 2 (2024). The Board notes that SSRN does not peer review its submissions.

²⁹⁷ See, e.g., Gene M. Grossman and Carl Shapiro, *Informative Advertising with Differentiated Products*, 51 The Review of Economic Studies 63 (1984) (finding that reduced information frictions (i.e., decreased informational advertising costs) could result in improved matching between sellers and buyers).

²⁹⁸ Some academic research finds that audit committees do select auditors based on observable aspects of the quality of their services. See, e.g., Vivek Mande and Myungsoo Son, *Do Financial Restatements Lead to Auditor Changes?*, 32

³⁰⁴ See United States Government Accountability Office, *Continued Concentration in Audit Market for Large Public Companies Does Not Call for Immediate Action* 21 (Jan. 8, 2008).

specific engagement partners within the larger audit firms.

c. Benefits to the PCAOB's Inspection and Enforcement Programs and Scholarly Auditing Research

The final metrics are expected to provide direct benefits to the PCAOB's internal operating effectiveness. In the PCAOB's oversight capacity, it engages in inspection and enforcement activities for audits of issuers and, in the course of doing so, it uses data from issuers and audit firms. The final metrics will expand the basis on which selections may be made. For example, the final metrics could improve the selection models used to aid in predicting negative audit outcomes, such as restatements or the potential for audit deficiencies. As discussed above, QC 1000 will help to ensure that the final metrics will be reliable. Greater insight into audit risks could improve the PCAOB's ability to select potential enforcement matters. Overall, improved PCAOB oversight may give auditors additional incentive to comply with PCAOB professional standards and rules.³⁰⁵

Moreover, the PCAOB actively engages in policy research related to the market for assurance services to further the PCAOB's mission by informing the standard-setting and rulemaking agendas among other purposes. The additional data provided by the final rules could enhance the PCAOB's ability to produce impactful research and recirculate that gained knowledge into improved standards and rules. Relatedly, the additional data could also provide valuable information sources for the public, including academic research. Commenters agreed that academics could benefit from the metrics. Improved research quality is an important element of the PCAOB's standard-setting and rulemaking projects.

One commenter said it was unclear how the PCAOB would use the information. As described in the proposal and above, the Board expects that the metrics will at least inform the PCAOB selection of engagements and focus areas for review and future academic research that utilizes the metrics could inform PCAOB rulemaking projects. Several

commenters agreed that the information would be useful to the PCAOB.

One commenter suggested that the PCAOB should be able to articulate which of the final metrics provide critical insights for effective monitoring by inspection teams using information obtained through PCAOB inspections. The PCAOB uses information like the final metric in various ways as part of its inspections approach. However, the Board believes the final metrics will on the whole provide additional value because they will be more comparable across firms, engagements, and time and the engagement-level metrics will be available to PCAOB staff at an earlier point in time than engagement-specific information provided pursuant to the review of an engagement. The same commenter said that public disclosure of the proposed metrics would not be necessary for the PCAOB to benefit from them. The Board agrees that some of the benefits to the PCAOB do not derive specifically from the public nature of the reporting. However, the PCAOB expects that it will benefit from academic research that the Board believes will be conducted using the publicly reported final metrics and broader stakeholder engagement. Public availability of the final metrics could also improve the quality of other stakeholder input received by the PCAOB (e.g., public comment or roundtable discussions).

One commenter suggested that reliance on the metrics by PCAOB oversight could create a risk of enforcement for minor, unintentional errors in reporting. The commenter said this risk could manifest as a cost to smaller and mid-sized firms. The Board believes the commenter may have misinterpreted the benefit to PCAOB oversight as a suggestion that the PCAOB intends to make reporting of the final metrics an inspection focus area. While PCAOB inspectors may do so in the future, the Board is not suggesting this will benefit PCAOB oversight per se. Rather, the Board are suggesting that the final metrics themselves may help PCAOB inspections staff select firms, engagements, or focus areas for review. However, the Board acknowledges that, by relying on the final metrics, potential deficiencies in how firms are reporting them may become apparent to PCAOB staff. To the extent PCAOB oversight does consider firms' compliance with the final rules, the Board believes the PCAOB would exercise appropriate discretion.

Overall, the benefit to the PCAOB is difficult to quantify, as the social and economic benefits of enhanced regulatory oversight that is more

efficient in its allocation of resources are difficult to monetize. The benefits of additional scholarly research are also difficult to quantify because there are a broad set of beneficiaries.

ii. Indirect Benefits Linked to Competition

Capital Market Effects

Assuming that the additional information, context, and perspective on auditors and audit engagements helps investors assess audit performance, it may help investors assess financial reporting quality.³⁰⁶ For example, investors may incorporate the metrics into their portfolio selection decisions.³⁰⁷ One commenter said that the final metrics were necessary for auditors to have their work judged as something other than a commodity (i.e., competition on price alone).

Issuers audited by auditors whose metrics capital markets associate with greater financial reporting quality may experience reduced cost of capital or other capital market benefits and investors may reallocate their capital accordingly. Taken in isolation, this would tend to result in a reallocation of capital from issuers with less reliable financial reporting quality to issuers with higher financial reporting quality. These capital market reactions could provide audit committees with a stronger incentive to appoint an auditor whose final metrics capital markets associate with greater financial reporting quality. These effects could lead to changes in audit fees as auditors respond to changing demand for their services. Facing capacity constraints, some audit firms may turn down engagements or recruit additional staff to expand capacity.

Auditor Competition

Against the backdrop of capital market reactions to the final metrics and as auditors become better able to

³⁰⁶ The IAG indicated in their comment letter regarding proposed QC 1000 that information related to audit quality would provide investors with "a level of confidence in the financial statements of companies in which they invest. Their level of confidence in the financial statements has a bearing on the prices they will be willing to pay or demand for investments." The comment letters received in response to proposed QC 1000 are available on the Board's website in Docket 046. See comment No. 4 on the proposed rule from the IAG, available at https://assets.pcaobus.org/pcaob-dev/docs/default-source/rulemaking/docket046/4_iag.pdf?sfvrsn=1941e7c0_4. See above for a discussion on the association between audit quality and financial reporting quality.

³⁰⁷ There is an extensive body of academic literature suggesting that financial markets incorporate information into securities prices. See, e.g., Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 The Journal of Finance 383 (1970).

³⁰⁵ Some academic research suggests that PCAOB oversight is beneficial. For example, one study of audit firms in foreign jurisdictions finds that PCAOB inspections access is positively associated with proxies for audit quality. See Phillip T. Lamoreaux, *Does PCAOB inspection Access Improve Audit Quality? An Examination of Foreign Firms Listed in the United States*, 61 Journal of Accounting and Economics 313 (2016).

monetize their reputations, auditors could have an incentive to compete on the final metrics.³⁰⁸ For example, to win engagements, auditors may seek to manage their final metrics by redeploying staff resources or providing additional training. This competitive dynamic could improve audit quality and, by extension, financial reporting quality.³⁰⁹ Reduced search costs could increase auditor competition.³¹⁰ In addition to facilitating issuers' selection of a preferred auditor, the increase in competition could potentially reduce audit fees.³¹¹

The Board notes that the benefits linked to competition between audit firms could be reduced for the larger issuer segment of the market because larger issuers have fewer audit firms available to choose from that are able to perform large, complex audits, without violating independence rules and other constraints. However, the final metrics could help promote competition between partners within the larger

³⁰⁸ Improved competition following mandatory disclosure regimes has been observed in other markets. See above for additional discussion. One study finds that non-U.S. auditors inspected by the PCAOB gain market share from competing auditors after PCAOB inspection reports are made public, more so when the PCAOB inspection report has fewer engagement-level deficiencies. See Daniel Aobdia and Nemit Shroff, *Regulatory Oversight and Auditor Market Share*, 63 *Journal of Accounting and Economics* 262, (2017).

³⁰⁹ See above for a discussion on the relationship between audit quality and financial reporting quality.

³¹⁰ Economic theory suggests that a reduction in search costs helps to make markets more competitive. See, e.g., Helmut Bester, *Bargaining, Search Costs and Equilibrium Price Distributions*, 55 *The Review of Economic Studies* 201 (1988). There is an extensive literature in industrial organization economics studying the impact of search and advertising costs on competition. For example, Jean Tirole, *The Theory of Industrial Organization*, MIT Press 294 (1988) studies informative advertising (i.e., costs borne by sellers to inform buyers of the seller's existence, product quality, and pricing) in a model involving differentiated sellers, and finds that prices fall as information costs fall. See also Grossman and Shapiro, *Informative Advertising*; and Glenn Ellison and Alexander Wolitzky, *A Search Cost Model of Obfuscation*, 43 *The RAND Journal of Economics* 417 (2012). Glenn Ellison and Sarah F. Ellison, *Search, Obfuscation, and Price Elasticities on the Internet*, 77 *Econometrica* 427 (2009) also show that reductions in search costs increase the price-sensitivity of demand, resulting in decreased prices for near-substitute goods, and that sellers may attempt to engage in obfuscation strategies to reduce competitive pressure.

³¹¹ The positive relationship between increased competition and lower audit fees is well-established, see, e.g., Wietke Numan and Marleen Willekens, *An Empirical Test of Spatial Competition in the Audit Market*, 53 *Journal of Accounting and Economics* 450 (2012); and Andrew R. Kitto, *The Effects of Non-Big 4 Mergers on Audit Efficiency and Audit Market Competition*, 77 *Journal of Accounting and Economics* 101618 (2024). Other potential unintended impacts the proposal may have on competition are discussed below.

firms.³¹² One commenter suggested that the ability of the proposed metrics to spark competition between firms is an important condition for rulemaking and one which the proposal abandons because the proposed metrics are divorced from audit quality and excessively burdensome. The Board agrees that the effect on competition is an important impact for the Board to consider, but the Board disagrees with the commenter's assertions that the proposal abandoned it. To the contrary, the Board's economic analysis considered all potential impacts of the final rules, competition among them. Indeed, based on the Board's careful consideration of academic research, public comment, and the Board's experience, the Board believes the final metrics could enhance competition and the Board's economic analysis reflects this view.

One commenter questioned whether firms' management of their metrics to win market share would improve audit quality. As discussed in the proposal and below, the Board acknowledges that management of the final metrics may not always lead firms to improve their audit approach. However, economic theory suggests that if management of the metrics is entirely manipulatory, then users of the information will entirely discount it as "cheap talk." ³¹³ The Board believes this extreme "cheap talk" outcome is unlikely, in part, because the final rules will be subject to PCAOB oversight as well as firms' QC systems, which are in turn subject to QC 1000.³¹⁴

iii. Indirect Benefits of Improved Financial Reporting Quality

As described above, to the extent the final rules improve audit performance, the final rules will also improve financial reporting quality. More reliable financial information would allow investors to improve the efficiency of their capital allocation decisions (e.g., investors may more accurately identify companies with the strongest prospects for generating future risk-adjusted returns and reallocate their

capital accordingly).³¹⁵ Investors may also perceive less risk in capital markets generally, leading to an increase in the supply of capital.³¹⁶ An increase in the supply of capital could increase capital formation while also reducing the cost of capital to companies.³¹⁷ A reduction in the cost of capital reflects a welfare gain because it implies investors perceive less risk in the capital markets.

The Board is unaware of any literature that would provide a basis for quantifying the magnitude of financial reporting quality improvement associated with the final rules. However, academic literature has attempted to quantify the impact of improved financial reporting quality on cost of capital by measuring the association between various quantitative proxies for financial reporting quality and cost of capital after controlling for other potential drivers of cost of capital. Subject to the caveats discussed below, this literature suggests, overall, that even small improvements in financial reporting quality can result in reductions in issuers' cost of capital of multiple basis points in magnitude. Due to the size of the U.S. capital markets, even a single basis point reduction in the cost of capital implies substantial welfare gains.

Some studies examine the relationship between improved

³¹⁵ See, e.g., Acito, et al., *Market-Based Incentives for Optimal Audit Quality*.

³¹⁶ See, e.g., Hanwen Chen, Jeff Zeyun Chen, Gerald J. Lobo, and Yanyan Wang, *Effects of Audit Quality on Earnings Management and Cost of Equity Capital: Evidence from China*, 28 *Contemporary Accounting Research* 892 (2011); Richard Lambert, Christian Leuz, and Robert E. Verrecchia, *Accounting Information, Disclosure, and the Cost of Capital*, 45 *Journal of Accounting Research* 385 (2007) (concluding that improving the quality of accounting disclosures can influence the cost of capital and under certain conditions can unambiguously lower the cost of capital).

³¹⁷ Cost of capital is the rate of return investors require to compensate them for the lost opportunity to deploy their capital elsewhere. Equivalently, cost of capital is the discount rate investors apply to future cash flows. Cost of capital depends, among others, on the riskiness of the underlying investment. Accordingly, the rate of return required by equity holders—cost of equity capital—and the rate of return required by debt holders—cost of debt capital—may differ to the extent equity and debt securities expose investors to different levels of risks. In the context of a particular company or portfolio of companies, the weighted average cost of capital is the average of the cost of equity capital and the cost of debt capital, weighted by the market values of the underlying equity and debt securities, respectively. See, e.g., R. A. Brealey, S. C. Myers, and F. Allen, *Principles of Corporate Finance*, 10th Edition McGraw-Hill 8, 90, and Chapter 7, (2011). For theoretical discussion on the link between financial reporting quality and cost of capital, see, e.g., Richard A. Lambert, Christian Leuz, and Robert E. Verrecchia, *Information Asymmetry, Information Precision, and the Cost of Capital*, 16 *Review of Finance* 1, 16–18 (2012); and David Easley and Maureen O'Hara, *Information and the Cost of Capital*, 59 *Journal of Finance* 1553, 1571 (2005).

³¹² See Ahum Choi, Sunhwa Choi, and Jaeyoon Yu, *Does Internal Competition among Audit Partners Affect Audit Pricing Decisions?*, *Auditing: A Journal of Practice & Theory* 1 (2024) (finding that U.S. audit partners compete for clients with other partners within their office who perform audits in the same industry).

³¹³ See Vincent P. Crawford and Joel Sobel, *Strategic Information Transmission*, *Econometrica: Journal of the Econometric Society* 1431 (1982).

³¹⁴ See below for additional discussion on how PCAOB oversight would mitigate potential manipulation of the final metrics.

financial reporting quality and companies' cost of equity capital. For example, one study quantified the relationship between earnings transparency and cost of equity capital.³¹⁸ The study found that, compared to a baseline of no transparency, companies with an average level of earnings transparency had between 1.7 and 3.4 percentage points lower cost of equity capital, depending on the estimation methodology. Using restatements as a proxy for financial reporting quality, another study found that a restatement increases the cost of equity capital by between six and 15 percent in the longer term.³¹⁹ Assuming a 10 percent cost of capital, this result corresponds to between a 60 and 150 basis point increase in the cost of equity capital. One study found that companies with the highest accruals quality had a 210 basis point lower cost of equity capital compared to companies with the lowest accruals quality.³²⁰ Using disclosure quality ratings (determined by an index prepared by analysts) as a proxy for financial reporting quality, another study found that companies with the highest disclosure quality ratings had roughly a 0.7 percentage point lower cost of equity capital compared to companies with the lowest.³²¹ From an international perspective, one study found that companies in countries in the 75th percentile of strength of disclosure rules and associated enforcement had roughly a 200 basis point lower costs of equity capital than countries at the 25th percentile (*i.e.*, countries with weaker disclosure rules and enforcement).³²² Another study found that, compared to companies in countries at the 75th percentile of earnings opacity, the cost of equity capital for companies in the 25th percentile (*i.e.*, countries with less

opaque earnings) had a 2.8 percentage point lower cost of equity capital.³²³

While the above studies examine the impact of improved financial reporting quality on companies' cost of equity capital, several studies examine instead the impact of improved financial reporting quality on companies' cost of debt capital. For example, one study found that companies with the highest disclosure quality ratings (determined by an index prepared by analysts) have roughly 1.1 percentage points lower cost of debt capital than companies with the lowest disclosure quality ratings.³²⁴ Another study found that companies in the highest decile of accruals quality had a 126-basis point lower cost of debt capital than companies in the lowest decile of accruals quality.³²⁵

While the Board believes these studies are indicative of the potential impacts improved financial reporting quality may have on capital markets, the Board acknowledges that the studies are subject to certain caveats.³²⁶ First, the studies do not indicate the degree to which the disclosure of firm and engagement metrics could impact financial reporting quality in the first instance. Therefore, the magnitudes must be treated as illustrative examples, rather than point estimates, of the potential benefits of the final rules.

Second, some of the studies may be subject to some endogeneity bias.³²⁷ For example, companies with high financial reporting quality may also be well-managed, a form of omitted variable bias. Similarly, companies that voluntarily provide higher quality information may do so because they are in a stronger financial position already, a form of self-selection bias. Due to these potential biases, some of the studies may overestimate the extent to which improved financial reporting quality reduces companies' cost of capital. Controlling for endogeneity bias is challenging and the results of any one methodology may be sensitive to the

methodology's assumptions.³²⁸ Indeed, after attempting to statistically control for endogeneity bias, one study found that the association between financial reporting quality and cost of equity capital remains while another found that it disappears.³²⁹

Third, while most research tends to find positive associations between financial reporting quality and the cost of capital, some studies have found counterintuitive or unexpected associations. For example, one study found that the timeliness of disclosures is negatively associated with the cost of equity capital.³³⁰ The results of another study suggest that the association between improved financial reporting quality and reduced cost of capital may apply only to companies with low analyst following.³³¹

Despite these caveats, the Board believes that the academic literature suggests overall that improved financial reporting quality results in lower costs of capital and, moreover, that even small improvements can reduce the cost of capital by one or more basis points. The studies discussed above found multiple percentage point reductions in cost of capital when companies (or countries) with the weakest financial reporting proxies are compared to the companies (or countries) with the strongest financial reporting proxies. As such, just one hundredth of the improvement in those measures could result in reductions in the cost of capital by multiple basis points. Due to the size of U.S. capital markets, even small reductions in the cost of capital, on the order of multiple basis points, can generate significant welfare gains. For example, using recent data on the size of the U.S. equity and debt capital markets, a single basis point reduction in the weighted average cost of capital

³¹⁸ See Mary E. Barth, Yaniv Konchitchki, and Wayne R. Landsman, *Cost of Capital and Earnings Transparency*, 55 *Journal of Accounting and Economics* 206, 216–217 (2013).

³¹⁹ See Paul Hribar and Nicole Thorne Jenkins, *The Effect of Accounting Restatements on Earnings Revisions and the Estimated Cost of Capital*, 8 *Review of Accounting Studies* 337, 337 (2004).

³²⁰ See Jennifer Francis, Ryan LaFond, Per Olsson, and Katherine Schipper, *The Market Pricing of Accruals Quality*, 39 *Journal of Accounting and Economics* 295, 297 (2005).

³²¹ See Christine A. Botosan and Marlene A. Plumlee, *A Re-examination of Disclosure Level and the Expected Cost of Equity Capital*, 40 *Journal of Accounting Research* 21, 22 (2002).

³²² See Luzi Hail and Christian Leuz, *International Differences in the Cost of Equity Capital: Do Legal Institutions and Securities Regulation Matter?*, 44 *Journal of Accounting Research* 485, 488 (2006).

³²³ See Utpal Bhattacharya, Hazem Daouk, and Michael Welker, *The World Price of Earnings Opacity*, 78 *Journal of Accounting and Economics* 641, 643 (2003).

³²⁴ See Partha Sengupta, *Corporate Disclosure Quality and the Cost of Debt*, 73 *The Accounting Review* 459 (1998).

³²⁵ See Francis, et al., *The Market Pricing* 297.

³²⁶ For a more general discussion of challenges identifying causal relationships in financial reporting research, see Leuz and Wysocki, *The Economics of Disclosure and Financial Reporting Regulation*.

³²⁷ Endogeneity occurs when an explanatory variable in a multiple regression model is correlated with unobserved factors that affect the dependent variable. See Jeffrey M. Wooldridge, *Introductory Econometrics: A Modern Approach*, South-Western Cengage Learning, 4th edition 838 (2008).

³²⁸ See David F. Larcker and Tjomme O. Rusticus, *On the Use of Instrumental Variables in Accounting Research*, 49 *Journal of Accounting and Economics* 186, 203 (2010).

³²⁹ See, e.g., Christian Leuz and Robert E. Verrecchia, *The Economic Consequences of Increased Disclosure*, 38 *Journal of Accounting Research* 91, 121 (2000) (using bid-ask spreads for German companies as a proxy for cost of capital) and David A. Cohen, *Does Information Risk Really Matter? An Analysis of the Determinants and Economic Consequences of Financial Reporting Quality*, 15 *Asia-Pacific Journal of Accounting & Economics* 69, 70 (2010).

³³⁰ The authors suggest that the result may be attributable to increased stock price volatility arising from excessive focus on short-term profits. See Botosan and Plumlee, *A Re-examination* 21 and 37.

³³¹ See Christine A. Botosan, *Disclosure Level and the Cost of Equity Capital*, 72 *The Accounting Review* 323 (1997).

would imply at least \$99.0 billion in welfare gains.³³²

One commenter suggested that a review of the academic literature on cost of capital should allow the Board to quantify the impact of the final metrics on cost of capital decisions. The proposal provided a review of academic literature on cost of capital. That review appears here in essentially the same form. As discussed above, the Board believes this literature does provide evidence of the quantitative benefits of improved financial reporting quality generally. However, the Board is unaware of any literature that would provide a basis for quantifying the magnitude of financial reporting quality improvement (and thus the magnitude of cost of capital reduction) associated with the final rules and the commenter did not identify such literature.

One commenter said that the proposal assumed that investors have homogenized interests when in fact there will always be a buyer and a seller with conflicting objectives. The Board recognizes that, with respect to secondary trading of issuer securities, buyers and sellers have conflicting objectives. To the extent the final metrics inform traders' perceptions of the value of issuer securities or otherwise improve financial reporting quality, the final metrics could in the short run benefit one trading counterparty at the expense of the other. However, for the reasons discussed above, the Board believes that more

reliable financial reporting quality benefits capital markets overall in the long run.

iv. Academic Literature and Comments Related to Specific Final Firm and Engagement Metrics

In the following discussion the Board reviews the extant literature related to the final metrics. In doing so, the Board separates the final metrics into three categories: (i) metrics related to audit personnel; (ii) metrics related to the allocation of audit hours; and (iii) metrics related to audit outcomes.

The Board notes three important caveats. First, as most of the final metrics are not currently publicly available, academic studies principally rely on information obtained from audit firms directly, surveys, or foreign jurisdictions. Their relevance is thus limited by the fact that the metrics they study are not equivalent to the final metrics and their results may not be directly applicable to the U.S. audit market more generally. Second, while the extant literature may draw conclusions regarding a particular metric's relationship to publicly available proxies for audit quality, this does not imply that a final metric will provide any new insights to investors and audit committees incremental to the insights already provided by the publicly available proxies for audit quality. Finally, those relationships may be non-linear or difficult to fully evaluate.

One commenter said that some studies cited in the proposal feature investors or investor groups who may not be representative of the broader population of investors. The commenter did not refer to any specific study. The Board acknowledges that the samples featured in some of the empirical studies discussed below may not be perfectly representative of the population of stakeholders that will be impacted by the final rules. While this fact limits their relevance, the Board believes their samples are similar enough to the impacted population that their results inform the economic analysis of the final rules. Consistent with the PCAOB's staff guidance on economic analysis, the Board highlighted key aspects of the studies (e.g., the representativeness of their data sample) that may limit their relevance.

Several commenters suggested that the PCAOB should, as a starting point, demonstrate that any final metric has an unambiguous impact on audit quality. One commenter suggested that the PCAOB obtain research suggesting that any behavioral change produced by a final metric should not harm audit

quality. The commenter also suggested that the univariate disclosures should provide a complete picture of the engagement and firm. As the commenter acknowledged, the Board performed an extensive literature review, the substance of which the commenter did not dispute. The Board also considered all academic research provided by commenters. While the Board considered the potential effects of the metrics on audit quality and auditor behavior, the Board does not believe that the rigid criteria suggested by commenters are necessary or appropriate. As the Board stated above, and as many commenters affirmed including this commenter, audit quality is complex and requires significant context to fully appreciate. As such, no metric taken in isolation can provide a complete picture of a firm and its engagements and thus have an unambiguous impact on audit quality. Furthermore, research cannot prove that any future behavioral changes would not harm audit quality. However, in selecting each of the final metrics, the Board considered whether the evidence on its relationship to the quality of firms and their engagements, which the Board believes reflects the spirit of the selection approach suggested by the commenter.

The same commenter also suggested that the Board consider whether the disclosures would meet the SEC's goals for required disclosures. The SEC's goals on required disclosures have traditionally focused on corporate disclosure, although they may include auditor disclosure in certain contexts. The Board has carefully considered whether the required disclosures would help the PCAOB achieve its objectives in furtherance of its statutory mandate.

The same commenter also questioned whether many of the academic studies surveyed in the academic literature review supported the proposal because they use statistical methods to identify causal relationship that hold other elements of the audit process fixed. The Board assumes that the commenter intended to contrast this standard statistical approach with the fact that, in practice, investors and audit committees will be comparing firms and engagements where other elements of the audit process are not fixed. The Board agrees that no single academic study that the Board reviewed provides dispositive proof that investors or audit committees will be able to interpret any individual metric in practice without also understanding the full context. Indeed, the Board has acknowledged that no individual metric can measure audit quality and a fuller appreciation of

³³² $(1 \text{ basis point} / (8\% \text{ average cost of capital} - 1 \text{ basis point})) \times (\$68.1 \text{ trillion in equity market capitalization} + \$11.0 \text{ trillion in debt market capitalization}) = \$99.0 \text{ billion}$. Source: S&P Capital IQ and SIFMA. The debt market capitalization figure reflects U.S. corporate bonds outstanding as of 2024 Q2. It does not include private debt. The Board notes several key assumptions and limitations of the calculation. The calculation assumes that debt and equity capital comprise all forms of capital (i.e., the calculation disregards other potential forms of capital) and that their total value is equal to the sum of all future cash flows discounted by the weighted average cost of capital. It assumes a weighted average cost of capital of 8% based on historic averages for the Russell 3000. See Michael J. Mauboussin and Dan Callahan, *Cost of Capital: A Practical Guide to Measuring Opportunity Cost*, Morgan Stanley Investment Management Counterpoint Global Insights, Exhibit 16 (2023). The calculation does not account for the potential beneficial impact of changes in the quantity of capital supplied nor does it account for potential general equilibrium effects in other markets. As discussed above, the calculation pertains to weighted average cost of capital reductions only. It does not capture potential increases in total market capitalization arising from improved management or improved capital allocation. The Board acknowledges that some issuers that contribute to the Board's market capitalization figures are not audited by firms that will be subject to the final requirements and therefore will not be impacted by the final requirements. However, the Board believes they make up a small share of total market capitalization.

audit quality requires consideration of a broad array of factors, many of which are unquantifiable (e.g., professional skepticism). However, the Board does not believe this implies that the academic studies surveyed provide no support for the final rules.

One commenter said that the proposal did not provide sufficient evidence that public disclosure of the proposed metrics would meaningfully impact audit quality. Given that data using the specific final metrics is not currently available, evidence of their effects on audit quality is necessarily limited. Nevertheless, the Board believes the academic literature discussed below and the analysis discussed throughout this section provide evidence that the final metrics, taken as a whole, could have meaningful impacts to audit quality, which the Board believes could lead to significant benefits to investors, audit committees, and other stakeholders.

a. Metrics Related to Audit Personnel

The Partner and Manager Involvement metrics will indicate the hours worked by senior professionals relative to more junior staff across the firm's large accelerated and accelerated filer engagements and on the specific engagement. Investors and audit committees could use this information to evaluate whether partners and managers are giving their engagement appropriate attention. Although the academic literature related to audit partner and manager involvement is limited, one study using Korean data suggests that audit partner involvement is positively associated with audit quality.³³³ Another study finds that the offices of U.S. Big 4 audit firms with relatively more CPAs tend to provide higher audit quality.³³⁴ While the number of staff with CPAs is not equivalent to the share of senior staff hours reflected in the metric, the finding does suggest that greater involvement of experienced staff is beneficial to audit quality.³³⁵ Another study using Chinese data finds that a greater partner to staff ratio is positively associated with audit quality.³³⁶ However, using U.S. data, another study finds partner time spent

concurrently on other audits is not associated with audit quality.³³⁷

The Workload metrics will indicate the average weekly hours worked on a quarterly basis by senior professionals, including time attributable to engagements, administrative duties, and all other matters, both firm-wide and on the core engagement team. Investors and audit committees could use this information to evaluate whether partners and managers are overworked or potentially distracted by other responsibilities. In certain circumstances, higher workloads could indicate that partners and managers are working longer to ensure audit quality is high. While there is no established optimal workload level for audit teams or their staffing components, academic literature suggests that auditors have high workloads, particularly during the busy season.³³⁸ Furthermore, several academic studies, primarily using international data, find that high workload levels (e.g., workloads that exceed 60 hours per week), particularly during the busy season, negatively impact audit quality.³³⁹ Auditors that work on multiple engagements in different environments and scopes may also experience issues with memory-related errors.³⁴⁰ However, the impacts of workload may depend on the auditor's ability to handle such normal workloads.³⁴¹ Furthermore, one study finds that audit partner busyness is not related to audit quality under equilibrium market conditions.³⁴²

³³⁷ See, e.g., Christensen, et al., *Team Workloads*.

³³⁸ See, e.g., Persellin, et al., *Auditor Perceptions* Table 2; Dana R. Hermanson, Richard W. Houston, Chad M. Stefaniak, and Anne M. Wilkins, *The Work Environment in Large Audit Firms: Current Perceptions*, 10 *Current Issues in Auditing* A38 (2016); and John T. Sweeney and Scott L. Summers, *The Effect of the Busy Season Workload on Public Accountants' Job Burnout*, 14 *Behavioral Research in Accounting* 223 (2002).

³³⁹ See, e.g., Christensen, et al., *Team Workloads*; Jun Chen, Wang Dong, Hongling Han, and Nan Zhou, *Does Audit Partner Workload Compression Affect Audit Quality?*, 29 *European Accounting Review* 1021 (2020); Jin Suk Heo, Soo Young Kwon, and Hun-Tong Tan, *Auditors' Responses to Workload Imbalance and the Impact on Audit Quality*, 38 *Contemporary Accounting Research* 338 (2021); Hwang and Hong, *Auditors' Workload*; Dennis M. Lopez and Gary F. Peters, *The Effect of Workload Compression on Audit Quality*, 31 *Auditing: A Journal of Practice & Theory* 139 (2012); Persellin, et al., *Auditor Perceptions*; and Ferdinand A. Gul, Shuai Mark Ma, and Karen Lai, *Busy Auditors, Partner-Client Tenure, and Audit Quality: Evidence from an Emerging Market*, 16 *Journal of International Accounting Research* 83 (2017).

³⁴⁰ See, e.g., Sudip Bhattacharjee, Mario J. Maletta, and Kimberly K. Moreno, *The Cascading of Contrast Effects on Auditors' Judgments in Multiple Client Audit Environments*, 82 *The Accounting Review* 1097 (2007).

³⁴¹ See Persellin, et al., *Auditor Perceptions*.

³⁴² See Goodwin and Wu, *What is the Relationship*.

The Retention of Audit Personnel metrics will indicate the continuity of senior professionals (through departures, reassignments, etc.) across the firm. Discontinuity of senior professionals at the firm could be a signal of dysfunction within the firm and a loss of valuable issuer and firm-specific human capital. Some research suggests that excessive levels of turnover, particularly at the staff level, could lead to a deterioration in audit quality.³⁴³ One study finds that auditor turnover at U.S. Big 4 firms has a significant negative effect on audit quality as measured by the prevalence of restatements.³⁴⁴ Using Belgian data collected from private and public companies, another study finds that abnormal turnover is more likely to affect audit quality than expected (i.e., normal or average) levels of turnover, and the negative consequences of turnover impact existing clients more than new clients.³⁴⁵ Firms with larger internal labor pools may be better positioned to mitigate the negative consequences of turnover. For example, using data from Chinese audit firms on auditor departure from public accounting, one study finds that the negative effect of departure on audit quality is stronger for non-Big 4 firms.³⁴⁶

The Experience of Audit Personnel metrics will indicate the average number of years worked at a public accounting firm (whether or not PCAOB-registered) by senior professionals across the firm and on the engagement. Greater experience of audit personnel metrics may indicate to investors and audit committee members that senior professionals are more effective and efficient auditors. The extant academic literature shows mixed results regarding the association between auditor experience and audit quality. One study of U.S. audit partners finds that absolute discretionary accruals, a proxy for audit quality, is increasing (decreasing) in the number of years the partner has been a CPA

³⁴³ See, e.g., Khavis and Szerwo, *Audit-Employee Turnover, Audit Quality, and the Auditor-Client Relationship* 27; and Christensen, et al., *Team Workloads*.

³⁴⁴ See Tao Ma, Chi Wan, Yakun Wang, and Yuping Zhao, *Individual Auditor Turnover and Audit Quality—Large Sample Evidence from US Audit Offices*, 99 *The Accounting Review* 297 (2024).

³⁴⁵ See, e.g., Linden, et al., *Audit Firm Employee Turnover and Audit Quality* 4.

³⁴⁶ See, e.g., W. Robert Knechel, Juan Mao, Baolei Qi, and Zili Zhuang, *Is There a Brain Drain in Auditing? The Determinants and Consequences of Auditors Leaving Public Accounting*, 38 *Contemporary Accounting Research* 2461 (2021).

³³³ See, e.g., Suyon Kim, *Engagement Partners' Effort*, 9 *Risks* 1 (2021).

³³⁴ See, e.g., Albert L. Nagy, Matthew G. Sherwood, and Aleksandra B. Zimmerman, *CPAs and Big 4 Office Audit Quality*, 42 *Journal of Accounting and Public Policy* 107018 (2023).

³³⁵ Another study using Japanese data finds that the number of CPA holders staffed to an audit engagement is positively associated with audit quality while the number of non-CPA holders is not. See Hossain, et al., *The Relationship*.

³³⁶ See, e.g., Lo, et al., *Does Availability of Audit Partners*.

licensee early (late) in their career.³⁴⁷ One experimental study from the United States found that less-experienced auditors may be less willing to request additional evidence from company controllers.³⁴⁸ However, another U.S. study finds that audit partner experience is not associated with audit quality.³⁴⁹ Using data from Taiwan, one study finds that an auditor's experience is positively associated with proxies for audit quality.³⁵⁰ One study on Chinese audit firms finds that the number of years that the partner has been engaged in audit work is negatively associated with absolute discretionary accruals, a proxy for audit quality.³⁵¹ However, another study using data from Chinese audit firms finds that an auditor's birth year, a proxy for total experience, is not associated with several proxies for audit quality.³⁵²

The Industry Experience metrics will indicate the average years of career experience of senior professionals in key industries audited by the firm at the firm level and the audited company's primary industry at the engagement level. The academic literature shows that industry experience, primarily using market share proxies, are related to audit quality.³⁵³ One study of U.S.

Big 4 firms finds that audit quality is positively associated with the number of years that the auditor is an industry specialist (*i.e.*, it has the largest market share in an industry and at least 10% more market share than the next-largest competitor).³⁵⁴ One experimental study finds that auditor participants that have experience in an industry are more likely to understand the specific financial reporting requirements and risks that issuers in those industries face.³⁵⁵ However, some research suggests that the impact of industry specialization on audit quality may depend on other contextual factors (*e.g.*, whether the auditor is local to the client or the difficulty of the audit).³⁵⁶ The Board also notes that some studies indicate that research on experience and industry specialization may be sensitive to design, proxy, and stratification level (*i.e.*, office-level and national-level). However, as one of the studies notes, the Board believes these findings do not imply that industry expertise is unrelated to audit quality.³⁵⁷

The Training Hours for Audit Personnel metrics would indicate average annual training hours for partners, managers, and staff of the firm, combined, both firm-wide and on the core engagement team. Overall, the academic literature provides mixed evidence regarding how auditor training relates to audit quality, but provides some evidence to support the association between specialized training and audit quality. Some studies find that certain proxies for auditor training are positively associated with some proxies for audit quality. For example,

one survey of junior auditors at large U.S. public accounting firms found that the perceived effectiveness of training was associated with lower turnover intentions.³⁵⁸ A study on Norwegian audit partners found that CPE hours were positively associated with audit effort and going concern opinion accuracy.³⁵⁹ A survey of auditors working in small audit firms in Sweden found that participation in four or more training activities or 50 or more hours of education per year were negatively associated with self-reported "dysfunctional" behaviors.³⁶⁰ However, other studies suggest that the benefits of training are driven primarily by specialized training. For example, one study on the Spanish audit market found that only partners' specialized, or non-generic audit knowledge (as proxied by industry-specific experience), was significantly positively associated with audit quality.³⁶¹ An older experimental study found that specialized indirect experience (*i.e.*, training), resulted in a stronger understanding for the auditor, but had a greater impact of knowledge unrelated to financial statement errors.³⁶² Another experimental study found that specialized training and experience were more strongly associated with improved audit outcomes than general knowledge.³⁶³

³⁴⁷ See Chenyong Liu and Chunhao Xu, *The Effect of Audit Engagement Partner Professional Experience on Audit Quality and Audit Fees: Early Evidence from Form AP Disclosure*, 29 Asian Review of Accounting 128 (2021).

³⁴⁸ See, *e.g.*, Bennett and Hatfield, *The Effect of the Social Mismatch* 46–47.

³⁴⁹ See, *e.g.*, Hye Seung Lee, Albert L. Nagy, and Aleksandra B. Zimmerman, *Audit Partner Assignments and Audit Quality in the United States*, 94 The Accounting Review 297 (2019).

³⁵⁰ See, *e.g.*, Chi, et al., *The Effects of Audit Partner* 363.

³⁵¹ See Steven F. Cahan and Jerry Sun, *The Effect of Audit Experience on Audit Fees and Audit Quality*, 30 Journal of Accounting, Auditing & Finance 78 (2015).

³⁵² See, *e.g.*, Ferdinand A. Gul, Donghui Wu, and Zhifeng Yang, *Do Individual Auditors Affect Audit Quality? Evidence from Archival Data*, 88 The Accounting Review 1993, Table 6 (2013).

³⁵³ See, *e.g.*, Craswell, et al., *Auditor Brand Name* (finding, using a sample of Australian firms, that industries that require greater specialization are associated with greater audit fees, consistent with "demand for audit quality"); Mark L. DeFond, Jere R. Francis, and T. J. Wong, *Auditor Industry Specialization and Market Segmentation: Evidence from Hong Kong*, 19 AUDITING: A Journal of Practice & Theory 49 (2000) (finding, using a sample of publicly listed Hong Kong companies, that industry specialization, as proxied by being among the top three firms in an industry by market share, is associated with greater audit fees among Big 6 auditors but lower audit fees among non-Big 6 auditors); Balsam, et al., *Auditor Industry Specialization and Earnings Quality* 95 (finding audit quality proxies are positively associated with the auditor being the largest auditor in an industry); Gopal V. Krishnan, *Does Big 6 Auditor Industry Expertise Constrain Earnings Management?*, 17 Accounting Horizons 1, 3 (2003) (finding that a firm's audit fee share within an industry is associated with higher audit quality [lower absolute

discretionary accruals]); and Knechel, et al., *Does Auditor Industry Specialization Matter?* (finding that issuers that switch to auditors that have at least a 30% market share in the issuer's industry experience significant positive abnormal returns).

³⁵⁴ See Jennifer J. Gaver and Steven Utke, *Audit Quality and Specialist Tenure*, 94 The Accounting Review 113 (2019).

³⁵⁵ See, *e.g.*, Low, *The Effects of Industry Specialization* 202.

³⁵⁶ See, *e.g.*, Jere R. Francis, Kenneth Reichelt, and Dechun Wang, *The Pricing of National and City-Specific Reputations for Industry Expertise in the U.S. Audit Market*, 80 The Accounting Review 113, 114 (2005) and Aobdia et al., *Heterogeneity in Expertise in a Credence Goods Setting*.

³⁵⁷ See, *e.g.*, Terry L. Neal and Richard R. Riley, *Auditor Industry Specialist Research Design*, 23 AUDITING: A Journal of Practice & Theory 169 (2004); Steven F. Cahan, Debra C. Jeter, and Vic Naiker, *Are All Industry Specialist Auditors the Same?*, 30 AUDITING: A Journal of Practice & Theory 191 (2011); and Miguel Minutti-Meza, *Does Auditor Industry Specialization Improve Audit Quality?*, 51 Journal of Accounting Research 779, 813 (2013) (finding that "auditor industry specialization, measured using the auditor's within-industry market share, is not a reliable indicator of audit quality" and that "these findings do not imply that industry knowledge is not important for auditors").

³⁵⁸ See Hossein Nouri and Robert J. Parker, *Career Growth Opportunities and Employee Turnover Intentions in Public Accounting Firms*, 45 The British Accounting Review 138 (2013).

³⁵⁹ See Limei Che, John Christian Langli, and Tobias Svanström, *Education, Experience, and Audit Effort*, 37 Auditing: A Journal of Practice & Theory 91 (2018). The study judged the accuracy of the auditor's going concern evaluation by reference to subsequent bankruptcy of the audited company. Note that there are several limitations to this proxy. See Marshall A. Geiger, Anna Gold, and Phillip Wallage, *Auditor Going Concern Reporting: A Review of Global Research and Future Research Opportunities* (2021).

³⁶⁰ See Tobias Svanström, *Time Pressure, Training Activities and Dysfunctional Auditor Behaviour: Evidence from Small Audit Firms*, 20 International Journal of Auditing 42 (2016). The study defines "dysfunctional behaviors" as: (1) making superficial reviews of client documents; (2) incorrectly signing off on an audit step; (3) prematurely signing-off on an audit step; (4) accepting weak client explanations; or (5) putting a greater level of trust in the audit client than is reasonable.

³⁶¹ See Josep García-Blandon, Josep María Argilés-Bosch, and Diego Ravenda, *Learning by Doing? Partners Audit Experience and the Quality of Audit Services*, 23 Revista de Contabilidad (Spanish Accounting Review) 197 (2020).

³⁶² See Ira Solomon, Michael D. Shields, O. Ray Whittington, *What Do Industry-Specialist Auditors Know?*, 37 Journal of Accounting Research 191 (1999).

³⁶³ See Sarah E. Bonner and Barry L. Lewis, *Determinants of Auditor Expertise*, 28 Studies on Judgment Issues in Accounting and Auditing 1 (1990) 16.

By requiring auditors to disclose these personnel related metrics, investors and audit committees could, for example, identify auditors with sustainable workloads, with the implicit outcome that sustainable workloads could improve auditor attentiveness and reduce error rates. Additionally, investors and audit committees may find the final metrics to be useful in evaluating the risk that the auditor has overlooked errors or material misstatements due to overworked partners or managers or that the engagement team was not sufficiently qualified or specialized. Moreover, investors may find the final metrics beneficial in understanding whether the engagement, and therefore the issuer, had significant risks or the issuer's operations were particularly complex compared to peer issuers. For example, if there was a significantly higher workload across partners, managers, and staff—or excessive turnover—compared to another investment opportunity of similar issuer size, the investor may then infer that the issuer had unique risks that necessitated increased audit effort. Such a signal may be particularly useful if the investor could ascertain whether peer issuers were more, or less, complex compared to the issuer under consideration. The investor may also be reasonably assured if there were positive audit outcomes as it may signal to the investor that the auditor exerted considerable or appropriate effort in obtaining a reasonable level of assurance on the issuer's financial statements in the context of their peers for that issuer's complexity and risk level.

Audit committees may also find these final metrics to be beneficial, as the audit committee may view them as confirming that the auditor is appropriately staffing the engagement. In addition, during the selection process for a new auditor, the audit committee may review the final metrics of potential candidate auditors in the context of peer-group engagements, thereby using the final metrics to make auditor selection decisions more effectively. By selecting an auditor based on their experience or industry-specific knowledge, audit committees could be better able to choose the preferred candidate auditor for their engagement—thereby improving the matching efficiency of human capital within and across firms by helping to align the demand for resources with the supply.

Audit firms may find the final metrics beneficial as they may be better able to monitor whether they are unintentionally over- or under-auditing,

as they will be able to compare their audit personnel metrics to other firms' metrics. Audit firms may also benefit from identifying lead industry-specialist auditors and improve their own audit services to compete with these industry specialists on the quality of those services. Importantly, incumbent auditors (*i.e.*, current auditors of an issuer) know more about the issuer's operations than rival competitor auditors.³⁶⁴ The disclosure of the final metrics could provide these competitor auditors with the ability to observe signals regarding the effort and experience required on the engagement, and those auditors may be able to use that information to compete against the incumbent auditor for the issuer's prospective engagement more effectively.³⁶⁵

The final metrics related to audit personnel and commenters' views are discussed and summarized above. Here the Board highlighted the comments that are most relevant to the economic analysis. Citing academic research, one commenter said that human capital inputs to audit production are crucial to audit quality.³⁶⁶ The same comment letter referred to a working paper written by the letter's authors which finds the manager-to-employee ratio at the audit office level is positively associated with audit quality.³⁶⁷ The commenter cited two academic studies that suggest audit offices are core functional units.³⁶⁸ Several commenters expressed concern that the benefits to reporting partner and manager involvement may be dampened by the fact that greater partner and manager involvement is not necessarily correlated with greater audit quality. Some of these commenters pointed out that partner and manager involvement is likely to vary with the complexity of the audit. For example, one commenter suggested that a less complex audit may require little additional supervision

³⁶⁴ See, *e.g.*, Monika Causholli, W. Robert Knechel, and Haijin Lin, and David E. M. Sappington, *Competitive Procurement of Auditing Services with Limited Information*, 22 *European Accounting Review* 573, 576–578 (2013).

³⁶⁵ *Id.*

³⁶⁶ See Jeffrey L. Hoopes, Kenneth J. Merkley, Joseph Pacelli, and Joseph H. Schroeder, *Audit Personnel Salaries and Audit Quality*, 23 *Review of Accounting Studies* 1096 (2018); Brandon Gipper, Luzi Hail, and Christian Leuz, *On the Economics of Mandatory Audit Partner Rotation and Tenure: Evidence from PCAOB Data*, 96 *The Accounting Review* 303 (2021); Christensen, et al., *Team Workloads*.

³⁶⁷ See Joshua Khavis et al., *Manager Staffing Leverage*.

³⁶⁸ See Kenneth L. Bills, Quinn T. Swanquist, and Robert L. Whited, *Growing Pains: Audit Quality and Office Growth*, 33 *Contemporary Accounting Research* 288 (2016); Christensen, et al., *Team Workloads*.

while a more complicated audit may require more supervision. One commenter said that the firm-level workload metric would not be comparable across firms due to variation in the size of each firm's issuer practice. Another commenter suggested that presenting firm-level average experience will be difficult to interpret because the distribution of personnel experience varies vastly. Several commenters agreed that defining a training metric that would provide decision-useful information would be challenging. One commenter said they think training increases technical competence. Another said that training builds awareness and on-the-job training is invaluable. However, the same commenter said that on-the-job-training could not be quantified. Another commenter supported a training metric but preferred an alternative calculation.

The Board acknowledges that the final metrics are imperfect proxies for audit quality.³⁶⁹ For example, the Board recognizes that average experience only partially describes the distribution of experience within a firm and, by extension, two firms with the same average experience could have quite different experience distributions. However, the Board believes that the final metrics will, on average, improve investors' decision-making.³⁷⁰ The Board agrees that the partner and manager involvement metric may vary with the complexity of the audit. The Board also agrees that the firm-level workload metric may vary by the size of the firm's issuer practice. However, the size of the firm's issuer practice and other proxies for the complexity of the audit are public information so stakeholders can adjust for any systematic variation in the partner and manager involvement and workload metrics. The Board also agrees that stakeholders may misinterpret the experience of audit personnel or training metrics. While some misunderstanding may reduce the usefulness of the final metrics, the Board believes that reporting the experience of audit personnel and training metrics will likely still be beneficial to investors.³⁷¹

³⁶⁹ See above for a more general discussion of commenters' concerns regarding comparability of the final metrics.

³⁷⁰ See above for a more general discussion of commenters' concerns regarding the relationship between the proposed metrics and audit quality.

³⁷¹ See below for a more general discussion of commenters' concerns regarding potential misinterpretation by investors, audit committees, and auditors.

b. Metrics Related to the Allocation of Audit Hours

The Allocation of Audit Hours metric would indicate the percentage of hours incurred prior to and following an issuer's year end across the firm's large accelerated and accelerated filer engagements and on the specific engagement. This metric may provide insight into whether the audit team is being efficiently and effectively deployed. Generally, the academic literature related to the allocation of audit hours is limited, as information pertinent to studying this topic is non-public. However, one recent study used PCAOB inspections data and found that audit engagements in which relatively more audit effort was spent prior to the issuer's fiscal year end had overall improvements in audit effectiveness and a lower likelihood of negative audit outcomes.³⁷² As noted in that study, other researchers have identified that work conducted earlier in the audit process may lead to an earlier identification of issues that could improve the possibility those issues would then be corrected.³⁷³ Another study, using data from one global accounting firm, also finds that a greater proportion of audit work performed earlier in the audit is associated with improved audit outcomes.³⁷⁴

The final Allocation of Audit Hours metric could allow investors and audit committees to better evaluate how their auditor plans its audit and compare their audit and auditor to peers. For example, it could indicate that their auditor has left substantial issues to the end of the engagement. The effective deployment of resources is of critical importance to a well-planned audit.³⁷⁵ The final metric may also help auditors understand whether they are effectively planning their audit. Auditors may compare their allocations of audit hours to those of other firms and adjust accordingly. The final Allocation of Audits Hours metric could also provide supplemental value to the final Workload and Partner and Manager Involvement metrics.

The final metrics related to allocation of audit hours and summarizes commenters' views are discussed above. Here the Board highlighted the comments that are most relevant to the economic analysis. Several commenters

cautioned that allocation of audit hours may not be a useful signal of audit quality because circumstances outside of the auditor's control may influence it (e.g., significant unusual, and unanticipated, transactions near the balance sheet date, going concern issues that arise after the balance sheet date, other unforeseen company delays). One commenter said that for the largest firms, individual issuer circumstances may not be significant enough to move the firm-level metric, but for smaller firms, individual issuer circumstances could impact the overall results. The Board recognizes that the allocation of audit hours will be an imperfect proxy for audit quality. However, the Board believes the academic literature provides evidence that the final metrics will likely be associated with audit effectiveness and audit outcomes and thus aid decision-making.³⁷⁶

c. Metrics Related to Audit Outcomes

The Restatement History metrics will summarize restatements of financial statements and management reports on internal control over financial reporting ("ICFR") that were audited by the firm over the past three years. In the academic literature, restatements are widely regarded as the strongest indicator of poor audit quality.³⁷⁷ Restatements have been shown to result in auditor dismissal or increased resources committed by the auditor to the issuer.³⁷⁸ Using data from Japanese audit firms, one study finds that auditors devote additional resources to companies the year they restate their

financial statements.³⁷⁹ However, it is important to note that restatements are often observed after a significant lag following the restatement event—which causes a reduction in the informativeness of the restatement event, if such information is viewed as stale by investors and audit committees. Furthermore, the absence of a restatement does not imply audit quality was high and the occurrence of a restatement identified by a successor auditor may signal improved audit quality when the auditor increases audit effort to identify errors in the work of prior auditors.³⁸⁰ The Board acknowledges that the incremental value of the final metric will be limited by the fact that restatements are public information already (e.g., U.S. issuers must file Form 8-K when they materially restate their financial statements and the public financial statements themselves indicate when a restatement has occurred). However, the Board believes that there is value in having the restatements aggregated and presented along with the other metrics.

The final metrics related to restatement history and commenters' views are discussed and summarized above. Overall, commenters were supportive of the proposed metrics related to restatement history. Two non-U.S. firm-related groups suggested that financial reporting quality is complex, and restatements are not a perfect proxy for audit quality. The Board agrees that it is not a perfect indicator. However, as the Board noted in the proposal, restatements are a widely-used proxy for audit quality. The Board agrees that context will be important to understand the final metrics, including the final Restatement History metric.³⁸¹ Two commenters said that restatements are already publicly available and therefore the metric would not be useful. The Board noted this in the proposal. The Board continues to believe that providing information on restatement history in Form FM would make the information more accessible to stakeholders.

³⁷⁶ See above for a more general discussion of commenters' concerns regarding the relationship between the proposed metrics and audit quality.

³⁷⁷ See, e.g., DeFond and Zhang, *A Review of Archival Auditing Research* (specifically, the discussion marked Section 2.3.1 Output-based audit quality measures). The Board notes that "little r" restatements are a less-widely used proxy for audit quality than "Big R" restatements. See Jayanthi Krishnan and Mengtian Li, *Are Referred-to Auditors Associated with Lower Audit Quality and Efficiency?*, 42 *Auditing: A Journal of Practice & Theory* 101 (2023) for one study that uses "little r" restatements as a proxy for audit quality. By contrast to "Big R" restatements, one study found muted or absent market reactions to "little r" restatements. See Daniel Aobdia, Vincent Castellani, and Paul Richardson, *Do Investors Care Who Led the Audit in the U.S.? Evidence from Announcements of Accounting Restatements*, SSRN Electronic Journal (2024). The Board notes that SSRN does not peer review its submissions.

³⁷⁸ See, e.g., Karen M. Hennes, Andrew J. Leone, and Brian P. Miller, *Determinants and Market Consequences of Auditor Dismissals after Accounting Restatements*, 89 *The Accounting Review* 1051 (2014); and Li-Lin Liu, K. Raghunandan, and Dasaratha Rama, *Financial Restatements and Shareholder Ratifications of the Auditor*, 28 *Auditing: A Journal of Practice & Theory* 225 (2009).

³⁷⁹ See, e.g., Chi, Wuchun and Chien-min Kevin Pan, *How Do Auditors Respond to Accounting Restatements? Evidence on Audit Staff Allocation*, 58 *Review of Quantitative Finance and Accounting* 1 (2022).

³⁸⁰ See, e.g., Stephen P. Rowe and Padmakumar Sivadasan, *Higher Audit Quality and Higher Restatement Rates: An Examination of Big Four Auditee Restatements*, SSRN Electronic Journal, (2021). The Board notes that SSRN does not peer review its submissions.

³⁸¹ See above for a more general discussion of commenters' concerns regarding the relationship between the proposed metrics and audit quality.

³⁷² See, e.g., Aobdia, et al., *The Economics of Audit Production* 1, 6 and 11.

³⁷³ See *id.* at 12.

³⁷⁴ See Christensen, et al., *Archival Evidence*.

³⁷⁵ See, e.g., Causholli, et al., *Competitive Procurement* (for an economic model describing the intersection of efficiency, quality, and competition in the market for audit services). See also Aobdia, et al., *The Economics of Audit Production*.

2. Costs

In the following discussion, the Board considered direct and indirect costs related to the final rules. The Board has attempted to quantify certain costs where possible. However, most of the costs are intractable to quantify, particularly the indirect costs.

- First, auditors may incur direct costs building an appropriate reporting infrastructure or updating existing infrastructure.
- Second, auditors may incur direct costs producing the firm and engagement metrics.
- Third, auditors, investors, and audit committees may incur indirect costs understanding and integrating the final metrics into their current decision-making frameworks.
- Fourth, auditors may incur indirect costs revising their audit approaches.
- Fifth, investors, audit committees, and auditors may incur indirect costs to the extent that issuers switch auditors more frequently as a result of the final rules.
- Sixth, issuers and investors may bear indirect costs to the extent that costs incurred by auditors are passed on in the form of higher audit fees.

Larger firms should be able to take advantage of economies of scale by distributing any fixed costs over a higher number of audit engagements. Smaller firms will likely distribute any fixed costs over a lower number of audit engagements, which, taking fixed costs as given, would make implementation relatively more costly for smaller firms.³⁸² Many commenters agreed that smaller firms, including non-U.S. firms, could be disproportionately impacted. However, the fixed costs may also be less for smaller firms than for larger firms (e.g., they may not require significant IT systems if they need to track only a few engagements).³⁸³

Referring to research from the SEC, one commenter noted that 99.9% of businesses are small businesses, 43.5% of the U.S. GDP is created by small businesses, and 63% of net new jobs are created by small businesses.³⁸⁴ The

commenter did not discuss what portion of these figures would be impacted by the proposal. The Board notes that the final rules will apply only to the auditors and audits of accelerated filers and large accelerated filers. However, the Board recognizes that some accelerated filers and larger accelerated filers may not be audited by the largest audit firms. For example, 24.0% of accelerated filers (representing 19.3% of total accelerated filer market capitalization) and 4.5% of large accelerated filers (representing 0.3% of total large accelerated filer market capitalization) are audited by non-affiliated firms.³⁸⁵

Several commenters said that the proposal did not fully consider the costs and complexities associated with complying with the proposed rules. Two commenters said that the proposal's economic analysis largely disregards costs and does not attempt to quantify the related costs of some requirements. To the contrary, the proposal's economic analysis included both a discussion of the available evidence about costs and PCAOB staff's attempt to quantify costs of the proposal to the extent feasible. The Board has carefully reviewed stakeholders' input regarding the potential costs of the proposal. Based on outreach to audit firms, one commenter agreed that firms' processes and systems would need to be established or updated.

One commenter suggested that the PCAOB should, as a starting point, consider whether the metrics would require additional systems, processes, or procedures. The Board considered these costs and quantified several of them in the proposal and, with modification to account for stakeholder feedback, address them again below.

One commenter suggested that it would be helpful if the Board could match each cost to each benefit. The Board does not believe such an analysis is feasible or reasonable. For example, it is not possible to match fixed costs (e.g., IT investments) to a particular benefit because they do not drive the benefit alone. Furthermore, the variable cost categories (e.g., gathering, calculating, and disclosing the metrics) cannot be matched to specific benefit categories (e.g., competition). Rather, these

Business Capital Formation, *Annual Report Fiscal Year 2023*.

³⁸⁵ Source: S&P and Audit Analytics. The Board's calculations use market capitalization data as of the second quarter of 2024. "Non-affiliated firms" are firms not affiliated with BDO International Limited, Deloitte Touche Tohmatsu Limited, Ernst & Young Global Limited, Grant Thornton International Limited, KPMG International Cooperative, or PricewaterhouseCoopers International Limited.

variable cost categories are each associated with producing the metrics, while disclosing the metrics drives all the benefits. Where feasible and reasonable, the Board highlighted in the proposal and below connections between certain qualitative cost categories and certain qualitative benefit categories. For example, the Board has highlighted that audit switching costs may arise from improved competition. The Board also acknowledges how certain metrics may be more costly or beneficial than others to allow the Board and commenters to consider each metric individually (e.g., by surveying academic literature by metric and highlighting challenges gathering data required for certain metrics).

One commenter noted that the use of data analytics at firms should enable them to more efficiently implement the final rules. The Board has observed that firms are increasingly using data analytics in their audits.³⁸⁶ However, the extent to which these capabilities lend themselves to regulatory compliance and management of the audit practice itself is less clear.

i. Direct Costs To Comply With the Final Rules

a. Modifying or Building a System To Produce the Final Metrics

Auditors may incur certain initial fixed costs (i.e., costs that are generally independent of the number of audits performed) related to modifying existing systems or building new systems that could collect the relevant data that is needed to generate the final metrics and produce compliant filings. The Board believes most firms will likely modify existing systems rather than build entirely new systems. These costs may include acquiring necessary IT infrastructure, establishing an appropriate system of controls, creating system documentation, and conducting system testing (e.g., with historical data or by conducting dry runs before the effective date of the final requirements). There could also be costs related to training personnel in how to use the new or modified system. This could include training: (i) engagement-level personnel on how to collect and document information relevant to the final metrics; (ii) centralized personnel on how to aggregate and produce the final metrics; and (iii) administrative personnel on how to create filings and ensure proper control over the system; all in compliance with QC 1000.³⁸⁷

³⁸⁶ See PCAOB Rel. No. 2024-007, 35 and cites therein for additional discussion on this topic.

³⁸⁷ See Michael J. Gurbutt, Wei-Kang Shih, Carrie von Bose, and Tasneem Raihan, *Staff White Paper*:

³⁸² See, e.g., Michael Minnis and Nemit Shroff, *Why Regulate Private Firm Disclosure and Auditing?*, 47 *Accounting and Business Research* 473, 498-499 (2017) (explaining that increased financial reporting regulation is disproportionately costly for smaller companies because complying with regulation has large fixed costs, and unlike larger companies, smaller companies do not benefit from economies of scale).

³⁸³ Among the firms that will be impacted by the final rules approximately 41%, 19%, and 11% had a total of one, two, or three accelerated filer or large accelerated filer engagements, respectively, during the 12-month period ending September 30, 2023.

³⁸⁴ See U.S. Securities and Exchange Commission, Office of the Advocate for Small

The fixed costs associated with these efforts will likely depend on the extent to which firms already have automated systems in place that may be adapted to comply with the final requirements. As discussed above, the Board believes many firms track much of the information that would be required to calculate the final metrics. In particular, information gathered by PCAOB staff in 2018 and 2019 pursuant to PCAOB oversight activities indicates that U.S. GNFs generally track some metrics similar to the final metrics and voluntarily provide quantitative information that is similar to many of the final metrics. With respect to roughly half of the engagements that will be subject to the final engagement-level reporting requirements, firms are already gathering total audit hours information from other auditors pursuant to Form AP reporting requirements. Furthermore, firms should be tracking CPE credits pursuant to licensing requirements and restatements pursuant to QC 1000. The Board believes firms likely have systems in place to help them track this information. As a result, these firms may be able to leverage their existing internal systems to comply with the final rules. Moreover, firms may be able to leverage existing systems related to their compliance with other PCAOB reporting requirements (e.g., QC 1000 and Form AP). Indeed, one GNF commenter, in response to the Concept Release, noted that some of the metrics discussed therein and included in the final rules would be “easy to compute.”

However, the Board has also considered that existing systems may not be functionally joined together, and that systems designed and operated for internal monitoring or informal reporting purposes may need to be enhanced to meet the needs of public reporting. There are, therefore, likely to be costs associated with integrating the various reporting systems and enhancing or updating current systems to comply with the final requirements. One GNF commenter on the Concept Release suggested that this would likely be especially true for NAFs. The required changes would depend on a firm’s size and the nature of their engagements.

Depending on their facts and circumstances, some firms may avoid the costs associated with modifying or building an automated system by opting for a more manual approach. Larger firms are more likely to build automated

systems, or increase automation in existing systems, given the scale of their operations and the scope of data that will need to be collected to calculate the final metrics (i.e., they have a larger number of employees and engagements). Smaller firms may choose to build or expand upon existing manual systems (e.g., collecting information in spreadsheets or simple databases) because, for these firms, the scope of information to be collected and processed may be effectively collated in a spreadsheet-based tool. Firms may also opt for automated systems to the extent that the final metrics will require a larger number of individual components, a broader pool of individuals, or more complicated calculations (e.g., the final metrics related to audit-team retention, auditor experience, or industry expertise). The fixed costs to build or modify existing automated systems are likely to be greater than manual systems. However, automated systems should reduce variable costs in the long run.

The Board is unaware of any data or research relevant to the potential costs of modifying firms’ existing automated systems, which the Board believes would be the most likely scenario for many firms, particularly the largest firms which audit a significant majority of the audit market.³⁸⁸ However, the costs to build an automated system from the ground up—that is, if a firm did not have any existing systems that track the inputs to the final metrics—could be comparable to the costs to implement an enterprise resources planning (ERP) system (but such costs are not exactly analogous). Using surveys of companies that have implemented ERP systems, some studies find that ERP system implementation costs scale with the company’s revenues and staff count. Using audit fees as a proxy for revenue and number of accountants as a proxy for staff count, an illustrative calculation suggests that the total costs (e.g., adding over all impacted firms), if every such firm were to implement an automated system from the ground up, could range from approximately \$371 million to \$512 million.³⁸⁹ This would

represent a one-time cost of approximately 2% to 3% of audit fees paid by issuers to covered firms in a year. However, as discussed in more detail below, the fixed costs associated with modifying or building a system to produce the final metrics are likely to be a fraction of this amount given that the Board expects most firms would modify existing systems rather than build entirely new systems. For this reason, this range likely represents an upper bound of the potential costs.

There are several reasons to expect the implementation costs will be substantially less than the cost of building a new ERP system. First, as noted above, the Board believes it is likely that firms, particularly the largest firms with the greatest market share, are already gathering much of the information that would be required to calculate the final metrics. For example, roughly half of the engagements that will be subject to the final engagement-level reporting requirements are already gathering total audit hours information from other auditors pursuant to Form AP reporting requirements. Furthermore, firms should be tracking CPE credits pursuant to licensing requirements and restatements pursuant to QC 1000. Second, the Board believes most larger firms have automated systems in place that could be leveraged to comply with the final rules. Third, smaller firms could opt for a manual approach. Indeed, firms are only expected to invest in an automated system if it would be efficient to do so.

ERP Report, Third-Stage Consulting Group, (2020)). Each of the U.S. Big 4 firms had over \$1 billion of revenue for the 2023 issuer fiscal year, while all other firms that will be impacted had less than \$1 billion. Using the midpoint of the ranges, 2.5% for U.S. Big 4 firms and 4% for all other firms, implementation costs related to building a new system to produce the final metrics will be approximately $\$12.7 \text{ billion} \times 2.5\% + \$4.8 \text{ billion} \times 4\% = \$512 \text{ million}$. The Board notes that 13 firms, which had a combined \$22 million in audit fees in 2022, had zero audit fees in 2023. Using information on client implementation projects active between January 2021 and December 2021, another consulting firm reported that companies having over 500, between 50 and 499, or less than 50 employees project spent \$11,000, \$9,000, or \$8,571 per ERP system user over a 5-year ERP implementation period and that 7.27%, 20.13%, and 34.8% of employees used the ERP system, respectively (2022 ERP Software Report, Software Path, (2022)). Information provided by registered firms that will be impacted by the final requirements on Form 2 indicates that, for the 2023 reporting year, 130, 58, and 19 firms employed over 500, between 50 and 499, or less than 50 accountants, employing a total of 431,680, 14,274, and 474 accountants, respectively. Using the number of accountants employed by a registered firm as a proxy for the number of employees, implementation costs related to building a new system to produce the final metrics would be approximately $430,074 \times 7.27\% \times \$11,000 + 14,142 \times 20.13\% \times \$9,000 + 444 \times 34.8\% \times \$8,571 = \$371 \text{ million}$. Source: Audit Analytics and RASR.

³⁸⁸ See, e.g., Ideagen Audit Analytics, *20-Year Review of Audit Fee Trends 2003–2022*, (July 2023) at 2.

³⁸⁹ The Board identified two publicly available reports related to the costs of implementing ERP systems. Referring to the experiences of over 1,000 client and non-client companies that had implemented a digital transformation effort in the past twenty years, one consulting firm estimated that implementation costs for companies with revenues under \$1 billion were approximately 3–5% of annual revenue, and implementation costs for companies with revenues over \$1 billion were approximately 2–3% of annual revenue (*The 2020*

Fourth, ERP systems possess many features that would not be necessary in an automated system for compliance. Finally, audit firms are likely to need to make similar investments in their internal systems in the near term, owing to the rapid pace of technological advancement and other rules and standards currently being adopted, thus potentially reducing the incremental costs attributable to the final rules. However, at the same time, and as suggested by commenters, the Board recognizes that implementing new systems may be especially costly for audit firms if staff resources are strained due to the need to comply with other standards being implemented in the same time period, such as QC 1000.³⁹⁰ The Board's estimate does not account for these capacity constraints. Overall, for these reasons, the Board believes these figures likely reflect an upper bound on the potential implementation costs and the actual implementation costs will likely be significantly less.

One commenter suggested that the Board's cost estimates are strawmen because they have too many caveats. The PCAOB's staff guidance on economic analysis recommends quantifying impacts to the extent feasible. However, it also notes that reliably quantifying impacts can be difficult. The SEC's current guidance on economic analysis in SEC rulemakings recommends "identify[ing] and discuss[ing] uncertainties underlying the estimates of benefits and costs."³⁹¹ Consistent with these recommendations, the Board has provided an exhaustive discussion of uncertainties in the Board's cost estimates because the Board believes it provides commenters with important context necessary to understand the economic analysis.

One commenter apportioned the Board's quantitative estimate of the cost to implement an automated system from the ground up to their firm by market share. Using this approach, the commenter estimated the cost would be between \$7 million and \$10 million. The commenter said that they believe their estimate is low because larger firms have greater economies of scale. The commenter also said that this cost could increase the audit fees they charge their issuer clients by between \$50,000

and \$70,000 per issuer assuming they pass through the entire implementation cost and raise each issuer's audit fee by the same amount. The Board notes some limitations to applying its numerical illustration in this way. First, as discussed in the proposal and again above, the Board's methodology assumes costs are a non-linear function of revenue which the commenter did not account for. Second, the Board notes that the commenter's estimate is subject to the same caveats described above regarding the Board's quantification methodology. Finally, the Board also notes it would not expect that the cost of implementing a new system would be passed through to issuers in the form of a permanent audit fee increase, both because it is a one-time cost and because it is a fixed rather than a variable cost. It also overestimates the true pass through to the extent the commenter is unable to pass through 100% of the implementation cost.

One commenter provided academic research that finds the costs to implement new systems is proportionally lower for larger firms.³⁹² The Board agrees, and the Board's quantification methodology reflects this. The same commenter also noted that the press has reported that larger firms have already invested significantly into their IT systems. As discussed above, the Board recognizes that larger firms likely already have systems in place that they would be able to leverage when implementing the final rules.

Finally, the Board also notes the implementation costs could be offset in part by benefits to auditors. For example, technological enhancements to auditors' systems may, in the long run, increase operational efficiency and profitability.

b. Producing the Final Metrics

Auditors may incur engagement-level and firm-level variable costs related to producing the final metrics. For example, the final rules may lead auditors to spend additional time recording, collating, and reporting information for relevant engagement-level, and then aggregated firm-level, metrics. As discussed above, the final rules do not impose new performance requirements other than the calculation

and disclosure of metrics. In addition, reviews by others, such as the engagement quality reviewer or the national office, may result in additional recurring costs. Audit firms are also likely to experience costs, or administrative time, related to legal review and quality control for the final metrics.

Specifically, variable costs may arise from the following activities related to producing the final metrics:

Recording & Collecting Information

Audit firms may incur variable costs recording the necessary information and collecting it in a centralized location. The magnitude of the costs will likely depend on the extent to which existing practice differs from the final requirements. As discussed above, the Board believes many firms already internally track information related to the final metrics. This will reduce the variable costs attributable to the final rules.

The magnitude of the variable costs may also depend on the size of the firm. As discussed, based on information obtained through inspections and oversight activities, the Board believes that the final rules will likely affect engagements performed by all firms but may have a greater impact on engagements performed by NAFs. However, NAFs that choose to use a manual recording system may face recurring costs associated with the continued collection of data and reporting of the final metrics. These costs likely will vary with the size of the audit team.

Finally, the magnitude of the variable costs to record and collect information may depend on the final metric. For example, collecting the information needed to calculate the final Workload metrics will likely be relatively straightforward as such information is likely already stored in firms' extant timekeeping systems. One commenter said that the proposed engagement-level Workload metric would take considerable effort to compile and calculate. The commenter did not articulate a basis for their conclusion. To the contrary, the Board believes the final Workload metric area will not be burdensome to calculate for several reasons. First, based on commenters' views, the Board decided to exclude staff from the final Workload metric calculations. The Board believes this should reduce the effort required by firms to compile and calculate the metrics. Second, firms that use other auditors or serve as an other auditor should already be tracking partner and manager hours in order to calculate total

³⁹⁰ Commenters' concerns about the cumulative impacts of multiple PCAOB standards and rules with overlapping implementation periods including potential benefits are discussed above.

³⁹¹ See Memorandum from Division of Risk, Strategy, and Financial Innovation (now, Division of Economic and Risk Analysis) and Office of the General Counsel to Staff of the Rulewriting Divisions and Offices re: Current Guidance on Economic Analysis in SEC Rulemakings (Mar. 16, 2012) (SEC Staff Guidance), 12.

³⁹² See Kathleen M. Bakarich and Patrick E. O'Brien, *The Robots are Coming . . . But Aren't Here Yet: The Use of Artificial Intelligence Technologies in the Public Accounting Profession*, 18 *Journal of Emerging Technologies in Accounting* 27, (2021) and Dereck Barr-Pulliam and Amanda Carlson, *Breaking Barriers to Change: The COVID-19 Pandemic's Impact on Attitudes Toward and Willingness to Pay for Audit Innovation*, SSRN Electronic Journal (2024). The Board notes that SSRN does not peer review its submissions.

audit hours pursuant to Form AP reporting. PCAOB staff analysis of AuditorSearch data finds that approximately 48% of audits of accelerated filers or large accelerated filers involved other auditors. Third, firms that track time electronically should be able to access hours information by staffing level and time period and make the required calculations electronically. The Board believes most larger firms track their time electronically already. However, the Board recognizes that some of the smaller firms may not. Indeed, one commenter said that many firms have moved away from the burden of time reporting. As discussed above, some of these smaller firms may choose to build a system that would track the information needed to efficiently produce the final metrics, including in the final Workload metric area. Finally, the Board also notes that firms will be permitted to use a reasonable method to estimate the components of a calculation when actual amounts are unavailable.

One commenter said that there could be costs associated with coordinating data collection efforts across firms. The Board recognizes that such costs would likely arise. However, the Board notes that the adjustments the Board has made to the set of required metrics and their calculations should alleviate this burden. Furthermore, firms should generally already be coordinating data collection efforts for Form AP reporting purposes and this data will be subject to quality controls over firm reporting. To the extent such coordination is necessary, academic research finds that 94% of component auditors identified on Form AP are associated with the lead auditor.³⁹³ This provides additional evidence there is a strong existing relationship between these firms which should facilitate any additional transfer of information required to implement the final rules.

Aggregating & Calculating Firm and Engagement Metrics

Once the information is collected, it will need to be aggregated and the final metrics will need to be derived following the calculation requirements discussed above. Costs will likely be incurred to make those calculations and to make and validate the filing. Moreover, these costs will be greater for

firms that will use manual systems than firms that will use automated systems.

Making the Filing

Once collected, aggregated, and calculated, the final metrics will then need to be filed with the PCAOB. There will be costs associated with developing the filing, validating the information, and drafting any voluntary textual disclosures. This could entail administrative costs such as legal review of the textual disclosures. Firms may also need to extend their existing quality control processes around PCAOB filings to cover these new filings.

Overall, it is difficult to estimate the potential costs that audit firms will incur to produce the final metrics owing in part to the variability in firms' current systems (e.g., automated versus manual) and the extent to which firms already produce similar metrics for internal reporting to national offices or external reporting in firm transparency reports. However, the Board may extrapolate from the economic impacts of prior PCAOB disclosure rules. For example, as a result of the implementation of AS 3101 in 2019, the largest four audit firms surveyed through the PCAOB's outreach activities indicated they incurred, on average, 23,000 hours to develop the processes and procedures to support the implementation of CAMs. The PCAOB staff monetized the economic impact to those largest four audit firms to be approximately \$4.4 million dollars each.³⁹⁴ Those audit firms also each reported 14,600 hours of training, estimated at \$2.1 million dollars. The next four largest audit firms reportedly incurred 3,700 hours, on average, to develop processes and procedures, and 3,100 hours in training their personnel to support the implementation of CAMs—estimated at \$610,000 and \$435,000, respectively, on average for each firm.³⁹⁵ As estimated through April 2021, the smallest of audit firms, after excluding outliers, reported only 400 hours implementing the CAM requirements, with 600 hours associated with CAM related training. The average implementation costs for these smallest of firms was estimated to be approximately \$185,000 per firm.³⁹⁶

³⁹⁴ See, e.g., Michael J. Gurbutt, Wei-Kang Shih, Carrie von Bose, Staff White Paper: Stakeholder Outreach on the Initial Implementation of CAM Requirements, PCAOB 1, 8 (2020).

³⁹⁵ Id. The "next four largest firms" refers to BDO USA LLP, Crowe LLP, Grant Thornton LLP, and RSM US LLP. See Gurbutt et al., *Stakeholder Outreach* at n. 4.

³⁹⁶ See Gurbutt, et al., *Staff White Paper: Second Stakeholder Outreach on the Initial Implementation*

Extrapolating these data points to the population of firms expected to be impacted by the final requirements implies a total cost of approximately \$67 million.³⁹⁷

Following the implementation of processes, procedures, and training, surveyed audit partners report that 1% of total audit engagement hours were spent identifying, developing, and communicating CAMs.³⁹⁸ PCAOB staff research found no systematic evidence of increased engagement hours for audits of large accelerated filers³⁹⁹ and a statistically significant 6.6% increase in engagement hours for audits of non-large accelerated filers.⁴⁰⁰ The findings suggest that there could potentially be variable costs associated with the final requirements that persist after the implementation phase.

Auditors of large accelerated filers realized efficiencies in developing and communicating critical audit matters in the second year of implementation, reporting that they generally spent the same or less time on critical audit matters compared to the initial year of implementation.⁴⁰¹ Accordingly, the Board expects that the costs to produce the final metrics will be most significant for the initial filings under the final rules because firm personnel will need to familiarize themselves with new reporting requirements and forms. In subsequent reporting periods, the Board anticipates that firms will incur lower costs as personnel become more familiar with the reporting requirements.

As noted above, AS 3101 and the final rules are different in ways that may

of CAM Requirements 1, 13. "Smaller audit firms" refers to Marcum LLP; Moss Adams LLP; Baker Tilly US LLP; BKD LLP; CohnReznick LLP; Dixon Hughes Goodman LLP (DHG); EisnerAmper LLP; Mayer Hoffman McCann P.C. (MHM); Plante & Moran, PLLC; and WithumSmith + Brown, PC.

³⁹⁷ As an example, aggregating these costs across active firms in the market implies roughly \$6.5 million in procedures and training for the largest four audit firms (\$4.4 million for processes and procedures and \$2.1 million for training), \$1.045 million for the next four largest firms, and \$185,000 for 202 smaller impacted firms, would amount to a combined \$67.0 million in costs to produce the final metrics outside of implementation costs associated with the systems (\$6.5 million × 4 larger firms + \$1.045 million × 4 next-largest firms + \$0.185 × 199 smaller firms = \$67.0 million).

³⁹⁸ See Gurbutt and Shih, *Econometric Analysis on the Initial Implementation of CAM Requirements* 4.

³⁹⁹ See Gurbutt and Shih, *Econometric Analysis on the Initial Implementation of CAM Requirements* 4.

⁴⁰⁰ See Jonathan T. Fluharty-Jaidee, Michael J. Gurbutt, and Wei-Kang Shih, *Staff White Paper: Second Econometric Analysis on the Initial Implementation of CAM Requirements*, Public Company Accounting Oversight Board, (2022).

⁴⁰¹ See, e.g., *Interim Analysis Report: Further Evidence on the Initial Impact of Critical Audit Matter Requirements*, PCAOB Rel. No. 2022-007 (Dec. 7, 2022).

³⁹³ See William M. Docimo, Joshua L. Gunn, Chan Li, and Paul N. Nicholas, *Do Foreign Component Auditors Harm Financial Reporting Quality? A Subsidiary-Level Analysis of Foreign Component Auditor Use*, 38 *Contemporary Accounting Research* 3113 (2021).

limit the relevance of the costs of AS 3101 to the potential costs of the final rules. For example, as discussed above, the final metrics will require the collection of a broader array of engagement-level information whereas CAM requirements focus more on narrative description. However, the processes, procedures, and training aspects are likely more comparable.

One commenter agreed with the Board's caveat that the CAMs requirements are not a perfect analogy for the proposed metrics. More specifically, the commenter said that the proposal would require significantly more effort to implement than AS 3101 due, in part, to the need to update QC policies and procedures. Furthermore, commenters pointed to specific facts and circumstances that could exacerbate the costs of the final metrics (*e.g.*, coincidence with other new PCAOB standards). One commenter asserted, incorrectly, that the proposal included no quantification of costs associated with reporting.

One commenter suggested that the Board perform further analysis of the firms' current data collection efforts and the data collection efforts that will be required under the final requirements. As part of the Board's economic analysis, the Board considered all relevant information available to the Board including information gathered through the Board's oversight activities, academic research, and comments received on the proposing release.

Commenters agreed that firms will incur some costs to report the final metrics. Two commenters said validating personnel's total experience prior to joining the firm will be challenging and expensive because firms do not generally track this information. Another commenter said that reporting industry experience of audit personnel would be costly because sufficient information to report this metric is not usually held in the human resources administration of firms. One commenter said the proposed engagement-level Workload metrics were very complicated and would take considerable effort to prepare. One commenter said that many firms do not track non-chargeable hours.

Commenters also said that they do not usually track restatements of former clients' financial statements. The Board considered these costs and have made several modifications to the required calculations which the Board believes will help mitigate them. The Board also notes that, under the final rules, firms would be permitted to use a reasonable method to estimate the components of a

calculation for which data are unavailable.

One commenter said that producing some of the proposed firm-level metrics (*e.g.*, Partner and Manager Involvement and Allocation of Audit Hours) would be challenging because it would require aggregation of engagement-level data, including data from other auditors, for a period different from that required for the corresponding proposed engagement-level metrics. The Board agrees there could be some incremental costs associated with collecting and validating data from other auditors. However, when producing the final firm-level metrics, firms would be able to leverage the audit hours information they already collected and validated pursuant to Form AP reporting for audit reports issued during the 12-month period ended September 30. Therefore, the Board does not believe the difference between the period covered by the firm-level metric and the period covered by Form AP presents unique challenges. To the contrary, the Board believes that adopted approach is an efficient way to provide information to stakeholders while minimizing costs to firms. The adjustments the Board has made to the calculations (*e.g.*, reducing the scope of the Partner and Management Involvement, Workload, and Allocation of Audit Hours calculation to large accelerated and accelerated filers only) and the Board's decision not to adopt the proposed Use of Shared Service Centers metric should attenuate any concerns like those raised by this commenter.

Several commenters said that there could be costs associated with correcting immaterial errors, particularly with regard to engagement-level metric reporting on Form AP. The Board agrees cost related to this aspect of the final rules could arise, either through extra up-front quality control costs or costs associated with amending an inaccurate Form AP. However, the Board believes investors and audit committees need reliable information, and correction of errors is an important part of ensuring the reliability of the information.

ii. Indirect Costs Arising From Market Reactions to the Final Metrics

The Board also reviewed and considered costs that could arise from how investors, audit committees, and auditors may react to the final metrics. For example, improved decision-making on the part of audit committees could lead to costs from switching auditors. Most of these costs are not feasible to quantify. However, they are likely to be incurred only to the extent that they are

deemed reasonable from a business perspective.

a. Understanding the Final Metrics

Investors that use the metrics will incur costs to understand the final metrics and incorporate them into their decision-making. Investors will choose to bear these costs only if they anticipate that the costs are outweighed by the benefits of using the metrics. Due to economies of scale, the Board believes institutional investors will be more likely to incur these costs than retail investors. Audit committees may incur costs to understand the final metrics because their fiduciary duties may prompt them to do so. Moreover, audit committees may spend additional time discussing the final metrics with their auditor, which would require both audit committees' and auditors' time.⁴⁰² Auditors may spend time and resources developing materials to explain or contextualize their metrics for the audit committee (*e.g.*, presentations and decision aids).

Furthermore, investors and audit committees may incur costs in monitoring the final metrics and learning to extract decision-making information from them. Investors may incur costs incorporating the final metrics into their investment decisions or exercising oversight over issuers and audit committees. Audit committees may incur costs to review the final metrics in support of their auditor oversight responsibilities.

There may also be costs associated with interpreting certain final metrics in relation to final metrics across other firms and engagements. For example, partner and manager involvement on an engagement may be more informative when considered in the context of the firm's overall partner and manager involvement or other firms' partner and manager involvement metrics. Moreover, investors and audit committees may spend time researching the state of the market for assurance services to provide more context to the final metrics.⁴⁰³

Auditors may also incur costs to monitor how their final metrics compare to those of their competitors. GNPs, in particular, could deploy significant resources in this way. NAFs may have less ability to fully evaluate the information contained in the final

⁴⁰² See below for additional discussion of attention diversion of audit committees.

⁴⁰³ For example, some literature suggests that the implications of staff turnover are better understood in the context of accounting labor supply. See Khavis and Szerwo, *Audit-Employee Turnover, Audit Quality, and the Auditor-Client Relationship* 2.

metrics and choose instead to retain outside experts to provide such research. Firms may also use the final engagement-level metrics to inform their acceptance and continuance policies (e.g., by considering industry experience).

Referring to academic research on information processing costs, one commenter incorrectly stated that the Board had not considered the costs incurred understanding the proposed metrics.⁴⁰⁴ The commenter also said there would be costs associated with misunderstanding the metrics. The Board discussed such costs in the proposal and again below.

b. Revising Audit Approaches

Armed with the new information discussed above, audit committees may question their auditor's audit approach. This may prompt auditors to make changes to their audit approaches. For example, an audit committee may come to the belief that the audit partners have too many other duties and may express this concern to the auditor. This may prompt auditors to adjust how they are staffing the audit. Similarly, audit firms could incur costs making those changes. Some of these costs may be greater than others. For example, reducing excessive turnover and workloads, to the extent they exist, could require a significant investment in resources.

As discussed above, the final rules may lead audit firms to compete on the final metrics. This could lead some firms to update their audit approaches, provide additional training, or increase their specialization. For example, auditors may increase training in industry-specific areas or hire additional individuals with specialized knowledge. As another example, to the extent issuer preferences show an increased demand for auditors with lower workloads, firms may increase staffing. Such an increase in human-capital investment will likely increase labor and overhead costs for audit firms. Auditors may also increase the quality review of their work to reduce the likelihood of restatements or enhance their audit procedures to compete on the basis of higher-quality audit services.

c. Switching Auditors

As discussed above, the final rules could result in increased auditor switching as investors and audit committees compare and evaluate current and alternative auditors. Should

audit committees ultimately choose to change auditors, there may be switching costs, both to the issuer and the auditor. For example, an auditor's work may be less efficient or less effective in the first years of auditing a new issuer as the auditor works to build an understanding of the issuer's business and financial reporting risks. There would likely be a transitory period of increased auditor switching, after which auditor switching would stabilize as the audit market reaches a new equilibrium.

iii. Other Indirect Costs

Economic theory suggests that auditors may pass on to issuers costs incurred as a result of the final rules in the form of higher audit fees.⁴⁰⁵ In addition, the degree to which increases in variable costs, such as certain firm compliance costs, are expected to be passed on will vary based on how widespread the costs are across competitors. Increases in variable costs that impact all sellers in an imperfectly competitive market are more likely to be passed on than cost increases that impact only a subset of sellers.⁴⁰⁶ If compliance costs have a greater impact on a subset of firms, such as smaller firms, those firms may be less inclined to pass on the incremental costs in order to stay competitive with larger firms. Accelerated filers and large accelerated filers may be disproportionately impacted by a cost passthrough because (i) auditors that do not audit accelerated filers or large accelerated filers would be out of scope and (ii) accelerated filer and large accelerated filer engagements would require additional data collection efforts.

Evidence from the PCAOB's PIR of AS 3101 suggests that there was no statistically significant increase in audit fees for the audits of large accelerated filers but a statistically significant 3.0% increase for the audits of non-large accelerated filers.⁴⁰⁷ Financial statement preparers and audit committees interviewed during the PCAOB's investor outreach efforts indicated that there were minimal or immaterial

costs.⁴⁰⁸ One academic study found a small, statistically insignificant audit fee increases as a result of PCAOB Rule 3211.⁴⁰⁹ Another study found that audit fees increased by a statistically significant 7.9 percentage points.⁴¹⁰

One commenter noted that the proposal failed to consider impacts on entities that are neither issuers nor broker dealers but are required or may be required under SEC rules to use a PCAOB-registered and inspected firm. The Board notes that the commenter provided just two examples of such SEC rules. One rule was recently vacated and the other is a proposal.⁴¹¹ The Board acknowledges that, to the extent any such entities are required under SEC rules to obtain an audit from a PCAOB-registered firm, they could be indirectly impacted by the final rules if their auditor is both (i) subject to the final requirements and either (ii) chooses to pass on to these entities any part of the costs associated with the final rules or (iii) exits the market as a result of final rules.⁴¹² Any passthrough of cost will likely be limited by the fact that the engagement-level reporting requirements will not apply to the audits of these entities and most of the firm-level metrics will not require information from their audits. This means that the final rules should have little or no effect on the cost of their audits. Furthermore, the Board notes that any costs to such entities could be offset by benefits. For example, stakeholders in the audit of these entities may use the final metrics to inform their decision-making.

⁴⁰⁸ See Gurbutt, et al., *Staff White Paper: Second Stakeholder Outreach on the Initial Implementation of CAM Requirements* 21.

⁴⁰⁹ See Cunningham, et al., *What's in a Name?* 141 and 156 (finding no statistically significant increase in fees following the implementation of AS 3211, Form AP, in 2017).

⁴¹⁰ See, e.g., John and Liu, *Disclosure of an Audit Engagement Partner's Name*.

⁴¹¹ See *SEC Final Rules on Private Fund Advisers: Documentation of Registered Investment Advisers Compliance Reviews*, SEC Rel. No. IA-6383 (Aug. 23, 2023). See also *SEC Proposed Rule on Safeguarding Advisory Client Assets*, SEC Rel. IA-6384 (Mar. 9, 2023).

⁴¹² SEC rules require the use of PCAOB-registered or PCAOB-registered and inspected audit firms by entities other than issuers and registered broker-dealers, including certain investment advisers, pooled investment vehicles, security-based swap data repositories, and clearing agencies. See, e.g., 17 CFR 275.206(4)-2 (custody of funds or securities of clients by investment advisers); 17 CFR 240.13n-11 (chief compliance officer of security-based swap data repository; compliance reports and financial reports); 17 CFR 240.17ad-22 (standards and clearing agencies); 17 CFR 240.15c3-1g (conditions for ultimate holding companies of certain brokers and dealers, Appendix G to 17 CFR 240.15c3-1); and 17 CFR 240.18a-1 (net capital requirements for security-based swap dealers for which there is not a prudential regulator).

⁴⁰⁴ See, e.g., Charles M.C. Lee and Qinlin Zhong, *Shall We Talk? The Role of Interactive Investor Platforms in Corporate Communication*, 74 *Journal of Accounting and Economics* 101524 (2022).

⁴⁰⁵ Economic theory suggests that fixed costs are less likely to be passed on. Only changes to variable costs are generally expected to impact sellers' pricing decisions. See, e.g., Mankiw, *Principles of Economics* 284 and 307 (showing that the profit-maximizing price is a function of marginal cost rather than fixed costs).

⁴⁰⁶ See, e.g., Erich Muehlegger and Richard L. Sweeney, *Pass-Through of Own and Rival Cost Shocks: Evidence from the U.S. Fracking Boom*, 104 *Review of Economics & Statistics* 1361 (2022).

⁴⁰⁷ See Gurbutt and Shih, *Econometric Analysis on the Initial Implementation of CAM Requirements*; and Fluharty-Jaidee, et al., *Staff White Paper: Second Econometric Analysis on the Initial Implementation of CAM Requirements*.

3. Unintended Consequences

In addition to the benefits and costs discussed above, the final rules could have unintended consequences. The following discussion describes potential unintended consequences the Board considered and, where applicable, any mitigating or countervailing factors.

i. Auditors May Exit the Market for Accelerated Filers and Large Accelerated Filers Due to Increased Competition and Costs

The final rules may lead auditors to compete on the final metrics. The Board believes this new competitive dynamic will be beneficial.⁴¹³ However, firms that are less able to compete on the final metrics could lose market share or be forced to lower their audit fees, resulting in strains on their profitability. Profitability could also be negatively impacted by the costs of the final rules. In some cases, these auditors may exit the public audit market for accelerated filer and large accelerated filer audits. This could reduce the number of potential auditors some accelerated filers or large accelerated filers may consider thereby reducing competition. One commenter noted that (i) the Big 4 firms already audit over 88% of the large accelerated filers and (ii) research shows that the population of firms with less than 100 clients has decreased by over 50% in recent years.⁴¹⁴

Many commenters said that the proposal could lead smaller firms to exit the market for accelerated filer or large accelerated filer audits and increase concentration. One commenter said that the proposed reporting requirements would be particularly onerous on non-U.S. firms that carry out only one or a small number of relevant PCAOB engagements. One commenter suggested that smaller firms may exit the public company audit market as a result of the proposed requirements, in conjunction with other standards recently issued and proposed by the PCAOB, and this could negatively impact smaller public companies that are seeking a smaller audit firm. The commenter referred to a

working paper on smaller firm exits to support their view. However, the cited paper finds the opposite result, namely that changes in PCAOB regulations play little if any role in a firm's decision to deregister.⁴¹⁵ One commenter noted that smaller firm exit could also reduce the benefits associated with firms competing on the proposed metrics. One mid-sized firm said that smaller firms would have fewer issuers to spread their fixed costs over. The same commenter said the proposal would put considerable strain on firms that provide audit services to the 40% of issuers that represent the remaining, at most, 2% of capital markets. The commenter did not indicate how they believe these issuers would be impacted by the proposal.

One commenter who represents CPAs said that the costs of the proposal could disproportionately impact smaller firms which could lead to the exit of some of the smaller firms. The commenter provided additional comments based on the results of a survey of small and mid-sized firms administered by the commenter. The commenter's survey was distributed to the 500 largest CPA firms in the United States. Eighty-eight firms responded. The respondent firms' revenues range from less than \$10 million to greater than \$500 million. The commenter provided the survey questions. All respondents that perform U.S. public company audits reported that the proposal would require a very heavy or substantial effort and would strain resources, driven in part by economies of scale. The Board notes that this data point is based on 36 survey participants, some of whom do not perform audits of accelerated filers or large accelerated filers and therefore would not be subject to the final requirements. The survey reports that 23% of respondents (approximately eight or nine respondents) would definitely or strongly consider exiting the public company audit market entirely.⁴¹⁶ However, the survey provides no information that would help the Board assess the significance of these firms to the overall audit market or whether they even audit accelerated filers or large accelerated filers, and therefore would be impacted by the

final requirements. The survey also reports that another 25% of respondents (9 respondents) that perform U.S. public company audits would eliminate or manage their client base of accelerated filers. However, in addition to the lack of information that would help the Board assess the significance of these firms to the overall audit market, the relevance of this result is obscured by the conflation of "elimination" and "management" of accelerated filers. Finally, the commenter provided little detail on how the survey was performed (e.g., how the proposal was described to the survey participants).

The potential negative consequences of firm exit could be mitigated by several factors. First, exit may be limited primarily to the smaller firms among those that would be impacted by the final rules, since smaller firms may be disproportionately impacted by the fixed costs of complying with the final rules. Reduced competition will thus tend to impact smaller accelerated filers rather than larger large accelerated filers, which typically require larger auditors. Second, there is little reason to expect exit from the market for non-accelerated filer audits. In fact, competition may increase in the non-accelerated filer issuer audit market to the extent firms exiting the accelerated filer and large accelerated filer issuer markets redeploy capacity to the non-accelerated filer issuer audit market. Finally, firms that remain profitable in the accelerated filer and large accelerated filer issuer audit markets could expand their market share, perhaps by acquiring additional capacity from exiting firms.

One commenter provided research suggesting that firms that exited the market following the Sarbanes-Oxley Act were not of lower quality than firms that remained.⁴¹⁷ The Board believes the commenter implied that issuers or broker-dealers may not necessarily obtain a higher quality audit after switching to a new auditor that has remained in the market. The study acknowledged that prior research using other audit quality proxies finds the opposite result, namely, that exiting firms indeed have lower audit quality.⁴¹⁸ Firm size is a widely accepted proxy for audit quality.⁴¹⁹ The

⁴¹³ See above for a discussion on the benefits linked to competition.

⁴¹⁴ See Xiaohong Liu and Dan A. Simunic, *Profit Sharing in an Auditing Oligopoly*, 80 *The Accounting Review* 677 (2005); Mark L. DeFond and Clive S. Lennox, *The Effect of SOX on Small Auditor Exits and Audit Quality*, 52 *Journal of Accounting and Economics* 21 (2011); Vincent Rylan, *The Big Four Continue to Dominate Auditing: Weekly Stat*, CFO Magazine, (June 29, 2022) available at <https://www.cfo.com/news/the-big-four-continue-to-dominate-auditing-weekly-stat/>; Brant Christensen, Kecia Williams Smith, Dechun Wang, and Devin Williams, *The Audit Quality Effects of Small Audit Firm Mergers in the United States*, 42 *Auditing: A Journal of Practice & Theory* 75 (2023).

⁴¹⁵ See Michael Ettredge, Juan Mao, and Mary S. Stone, *Small Audit Firm De-Registrations From the PCAOB-Regulated Audit Market: Strategic Considerations and Consequences*.

⁴¹⁶ Citing the result of the survey provided by this commenter, another commenter said that nearly 75% of respondents would consider eliminating their public company audit process as a result of the proposal. However, this is not what the survey found. Rather, the survey found that 50% of respondents would at least consider getting out of the public company market.

⁴¹⁷ See Neil L. Fargher, Alicia Jiang, and Yangxin Yu, *Further Evidence on the Effect of Regulation on the Exit of Small Auditors from the Audit Market and Resulting Audit Quality*, 37 *Auditing: A Journal of Practice & Theory* 95 (2018).

⁴¹⁸ See DeFond and Lennox, *The Effect of SOX on Small Auditor Exits and Audit Quality*.

⁴¹⁹ See DeFond and Zhang, *A Review of Archival Auditing Research*. Though firm size is widely accepted as a proxy for audit quality, it is not a

Board's oversight activities indicate that noncompliance with auditing standards is higher among smaller firms.⁴²⁰ Therefore, to the extent smaller firms tend to exit rather than larger firms, as commenters contended, then audit quality could improve on average as issuers switch to larger firms. The Board recognizes there is currently some debate on the extent to which the large-firm audit quality effect is driven by correlated issuer characteristics rather than auditor effects.⁴²¹ The Board believes compliance with auditing standards is less sensitive to issuer characteristics than other audit quality proxies (e.g., absolute discretionary accruals). After assessing the available evidence, the Board believes it is likely that the firms that any issuers or broker-dealers would switch to would likely not provide lower quality audits.

Two commenters said that the final rules would disproportionately impact smaller firms, leading them to increase their audit fees. Several commenters suggested that regulatory burdens incentivize companies to go or remain private. Referring to the SEC Office of the Advocate for Small Business Capital Formation Fiscal Year 2023 annual report as support ("SEC Small Business Advocate Annual Report"), one commenter highlighted that: (i) in 2022, the number of exchange-listed IPOs dropped to its lowest point since 2009; (ii) small exchange-listed companies accounted for the vast majority of the decline; and (iii) smaller companies are disproportionately impacted by regulatory costs because a large portion of regulatory costs are fixed.⁴²² The Board agrees that the final rules could disproportionately impact the smaller in-scope firms. However, smaller issuers—those that the commenter contended are most sensitive to regulatory burden and at greatest risk of

eschewing the capital markets—would be minimally impacted by the final rules for several reasons. First, firms that do not audit accelerated filers or large accelerated filers (that is, all but approximately 207 firms) would be out of scope and therefore there would be no effect on audit fees for their non-accelerated filer issuers. Second, to the extent in-scope firms choose to pass through all or part of the cost of the final rules, they would be less likely to do so for their non-accelerated filer issuers because their audits will not be subject to the engagement-level reporting requirements. Third, the Board does not believe issuers will incur any significant fixed costs, which the commenter asserted disproportionately impact smaller companies. Therefore, any disincentive among smaller companies to participate in capital markets arising from increased audit fees would likely be minimal. Among accelerated filer and large accelerated filer issuers, the Board notes that audit fees, on average, comprise roughly 0.15% to 0.2% of issuer revenue and any increase in audit fees attributable to the final rules would be a fraction of this.⁴²³ Therefore, any disincentive among larger companies to participate in capital markets arising from increased audit fees would also likely be minimal. Fourth, while the SEC Small Business Advocate Annual Report demonstrates that smaller exchange-listed companies accounted for the vast majority of the decline in exchange-listed companies, the report also cites a paper that concludes regulatory cost itself is unlikely to explain the full magnitude of IPO decline in the United States over the past two decades.⁴²⁴ Indeed, PCAOB staff analysis finds that accounting fees typically comprise roughly 4.5% of the costs of an initial public offering (0.3% of the proceeds).⁴²⁵ With respect to the

recurring costs of remaining a public company, one market research report indicates that accounting fees comprise 32% of the costs.⁴²⁶ Any incremental costs associated with IPOs or remaining a public company attributable to the final rules would be a fraction of these costs.

In connection with their concerns regarding potential disproportionate costs to smaller firms, one commenter said the PCAOB should evaluate and identify the characteristics of investors in smaller companies and determine if the needs of investors in those companies are the same as the potential needs of investors in large companies. The Board notes that one recent working paper finds that institutional ownership is, on average, lower for smaller companies.⁴²⁷ Since institutional investors may be more likely to use the metrics, these data suggest that investors in smaller public companies may, on average, be less likely to use the metrics. However, the Board believes that investors in smaller companies could still benefit from the metrics because: (i) retail investors could benefit from the improved accessibility and comparability of information about firms and their engagements; and (ii) institutional ownership in smaller companies, though less than larger companies, is not trivial (41.6% for the lowest quintile of companies by market capitalization).⁴²⁸ Furthermore, as the Board discussed below, financial reporting quality may be relatively more important for smaller companies. Finally, the Board notes that the final rules require engagement-level reporting only for accelerated filers and large accelerated filers and firm-level reporting only for firms that audit at least one accelerated filer or large accelerated filer. This should help mitigate any concern that investors in smaller companies do not have a need for the final metrics.

notes that the accounting fee share of proceeds is decreasing in deal proceeds. PCAOB staff calculated the accounting fee share of IPO costs as the ratio of all accounting fees to all IPO costs across all deals in the Board's sample. The PCAOB staff's analysis assumes IPO costs are equal to the sum of accounting, legal, and investment bank underwriting fees. The PwC market research report indicates that there are other IPO cost categories, but they are relatively small.

⁴²⁶ See PwC, *Considering an IPO?*

⁴²⁷ See Jonathan Lewellen and Katharina Lewellen, *The Ownership Structure of U.S. Corporations*, SSRN Electronic Journal (2022), at Table 3. The Board notes that SSRN does not peer review its submissions.

⁴²⁸ *Id.*

perfect predictor of audit quality. Some large firms may provide low quality audits and some small firms may provide high quality audits.

⁴²⁰ See, e.g., *Spotlight Staff Update on 2023 Inspection Activities* (Aug. 2024), available at <https://pcaobus.org/resources/staff-publications> and PCAOB Rel. No. 2024-005 at Figure 1.

⁴²¹ See Alastair Lawrence, Miguel Minutti-Meza, and Ping Zhang, *Can Big 4 Versus non-Big 4 Differences in Audit-Quality Proxies be Attributed to Client Characteristics?*, 86 *The Accounting Review* 259 (2011); Mark DeFond, David H. Erkens, and Jieying Zhang, *Do Client Characteristics Really Drive the Big N Audit Quality Effect? New Evidence from Propensity Score Matching*, 63 *Management Science* 3628 (2017).

⁴²² See U.S. Securities and Exchange Commission, Office of the Advocate for Small Business Capital Formation, *Annual Report Fiscal Year 2023* citing an earlier working paper version of Michael Ewens, Kairong Xiao, and Ting Xu, *Regulatory Costs of Being Public: Evidence from Bunching Estimation*, 153 *Journal of Financial Economics* 103775 (2024).

⁴²³ See Ideagen Audit Analytics, *20-Year Review of Audit Fee Trends 2003–2022*, (July 2023) at 16.

⁴²⁴ See Ewens, et al., *Regulatory Costs of Being Public* (explaining that non-regulatory factors—such as decline in business dynamism, shifting investment to intangibles, abundant private equity financing, changing economies of scale and scope, and changing acquisition behavior—are likely to play a more important role than regulatory cost in the decline of IPOs).

⁴²⁵ PCAOB staff obtained data on accounting fees and legal fees from Audit Analytics and investment bank underwriting fees from a PwC market research report. See PwC, *Considering an IPO? First, Understand the Costs*, available at <https://www.pwc.com/us/en/services/consulting/deals/library/cost-of-an-ipo.html> and Audit Analytics, *2018–2019 IPO Accounting and Legal Fees*, (Feb. 20, 2020). PCAOB staff calculated deal proceeds by multiplying the quantity of shares issued by their price at issue. PCAOB staff calculated the accounting fee share of proceeds as the proceeds-weighted average accounting fee share of proceeds across all deals in the Board's sample. The Board

ii. Some Auditors May Strategically Manage Their Issuer Portfolios

As discussed above, auditors that do not audit accelerated filers or large accelerated filers will not be subject to the final reporting requirements. Some auditors may strategically seek to audit only non-accelerated filers to avoid disclosure of the final metrics, either to avoid costs of complying or out of concern that disclosing the metrics could potentially damage their reputation.⁴²⁹ As a result, there could be a separating equilibrium in the audit market.⁴³⁰ One commenter agreed that smaller firms may manage their engagement portfolios to avoid being required to comply with the final requirements and one commenter provided the results of a survey indicating that some firms may eliminate or manage their client base of accelerated filers. Assuming that lower-quality auditors are more likely to avoid accelerated filers in this way, this would increase the supply of low-quality auditors to non-accelerated filers and decrease the supply of low-quality auditors to accelerated filers. For non-accelerated filers, this supply shock could increase competition among audit firms for non-accelerated filers and therefore reduce audit fees. However, because the supply shock would consist primarily of low-quality auditors, it could also lower audit quality for non-accelerated filers. For accelerated filers, the opposite would occur. Reduced availability of auditors would tend to reduce competition and therefore increase audit fees. However, because higher-quality auditors would remain, audit quality could increase. As a result of these complex and countervailing influences, it is unclear whether this unintended consequence would have a net positive or negative impact.

Auditors may also attempt to manage their metrics via their acceptance and

continuance policies. Reputation risks to the auditor associated with individual engagements may start to play a greater role in firms' acceptance and continuance decisions as well as their audit fee decisions because new engagements could impact firms' metrics and hence their ability to charge audit fees on existing engagements. For example, a prospective issuer engagement may present a higher risk of restatement. Since restatements will be reported on Form FM in a uniform and comparable way, auditors may require a fee premium for this issuer to offset any negative effect the issuer may have on the auditor's metrics. In extreme cases, risky issuers may not be able to find an auditor, may be forced to hire a low-quality auditor, or may be forced to delist.

To avoid such adverse outcomes, issuers may take steps to reduce their contribution to audit risk.⁴³¹ For example, issuers may become more forthcoming with information or opt for less aggressive financial reporting. This potential unintended consequence would also be mitigated to the extent capital markets recognize that an auditor's metrics are driven in part by the riskiness of the auditor's client portfolio rather than the quality of the auditor.⁴³² Indeed, auditors will have the opportunity to explain important context like this in the qualitative portion of the final disclosures.

iii. Investors, Audit Committees, and Auditors May Misinterpret or Misuse the Final Metrics

As discussed above, it is possible that the final metrics may not relate to audit quality in a straightforward way. As a result, there is a risk that investors, audit committees, and auditors could misinterpret, or misuse, the final metrics (e.g., by assuming they are strongly related to audit quality). The outcomes of misinterpretation or misuse are difficult to predict because they would be rooted in complex aspects of human psychology.⁴³³ As one example, investors and audit committees could rely too heavily on a final metric (e.g., when making capital allocation or auditor selection decisions). In response

to market forces or requests from audit committees, some auditors could make changes to their audit approach that could negatively impact audit quality. As another example, auditors could mistakenly attribute other firms' competitiveness to one final metric and adjust their audit approach in a way that compromises the quality of their services.

Many commenters agreed that there would be a risk that users, particularly investors, of the proposed metrics would misunderstand the metrics. One commenter said the proposed metrics would be misinterpreted. The commenter suggested that this may undermine the benefits of the proposal. Another commenter said that users would not understand some of the proposed metrics. One commenter suggested that this potential unintended consequence should be acknowledged as a cost because the negative effects would be borne by investors. One commenter performed a survey of audit committee chairs.⁴³⁴ Some survey participants agreed that the proposed metrics could lead to inappropriate conclusions. One commenter said that the risk of misusing the proposed metrics by audit committees could lead to increased director insurance costs. One commenter said investors or other stakeholders could pressure audit committees to only appoint auditors whose metrics fall within a certain range without considering other aspects of the firm's audit quality. One commenter said that overemphasis on metrics by auditors could commoditize the profession and reduce incentives to innovate the audit approach.

The Board agrees that, as with other financial information made available to investors, some investors may misunderstand the metrics and make poor decisions as a result. If so, this could negatively impact them. However, the Board believes that the final metrics will likely, on average, improve investors' decision-making and therefore have chosen to acknowledge improved decision-making as a benefit. The Board acknowledges that some misunderstanding could also reduce the magnitude of this benefit. However, the Board believes this unintended consequence, should it arise, would diminish over time as investors learn how to effectively integrate the final metrics into their decision-making. Though the Board believes the metrics will spur competition on quality by allowing firms to credibly differentiate themselves, the Board recognizes it is possible that some firms would

⁴²⁹ Commenters on proposed QC 1000 said that mid-sized firms would deliberately manage their portfolios to avoid the proposed scalability requirements that apply only to annually inspected firms. Therefore, the Board believes that such portfolio management is possible in relation to the final rules. Among the firms that will be impacted by the final rules, approximately 41%, 19%, and 11% had one, two, or three accelerated filer or large accelerated filer engagements during the 12-month period ending September 30, 2023.

⁴³⁰ Contextually, a separating equilibrium occurs when incentives cause a division in the market in which one type of auditor gravitates towards a particular market segment. See, e.g., Michael Rothschild and Joseph E. Stiglitz, *Equilibrium in Competitive Insurance Markets: An Essay on the Economics of Imperfect Information*, 90 *The Quarterly Journal of Economics* 629, 634 (1976) (specifically, the discussion marked *I.6 Imperfect Information: Equilibrium with Two Classes of Customers*).

⁴³¹ Economic theory suggests that private negotiations yield efficient allocations of decision rights. See Ronald Coase, *The Problem of Social Cost*, 3 *The Journal of Law and Economics* 1 (1960).

⁴³² Some research finds that poor financial reporting outcomes are attributable to client risk rather than poor audit quality. See Minutti-Meza, *Does Auditor Industry Specialization Improve Audit Quality?*

⁴³³ See, e.g., Loewenstein et al., *Disclosure* (discussing how "[p]sychological factors severely complicate the standard arguments for the efficacy of disclosure requirements.").

⁴³⁴ See above for more discussion on the survey.

coordinate their metrics. The Board discussed this potential unintended consequence below.

Commenters described specific ways the proposed metrics could create confusion. Several commenters said that some of the definitions in the proposal conflict with other definitions in PCAOB standards or otherwise lead to confusion. The Board does not believe there are any direct conflicts with other PCAOB standards. The Board has attempted to draft the definitions in the proposal as precisely and clearly as possible. Commenters suggest that the ICB industry classification used for the industry specialization metric could create confusion because the SEC uses the SIC system. One commenter agreed that it is appropriate to use the ICB for industry classification. The Board acknowledges that a taxonomy based on the ICB industry classification could create some confusion. However, crosswalks between the ICB system, the SIC system, and other industry classification systems are available. The Board describes in the proposal and above why the Board based the taxonomy on the ICB system rather than the SIC system. One commenter said that the proposed restatements metrics would be difficult to compare with public data because Audit Analytics categorizes restatements in a different way than the proposed requirements would require firms to categorize them. The commenter did not explain what Audit Analytics categorization they are referring to. The Board does not believe a user of the final metrics who is also familiar with Audit Analytics data and wishes to reconcile the two data sources would find it challenging to do so.

One commenter pointed to research that suggests more information, including via mandatory financial disclosure, is not always better for investors.⁴³⁵ Several other commenters

also suggested information overload would be a concern. The Board appreciates this research and agrees that there will be opportunity costs to understand the final metrics. However, the Board notes that investors will be free to disregard the final metrics if they find the costs to understand them exceed their benefits. Furthermore, the Board agrees with one commenter who said that technology would obviate this potential unintended consequence.

Several commenters were concerned that certain calculations would drive misinterpretation. These comments are discussed above. For example, one commenter suggested that users may misinterpret the proposed headcount changes as turnover. One commenter said industry experience of audit personnel could be misleading because it does not distinguish between recent and past experience. The Board also acknowledges that some investors may misunderstand this metric and make poor decisions as a result that will negatively impact them. However, the Board believes that the final requirements would, on average, improve investors' decision-making and therefore have chosen to acknowledge improved decision-making as a benefit. In the final rules, the Board has modified some of the scoping and calculations, which likely will reduce some of the potential for confusion.

iv. Auditors May Attempt To Manipulate the Final Metrics

As discussed above, the final rules could lead firms to compete on the final metrics. As a result, the Board believes some firms will take steps to provide higher service quality. However, it is possible that some firms could instead manipulate the final metrics in ways that create an impression of providing higher service quality when in fact this

is not the case. For example, firms could increase training hours by introducing training that has little benefit for audit quality, or could adjust staffing in ways that they believe make their metrics look better but that do not improve audit quality. This unintended consequence will be analogous, in some regards, to earnings management by financial statement preparers.⁴³⁶

Some final metrics will be more difficult to manage than others. To the extent firms are able to manage a final metric, management of the final metric will tend to reduce the overall informativeness of the corresponding disclosures and could lead investors and audit committees to doubt the quality of other firms' disclosures as well. This could degrade existing empirical relationships between the final metrics and audit quality that have been found in the literature discussed above.⁴³⁷

Referring to academic research, one commenter agreed that firms could try to manipulate their metrics, comparing this incentive to the incentive companies face to manage earnings.⁴³⁸ The same commenter agreed that firms' attempts to manipulate could be detrimental to audit quality. The commenter also suggested that oversight by the PCAOB would create an incentive to intentionally manage the

⁴³⁶ See, e.g., Graham, John R., Campbell R. Harvey, and Shiva Rajgopal, *The Economic Implications of Corporate Financial Reporting*, 40 *Journal of Accounting and Economics* 3, 4 (discussing how "[a] surprising 78% of the Board's sample admits to sacrificing long-term value to smooth earnings"). Firms could manipulate the final metrics in ways analogous to both accounting-based earnings management and real earnings management. For example, they might adjust training hours or reported experience levels without substantive improvements (analogous to accounting-based earnings management) or make operational changes, such as altering client portfolios, solely to improve metrics (analogous to real earnings management).

⁴³⁷ Such behavior can be ascribed to Goodhart's law in that, once the final metrics are disclosed and market participants act upon them, previously defined relationships change, and the final metrics may become unrelated to the alignments previously discussed.

⁴³⁸ See Mark S. Beasley, Joseph V. Carcello, Dana R. Hermanson, *Fraudulent Financial Reporting: 1987–1997: An Analysis of US Public Companies*, Committee of Sponsoring Organizations of the Treadway Commission (1999); Mark S. Beasley, Dana R. Hermanson, Joseph V. Carcello, and Terry L. Neal, *Fraudulent Financial Reporting: 1998–2007: An Analysis of US Public Companies*, Committee of Sponsoring Organizations of the Treadway Commission (2010); Ilia D. Dichev, John R. Graham, Campbell R. Harvey, and Shiva Rajgopal, *Earnings Quality: Evidence from the Field*, 56 *Journal of Accounting and Economics* 1 (2013); Graham et al., *The Economic Implications*; and Jaime L. Grandstaff and Lori L. Solsma, *Financial Statement Fraud: A Review from the Era Surrounding the Financial Crisis*, 13 *Journal of Forensic and Investigative Accounting* 421 (2021).

⁴³⁵ See Allen G. Schick, Lawrence A. Gordon, and Susan Haka, *Information Overload: A Temporal Approach*, 15 *Accounting, Organizations and Society* 199 (1990); Eugene G. Chewing Jr and Adrian M. Harrell, *The Effect of Information Load on Decision Makers' Cue Utilization Levels and Decision Quality in a Financial Distress Decision Task*, 15 *Accounting, Organizations and Society* 527 (1990); Herbert A. Simon, *Rationality in Psychology and Economics*, 59 *Journal of Business* S209 (1986); J. Richard Dietrich, Steven J. Kachelmeier, Don N. Kleinmuntz, and Thomas J. Linsmeier, *Market Efficiency, Bounded Rationality, and Supplemental Business Reporting Disclosures*, 39 *Journal of Accounting Research* 243 (2001); Morris H. Stocks and Adrian Harrell, *The Impact of an Increase in Accounting Information Level on the Judgment Quality of Individuals and Groups*, 20 *Accounting, Organizations and Society* 685 (1995); Knechel, et al., *Audit Quality*; DeFond and Zhang, *A Review of Archival Auditing Research*; Joost Impink, Mari Paananen, and Annelies Renders, *Regulation-Induced Disclosures: Evidence of*

Information Overload?, 58 *Abacus* 432 (2022); Cornelius J. Casey Jr., *Variation in Accounting Information Load: The Effect on Loan Officers' Predictions of Bankruptcy*, 55 *Accounting Review* 36 (1980); Brad Tuttle and F. Greg Burton, *The Effects of a Modest Incentive on Information Overload in an Investment Analysis Task*, 24 *Accounting, Organizations and Society* 673 (1999); Michael B. Clement, *Analyst Forecast Accuracy: Do Ability, Resources, and Portfolio Complexity Matter?*, 27 *Journal of Accounting and Economics* 285 (1999); Brian P. Miller, *The Effects of Reporting Complexity on Small and Large Investor Trading*, 85 *The Accounting Review* 2107 (2010); Christine A. Botosan and Mary S. Harris, *Motivations for a Change in Disclosure Frequency and its Consequences: An Examination of Voluntary Quarterly Segment Disclosures*, 38 *Journal of Accounting Research* 329 (2000); and John L. Campbell, Hsinchun Chen, Dan S. Dhaliwal, Hsin-min Lu, and Logan B. Steele, *The Information Content of Mandatory Risk Factor Disclosures in Corporate Filings*, 19 *Review of Accounting Studies* 396 (2014).

metrics. While the Board agrees that PCAOB oversight could put pressure on firms, the Board notes that, in addition to informing the Board's selection of firms, engagements, and focus areas for review, PCAOB oversight will be focused on compliance with the final rules which should deter any efforts to manipulate the final metrics. The commenter also suggested that disclosure of the metrics may change behavior in ways that are harmful to audit quality. The commenter provided specific examples of how this could occur for the proposed internal monitoring and compensation metrics. The Board is not adopting these metrics. As discussed above, the Board believes behavioral responses to the metrics by firms would be largely beneficial.

Referring to the evolution of CAMs, one commenter suggested that the metrics could become boilerplate. The Board agrees that the narrative discussion could potentially become boilerplate to some extent. However, as the quantitative calculations are not boilerplate, the Board believes the corresponding optional narrative discussion will be less susceptible to boilerplate.

In general, QC 1000 should help mitigate this potential unintended consequence by explicitly subjecting the final metrics to firms' QC systems. Furthermore, firms' QC systems and their disclosure practices, including compliance with the final rules, will be subject to PCAOB oversight.⁴³⁹ The required documentation will also constrain firms' ability to manipulate their metrics because it will allow PCAOB inspections staff to understand how the metrics were calculated.⁴⁴⁰ The Board believes the PCAOB will exercise appropriate discretion in its oversight. Furthermore, firms will also be constrained by the fact that manipulations may be detected by comparison to peers. Indeed, academic research on earnings management suggests that peer comparisons help stakeholders identify deceptive reporting practices, serving as a disincentive to manage earnings.⁴⁴¹ Finally, the final rules require that any optional narrative disclosure should be concise and focused on the reported metrics, with a view to facilitating the

reader's understanding of the metrics. The Board believes this should help mitigate the risk that auditors would use the optional narrative disclosure to manipulate users' perceptions of the metrics.

Firms may attempt to improve their metrics by shifting resources from non-accelerated filer engagements to accelerated filer or large accelerated filer engagements. This could reduce the quality of service on non-accelerated filer engagements. However, subject to the audit labor market concerns discussed below, firms would be able to mitigate this effect by acquiring additional resources for their accelerated filer and large accelerated filer engagements (e.g., hiring additional staff). Furthermore, the effect would be mitigated by the fact that non-accelerated filers have additional time to file their financial statements with the SEC compared to accelerated and large accelerated filers. Firms may also attempt to improve certain metrics by shifting resources within an engagement. For example, a firm may attempt to reduce its workload metrics by shifting manager audit hours to more junior staff. However, attempting to do so may not be beneficial to firms because it could at the same time degrade other metrics. For example, if a firm attempted to reduce its workload metrics by shifting manager audit hours to more junior staff, it would at the same time reduce their partner and manager involvement metrics. Furthermore, the firm's QC system operates over all its PCAOB engagements and should limit the extent to which resources can be diverted.

v. Audit Labor Market Impacts

The final metrics could lead to increased public scrutiny of firms and their engagements. This could negatively impact the issuer audit labor market if individual auditors believe the increased public scrutiny negatively impacts their personal reputations or otherwise increases their work pressures. Some commenters agreed that the proposed requirements could make the audit market less attractive to auditors.⁴⁴² One commenter suggested

that the potential negative impact on individual auditors could lead individual auditors to exit the labor market which would in turn drive up labor costs to audit firms. The commenter suggested this could potentially increase labor costs for issuers as well to the extent audit firms seek to hire individuals from issuers that have relevant industry experience.⁴⁴³ Based on discussions with audit committee chairs, one commenter said that survey participants were "very concerned" that the proposal could render the profession less appealing to new auditors.⁴⁴⁴

Referring to a survey commissioned by the commenter's parent organization, one commenter reported that, among undergraduate accounting majors not pursuing or undecided on CPA licensure, 94% cite the regulatory environment as either a major or partial reason.⁴⁴⁵ The Board notes that this statistic ignores the facts that: (i) undergraduate accounting majors not pursuing or undecided on CPA licensure reflect just 20% of the participants in the survey (80% of the participants in the survey are planning to pursue a CPA); and (ii) respondents to the question were allowed to select multiple reasons. Indeed, 10 out of 14 of the possible reasons were cited by over 85% of the respondents as a major or partial reason for not pursuing or being undecided on CPA licensure. Thus, the findings suggest, at most, that the regulatory environment is one of many factors discouraging some students from pursuing a CPA. Furthermore, one commenter suggested that, rather than the regulatory environment, the 150-credit hour requirement to apply for a CPA license and work-life balance concerns are the key reasons college graduates are discouraged from becoming auditors. The commenter said that the challenges finding qualified auditors are especially pronounced for smaller firms.

The Board notes that individual auditors could also use the final metrics to gain insights into workplace conditions and find firms more suitable

⁴³⁹ Some research finds that SEC oversight reduces some forms of earnings management. See, e.g., Lauren M. Cunningham, Bret A. Johnson, E. Scott Johnson, and Ling Lei Liscic, *The Switch-Up: An Examination of Changes in Earnings Management after Receiving SEC Comment Letters*, 37 Contemporary Accounting Research 917 (2020).

⁴⁴⁰ See above for a discussion on the final documentation requirements.

⁴⁴¹ See, e.g., Dichev, et al., *Earnings Quality: Evidence from the Field*.

⁴⁴² One commenter referred to a market research report that finds downwards trends in the number of accounting graduates and the number of hires but upwards trends in the number of new CPA candidates. See Association of International Certified Professional Accountants, *2021 Trends: A Report on Accounting Education, the CPA Exam and Public Accounting Firms' Hiring of Recent Graduates*, (2022). The commenter also referred to an article discussing the perceived talent shortage, firms' efforts to address it, and commentators views. See Stephen Foley, *Accountants Work to Shed 'Boring' Tag Amid Hiring Crisis*, Financial Times (Oct 3. 2022).

⁴⁴³ In the context of this comment, the commenter referred to an academic article where discussion on dysfunctional manager and investor behavior in response to differential audit quality could be found. The Board is unsure how such a discussion or the article itself are relevant to the topic at hand. See Patrick J. Hurley, Brian W. Mayhew, Kara M. Obermire, and Amy C. Tegeler, *The Impact of Risk and the Potential for Loss on Managers' Demand for Audit Quality*, 38 Contemporary Accounting Research 2795 (2021).

⁴⁴⁴ See above for more discussion on the survey.

⁴⁴⁵ See Center for Audit Quality, *Increasing Diversity in the Accounting Profession Pipeline: Challenges and Opportunities*, (July 2023).

to their skillsets and workplace preferences. This may lead firms to compete for labor by improving their workplace conditions. One commenter explained that the industry's challenges attracting staff may be driven in part by the commodification of the audit, which the proposal would help reduce by providing transparency around the quality of the audit. The same commenter agreed that the proposed metrics could empower potential employees when shopping for a potential audit firm employer.

One commenter said that the firm-level retention metric could present firms with a competitive disadvantage for recruiting talent if high turnover rates are provided without sufficient context (e.g., changes in firm structure, shifting industry concentrations, eliminating personnel due to performance or ethical concerns, independence issues resulting in the departure of firm personnel, etc.). The retention metric may result in additional recruiting costs to some firms. However, the Board believes that auditors will benefit from using this metric to shop for employers. Firms would also be able to provide additional context through the optional narrative disclosure.

Some commenters said that the costs would be increased by the need to implement multiple significant PCAOB standards at the same time.⁴⁴⁶ Relatedly, one commenter said that the costs would be exacerbated by the proposed timing for Form FM, which would fall during the same time as PCAOB inspections and the QC system evaluation. The Board acknowledges that the issuer audit labor market may be relatively inelastic in the short run, particularly so given recent concerns about inadequate labor supply, which could increase the cost implications of the additional staffing that would be required to implement multiple PCAOB standards in relatively quick succession. This could exacerbate the costs of the final rules or lead to improper implementation.

vi. Litigation and Reputations Risks

Two commenters suggested that the proposed rules would exacerbate audit firm litigation and reputation risks. One commenter performed a survey of audit committee chairs.⁴⁴⁷ Some participants in the survey agreed that the proposal could create litigation and reputation risk. Regarding litigation risk, the Board

agrees that plaintiffs' lawyers may use the final metrics to support their cases. Supporting this view, some research finds that PCAOB inspection reports with audit deficiencies are positively associated with the number of lawsuits subsequently filed against the inspected auditor.⁴⁴⁸ However, while the Board acknowledges this could encourage some frivolous lawsuits, the Board believes it would largely contribute positively to audit quality as it would create an incentive for firms to produce high quality audits. Indeed, the Board believes it would help drive more competition on audit quality, a criterion that the same commenter urged the Board to consider. Regarding reputation risk, the Board believes that the impact on reputation is central to the intended impacts of the final rules.

vii. Tacit Collusion

Some commenters suggested that the proposal could have anticompetitive effects. One commenter analogized the proposed metrics to (i) the sharing of compensation practices in the poultry-processing market; (ii) information sharing in healthcare; and (iii) information benchmarking in the meat-packing market. Relatedly, several commenters suggested that the proposed metrics could reveal competitively sensitive information. The Board acknowledges commenters' concerns about potential anticompetitive effects which, if obtained, could reduce quality or increase price. For example, in addition to the largely procompetitive effects discussed in the proposal and above, there could be an offsetting negative effect on competition to the extent the final metrics facilitate tacit collusion among audit firms.⁴⁴⁹ Some research suggests that public disclosure can negatively impact competition. For example, one academic study suggests that U.S. public companies opportunistically use their public financial disclosures to tacitly collude.⁴⁵⁰ Another academic study

shows that public disclosure of transaction-level pricing data by Danish antitrust authorities led to an increase in prices for ready-mix concrete.⁴⁵¹ Similarly, another academic study shows that legacy airlines use their earnings calls to coordinate capacity reductions on competitive routes.⁴⁵² However, this research may not necessarily apply to the audit market. For example, the relationship between competition and audit quality is ambiguous with some research suggesting that increased competition is negatively associated with audit quality.⁴⁵³ As a result, to the extent the final rules facilitate tacit collusion, this effect could either raise or lower audit quality in certain segments of the market. By contrast, the Board believes the procompetitive effects of the final rules described above will be significant due to the dearth of information currently available to audit committees and investors. Furthermore, competition in the audit market is limited by the presence of switching costs, reducing firms' incentives to tacitly collude.

viii. Opportunistic Behavior by Preparers

One commenter suggested that financial statement preparers may be able to use the proposed metrics to evade their auditor's scrutiny.⁴⁵⁴ The Board agrees that preparers might be able to exploit some of the final metrics in this way (e.g., partner and manager involvement) but for others it will be

detailed information in their financial disclosure about their customers, contracts, and products. This new information potentially benefits peers by helping to tacitly coordinate actions in product markets.").

⁴⁵¹ See Svend Albæk, Peter Møllgaard, and Per B. Overgaard, *Government-Assisted Oligopoly Coordination? A Concrete Case*, 45 *The Journal of Industrial Economics* 429 (1997).

⁴⁵² See Gaurab Aryal, Federico Ciliberto, and Benjamin T. Leyden, *Coordinated Capacity Reductions and Public Communication in the Airline Industry*, 89 *Review of Economic Studies* 3055 (2022).

⁴⁵³ See, e.g., Yue Pan, Nemit Shroff, and Pengdong Zhang, *The Dark Side of Audit Market Competition*, 75 *Journal of Accounting and Economics* 101520 (2023) (explaining how greater competition can, on one hand, "foster audit process innovation" and, on the other hand, lead auditors to "focus on appeasing clients by reducing professional skepticism and allowing clients excessive financial reporting discretion") and cites therein. The Board notes that controlling for all potential drivers of audit quality and fees is challenging. As such, the results obtained by these studies may be affected by omitted variable biases.

⁴⁵⁴ The commenter referred to two articles about "the fraud diamond," a heuristic that approximates the conditions under which fraud may occur. See David T. Wolfe and Dana R. Hermanson, *The Fraud Diamond: A 20-year Retrospective*, *The CPA Journal* 16 (2024) and David T. Wolfe and Dana R. Hermanson, *The Fraud Diamond: Considering the Four Elements of Fraud*, *The CPA Journal* 38 (2004).

⁴⁴⁶ Commenters' concerns about the cumulative impacts of multiple PCAOB standards and rules with overlapping implementation periods including potential benefits are discussed above.

⁴⁴⁷ See above for more discussion on the survey.

⁴⁴⁸ See, e.g., Brant E. Christensen, Nathan G. Lundstrom, and Nathan J. Newton, *Does the Disclosure of PCAOB Inspection Findings Increase Audit Firms' Litigation Exposure?*, 96 *The Accounting Review* 191, (2021).

⁴⁴⁹ Tacit collusion refers to coordinated action among competitors intended to raise profits that does not involve explicit communication. See, e.g., Rama Cont and Wei Xiong, *Dynamics of Market Making Algorithms in Dealer Markets: Learning and Tacit Collusion*, 34 *Mathematical Finance* 467 (2024). The concentrated nature of the audit market may enhance the possibility of tacit collusion.

⁴⁵⁰ See Thomas Bourveau, Guoman She, and Alminas Zaldokas, *Corporate Disclosure as a Tacit Coordination Mechanism: Evidence from Cartel Enforcement Regulations*, 58 *Journal of Accounting Research* 295 (2020) (finding that "after a rise in cartel enforcement, U.S. firms start sharing more

less likely (e.g., restatements). The effect will be limited by the fact that preparers already have some familiarity with their auditor's processes. For example, auditors are required to provide a variety of audit committee communications which preparers may be privy to.⁴⁵⁵ Indeed, one key premise of the economic analysis is that auditors and preparers have better information than investors and audit committees do about the audit process and outcomes.

The same commenter suggested that financial statement preparers could use the proposed metrics to shop for a lower quality auditor. The Board agrees this will be possible but, as the Board discussed in the proposal and above, the Board believes that the public nature of the metrics will tend to suppress this. More specifically, the broader financial statement user community will be able to observe how auditor switches correlate with company characteristics and firms' metrics and judge the company's financial reporting quality, and the audit committee's execution of its auditor oversight responsibilities, accordingly. However, the Board acknowledges that, because companies will be better informed about the nuances of the audit process, the final metrics could make it easier for some companies to shop for a lower quality auditor without significant negative consequence.

ix. Attention Diversion

One commenter suggested that the proposed rules could reduce audit quality by diverting engagement teams' attention away from other activities. Another commenter suggested that this risk would be greater for smaller audit firms and provided numerous research articles suggesting that auditors are overburdened.⁴⁵⁶ The same commenter suggested that the PCAOB should, as a starting point, consider whether the proposed metrics place burdens on engagement teams that would distract them from audit quality. Several commenters suggested that the time required to prepare the proposed metrics would necessarily divert attention from audit work and thus reduce audit quality. One commenter suggested that strains on the audit labor market could increase audit deficiencies. Another commenter suggested that the proposed metrics

would distract audit committees from their oversight responsibilities.

The Board acknowledges that the final rules could require some engagement team members' time. For example, some engagement team members may be tasked with gathering information from the engagement team and forwarding it to the national office (e.g., experience, hours). Subject to the audit labor market concerns discussed above, firms will be able to relieve some of this burden by hiring additional staff or by centralizing or automating certain aspects of the implementation effort.⁴⁵⁷ The Board also rejects the premise that the presence of any engagement-level burden should automatically disqualify a metric. Such a criterion ignores the metric's associated benefits. Regarding audit committees, as discussed in the proposal and again above, the Board recognizes that audit committees could incur costs understanding the metrics. One type of cost could be the opportunity cost associated with spending less time on other oversight activities to the extent audit committees choose to do so. However, the Board notes that audit committees could minimize this opportunity cost by spending more total time overseeing the audit. Also, the various ways the final metrics would improve audit committee oversight is discussed above.

x. Non-PCAOB Registered Firms

One commenter suggested the proposed metrics could have cost implications for non-PCAOB registered firms. The Board agrees. For example, non-substantial role firms may incur costs providing information to firms subject to the final requirements. However, they already should be providing total audit hours for Form AP reporting purposes. Also, any incremental cost will be limited to the Partner and Manager Involvement and Allocation of Audit Hours final metrics.

xi. Unintentional Engagement-Level Disclosures

Several commenters said that, for firms that issue a limited number of audit reports for accelerated filers and large accelerated filers, many of the firm-level metrics could result in the disclosure of engagement-level information.⁴⁵⁸ One commenter cited the internal monitoring metric as an example. However, for most of the final firm-level metrics, corresponding

engagement-level information will also be publicly available independent of the public disclosure of the firm-level metric itself. The Board does not believe that the possibility of making engagement-level inferences from the final metrics that are required only at the firm level would impose costs on firms. Furthermore, the Board notes that the proposed internal monitoring metric is not among the final metrics.

Alternatives Considered

The development of the final rules involved considering alternative approaches to address the problems described above. This section explains: (i) why standard setting is preferable to other policy-making approaches, such as providing interpretive guidance or enhancing inspection or enforcement efforts, (ii) other standard-setting approaches that were considered, and (iii) key policy choices made in determining the details of the final standard-setting approach.

1. Why Standard Setting Is Preferable to Another Approach

As potential alternatives to standard setting, the Board considered whether interpretive guidance or greater focus on inspections or enforcement could better address the need described above. One commenter suggested the PCAOB could communicate to stakeholders observations related to audit quality based on the outcomes of its inspections and its enforcement actions, noting that the PCAOB has unique access to information and people and has the context to understand quality risks. The Board determined that, despite long-term requests by investors to disclose additional metrics, similar initiatives by other standard setters, and the apparent ability of firms to voluntarily disclose metrics, the fact that most auditors have not voluntarily acted to disclose effective metrics on a uniform basis at the firm and engagement level points to the need for regulatory intervention through standard setting.

Increased focus on inspections or enforcement is unlikely to incentivize audit firms to voluntarily disclose the final metrics. Likewise, interpretive guidance is unlikely to address audit firms' lack of incentives to voluntarily disclose the final metrics. While some firms may choose to disclose information similar to the final metrics voluntarily, the lack of a standardized approach would result in inconsistencies that prevent effective comparisons across the profession. Similarly, standardization without mandated disclosure is not sufficient to ensure the availability of comparable

⁴⁵⁵ See AS 1301.

⁴⁵⁶ See Kimberly D. Westermann, Jeffrey Cohen, and Greg Trompeter, *PCAOB Inspections: Public Accounting Firms on "Trial"*, 36 *Contemporary Accounting Research* 694 (2019); Persellin, et al., *Audit Perceptions*.

⁴⁵⁷ See above.

⁴⁵⁸ Among the firms that will be impacted by the final rules, approximately 41%, 19%, and 11% had a total of one, two, or three accelerated filer or large accelerated filer engagements, respectively, during the 12-month period ending September 30, 2023.

public reporting of metrics.⁴⁵⁹ As discussed above, required mandatory and uniform reporting will help audit committees make more informed decisions in retaining and monitoring auditors, and investors make more informed decisions when ratifying auditor appointments, electing board members (including those who serve on the audit committee), and allocating capital. The Board believes that standard setting addresses the problem in the most effective way.

One commenter said that the commenter's experienced implementing the Form AP amendments proved to them that calculations require a robust implementation support infrastructure. Several commenters suggested that guidance regarding the final amendments would reduce the complexity and challenges associated with calculating the metrics. One commenter said that guidance would be essential to balance the costs of compiling and reporting the information and this guidance should extend to the evaluation of differences that may arise in the disclosure of participating firms on Form AP. Another commenter said that the Board should clarify whether the current Form AP Staff Guidance regarding amendments would extend to all metrics as well as how routine corrections and re-allocations of time entries and other matters affecting metrics reported on Forms FM are expected to be handled.⁴⁶⁰ The Board acknowledges that guidance could help reduce the complexity and costs associated with implementing the final rule. As discussed above, the Board will monitor for issues and consider updates to implementation guidance as appropriate.

2. Other Standard-Setting Alternatives Considered

During the development of the final rules, the Board considered two alternatives to the current disclosure rules: (i) publishing benchmarks on the final firm and engagement metrics, and (ii) requiring additional audit committee communications.

First, the Board considered collecting the final metrics from the firms on a non-public basis and then publicly publishing benchmarks based on those metrics. This approach would benefit the Board in the ways described above. However, the Board believes that investors and audit committees will be able to effectively interpret the final

metrics in their disaggregated form when made directly available to the public. Therefore, public transparency will be important. Moreover, as discussed above, benchmarking could even have potentially harmful unintended consequences.

Second, the Board considered requiring auditors to communicate the final metrics just to their audit committees and not to members of the public. One commenter suggested that the benefits of the proposal would be the same under this alternative. However, such a policy choice would not directly benefit the decision-making capabilities of investors and other stakeholders in the public securities markets. Moreover, it would limit audit committees' ability to compare the final metrics across different firms and engagements and thus impair their decision-making (e.g., auditor selection) by depriving audit committees of the broader context needed to make informed choices.

One commenter suggested that the Board adopt a specific plan to conduct a PIR. The Board has an established PIR program under which staff of the Office of Economic and Risk Analysis (OERA) conduct an analysis of the overall effect of new rules or amendments on key stakeholders in the audit process, including whether the rules or amendments are accomplishing their intended purpose and identifying benefits, costs, and unintended consequences flowing from them. In determining whether to conduct a PIR, PCAOB staff will consider the nature of the rules or amendments (including the magnitude of and degree of uncertainty around the key economic effects), the feasibility (including research design and data availability), and the potential utility to the Board (including whether the PIR might identify a demand for additional guidance or amendments). Under the established PIR program, the Board expects that OERA staff will consider whether, based on these factors, a PIR might be warranted and, if so, OERA staff will recommend that the Board determine to conduct one. In other words, this deliberation should take place without any commitment. By contrast, a commitment to conduct a PIR can be counter-productive if OERA staff would otherwise determine that a PIR is not warranted or feasible. In addition, a well-designed PIR is one that is itself based on some early experience (even if only anecdotal), and thus, the Board believes having a specific plan of PIR at this stage may be premature. The Board believes having an established PIR program tends to increase the net expected value of the PCAOB's adopted

rules and standards. Should future PIRs lead to potential modification or revision of these rules and standards, this dynamic approach to assessing the impact of the PCAOB's rules and standards compares favorably with a static analysis of costs and benefits.⁴⁶¹

Several commenters that opposed aspects of the rulemaking suggested that the Board should pilot test the final rules. One commenter suggested pilot testing would allow the PCAOB to obtain feedback on the nature, timing, extent, and usefulness of reporting. The commenter referred to a pilot program planned by another regulator. Another commenter said that pilot testing should occur prior to adoption of the final rules to confirm whether the final metrics can be consistently collected and reported by firms and whether they would be useful to stakeholders. One commenter suggested that pilot testing would provide the Board with data to quantitatively estimate the economic impacts of the proposal.

The Board agrees that a pilot study could theoretically provide useful preliminary compliance data.⁴⁶² For example, a pilot study could provide insights on the impacts of the proposed requirements or alternative approaches. However, the Board believes several concerns would challenge the utility of such an approach. First, participation in a pilot study would likely be voluntary, potentially with a limited group of participating firms, which may not be representative of all firms. This could skew results and would limit the applicability of any findings to a broader set of firms. Second, the impacts of the metrics on competition and capital allocation in the markets are complex and may require analysis across a broad set of firms and market conditions. A pilot study would not capture this diversity or the broader impacts on competition and capital markets, potentially leading to

⁴⁶¹ See, e.g., Yoon-Ho Alex Lee, *An Options-Approach to Agency Rulemaking*, 65 *Administrative Law Review* 881 (2013); see also OMB Circular A-4 at 69 ("The assessment of real options allows you to monetize the benefits and costs of changing the timing of regulatory effects in light of the value of information about potential states of the world that can be learned over time."). In short, when a policy is reversible (as in the case with the final rules) and the policy outcome is probabilistically determined between an efficient outcome and an inefficient outcome, a case can be made for moving forward with the policy even when the net expected benefit under the static cost-benefit analysis is negative because of the option of repealing the policy in the future in case the inefficient outcome is realized.

⁴⁶² See Admin. Conf. of the U.S., Recommendation 2017-6, *Learning from Regulatory Experience*, 82 FR 61738 (Dec. 29, 2017), available at <https://www.acus.gov/recommendation/learning-regulatory-experience>.

⁴⁵⁹ See, e.g., Patrick Bolton and Marcin T. Kacperczyk, *Firm Commitments*, SSRN Electronic Journal (2024). The Board notes that SSRN does not peer review its submissions.

⁴⁶⁰ See PCAOB Staff Guidance on Form AP.

incomplete or misleading conclusions. Third, the full implications of the metrics on competition and capital formation might take several years to manifest, as stakeholders would need time to adapt to and fully integrate the final metrics effectively. This delay could postpone the benefits expected from the final rules, especially if the pilot study would need to run for multiple years to capture the necessary information and trends. Finally, as stakeholders (including firms, issuers, investors, and others) adapt to the new metrics, their behaviors and the resulting data might change over time, potentially rendering early data from a pilot study less relevant or useful for long-term policy decisions. For these reasons, a pilot study, while potentially yielding some initial insights, would have limited overall benefits in this case. It would not offer a comprehensive view of the metrics' implications across the entire spectrum of firms and could unduly delay the transparency objectives of the rulemaking. The Board notes that the proposal considered the work of other regulators, including the planned pilot study referred to by one of the commenters.⁴⁶³ That discussion appears above in substantially the same form.

3. Key Policy Choices

During the development of the final rules, the Board considered different approaches to addressing key policy issues.

i. Definitions and Calculations of the Final Metrics

The Board considered a variety of alternative definitions and calculations of the final metrics, including several suggested by commenters and those initially proposed. *See* above for a discussion of these considerations.

ii. Applicability

The conditions under which firms will be required to comply with the final engagement and firm-level reporting requirements are described above. During the development of the final rules, the Board considered limiting applicability to firms that met a certain aggregate issuer market capitalization threshold. The Board also considered broadening the set of applicable filer statuses.

The Board noted that compared to the proposed approach, an aggregate issuer market capitalization threshold could help focus the final rules on auditors

and engagements that investors are most interested in.

Commenters during the development of QC 1000 indicated that a threshold based on market capitalization was perhaps preferable to a threshold based on issuer count because many auditors audit numerous small engagements with limited operations (e.g., special purpose acquisition companies). However, such an approach could present challenges. As one commenter noted, thresholds based on market capitalization may be subject to the volatility of the market. During a review of the potential methodologies, the Board found that such a threshold would also be sensitive to auditor switches, particularly if the switching issuer had a large market capitalization. Some auditors near the threshold could move back and forth between applicability and non-applicability. The Board also considered alternative transition thresholds for market capitalizations, or a phase-out period in attempting to mitigate the negative aspects of these options. Ultimately, the Board has determined that there was limited benefit to using these alternative applicability thresholds.⁴⁶⁴

The Board also considered broadening the applicability of the final firm-level metrics to include all firms that audited at least one operating company. This would increase the number of firms impacted by the final firm-level metrics by approximately 160 and increase the number of engagements and market capitalization covered by the final firm-level metrics by approximately 16% and less than 0.1%, respectively.⁴⁶⁵ Expanding the scope to cover all firms that audit at least one operating company could reduce any potential negative stigma associated with smaller firms for not being required to disclose the final metrics. However, these firms tend to be smaller and hence may lack the infrastructure and economies of scale to efficiently implement the final rules. Furthermore, the gain of information to audit committees and investors would be limited by the fact that these firms tend to have smaller or fewer issuers on average. It also could create confusion to have different thresholds for the final firm-level reporting requirements and the final engagement-level reporting requirements. Finally, firms that will not be subject to the final firm-level

disclosure requirements could voluntarily disclose the final metrics.

The Board also considered broadening applicability of the final engagement-level metrics to include non-accelerated filer issuers. While the importance of audit quality may be more significant for smaller issuers,⁴⁶⁶ PCAOB staff analysis finds that non-accelerated filers are proportionately smaller—at the median—than accelerated filer and large accelerated filers in terms of audit fees and total assets.⁴⁶⁷ One survey of audit committees of smaller public companies found that five of the 28 metrics discussed in the Concept Release were evaluated by more than half of the audit committees surveyed.⁴⁶⁸ PCAOB staff also reviewed the relative trading volume associated with these filer status groups and found that non-accelerated filer issuers have higher average daily (unit) volume than accelerated filer issuers but lower average daily (unit) volume than large accelerated filers.⁴⁶⁹

⁴⁶⁶ See below for additional discussion.

⁴⁶⁷ Based on 2023 fiscal year data sourced through Audit Analytics' Web service, non-accelerated filers paid median audit fees of \$320,000 and had median total assets of \$66 million. Comparatively, accelerated filers paid median fees of \$1,300,000 and had median total assets of \$765 million. Large accelerated filers paid median fees of \$3,010,000 and had median total assets of \$5,509 million. Only issuers filing pursuant to the Exchange Act (a.k.a. Act-34 filers) were retained in the sample.

⁴⁶⁸ See, e.g., Harris and Williams, *Audit Quality Indicators*.

⁴⁶⁹ Sourcing data across the University of Chicago's Center for Research and Security Prices (CRSP) Annual flat-file to collect annual volume, along with Compustat, and Audit Analytics, the Board identified, using filer statuses reported by Audit Analytics, that the median average daily volume (the quantity of share units traded per year divided by 252 trading days) for large accelerated filers in 2020 and 2021 was roughly 867,000 units per day and 762,000 units per day, respectively. For accelerated filers, the average daily volume was 183,000 and 168,000 respectively. For non-accelerated filers, the average daily volume was 528,000 and 756,000, units per day, for 2020 and 2021. One reason for this is possibly the relatively lower share price non-accelerated filer issuers have, resulting in a higher unit-volume (per trade lot) compared to accelerated filer issuers. The Board maintains share codes 10, 11 (i.e., U.S. issuers), and 12 (foreign issuers trading on U.S. exchanges) in the Board's analysis, and remove American depository receipts, shares of beneficial interest, real estate investment trusts, SBIs, REITs, and closed-end funds. Additionally, the Board retains only Exchange Act 1934 filers and volumes related to the first audit opinion filed with the SEC for a given fiscal year. Filer status, as sourced through Audit Analytics, may be an imperfect proxy of the true filer status of the entity-issuer due to errors in reporting and or collection. Furthermore, the Board retains only observations in which there is recorded to be complete volume for the entire annual period. There were 1,350 large accelerated filer issuers in the Board's sample in 2020, and 1,358 in 2021. For accelerated filers there are 337 and 329 issuers in each 2020 and 2021 that remain in the Board's sample, and for non-accelerated filers there are 121 and 134 issuers, respectively. The Board attempts to remove issuers additionally classified as Small

⁴⁶³ See FRC, *Consultation Document: Firm-level Audit Quality Indicators*.

⁴⁶⁴ See above for a discussion of phased implementation.

⁴⁶⁵ See above for discussion on data sourcing. The Board excludes firms that filed an audit opinion during the sample period but whose registration has since been withdrawn, revoked, or is pending withdrawal.

Neither issuer group, in general, was “thinly traded,” as measured by average daily volume.⁴⁷⁰ Given these differences, the costs of the final rules associated with non-accelerated filer issuer engagements could be proportionally higher than the costs associated with accelerated filer or large accelerated filer issuers engagements. As a result, the Board has restricted the applicability of the final engagement-level metrics to accelerated filer and large accelerated filer engagements. Firms that will not be subject to the final engagement-level disclosure requirements could voluntarily disclose the final metrics.

The Board also considered whether the scope for engagement-level reporting should be extended to non-operating company issuers whose financial statements are required under SEC rules to be audited under PCAOB standards (*i.e.*, investment companies, employee stock plans) and broker-dealers. While these additional disclosures could be informative, commenters indicated that the proposed metrics would be less beneficial for these entities compared to accelerated filers and large accelerated filers.⁴⁷¹ The Board agrees, and therefore are not requiring disclosure of these metrics for issuers that are not accelerated filers or large accelerated filers under the final rules.

iii. Reporting

Several commenters suggested that the Board could alleviate the burden on smaller firms by raising the reporting threshold. One commenter said that firms that issue audit reports for 100 issuers or more are the firms whose metrics investor-related groups would be most interested in reviewing, given these firms audit a significant majority of the market capitalization of issuers reporting on Form 10-K, Form 20-F, and Form 40-F. Another commenter suggested a threshold of 25 or more large accelerated filer and accelerated filer issuer engagements combined. The same commenter said that metrics of firms with few engagements could be unduly influenced by a single

engagement. By contrast, one commenter suggested making the reporting requirements apply to all PCAOB-registered firms. As discussed in the proposal and above, the Board recognizes the potential disproportionate cost to smaller firms and have considered this in the Board’s decision to scope in all firms that audit at least one accelerated filer or large accelerated filer.⁴⁷² The Board believes audit committees and investors will benefit from information related to the audits of accelerated filers and large accelerated filers and the firms that perform these audits. Two commenters agreed that the proposed scope captures situations where investment and proxy voting decisions would be most likely to benefit from additional information about the audit and the auditor.

As discussed above, firms subject to the final engagement-level reporting requirements will be required to disclose the final engagement-level metrics in Form AP, to be filed by the 35th day (for most audits) after the date the audit report is first included in a document filed with the SEC. Firms subject to the final firm-level reporting requirements will also be required to disclose the final firm-level metrics in the newly created Form FM.

As contemplated above, the Board considered requiring that the final metrics be included in the audit report in addition to on Form AP and Form FM. Under this alternative, costs incurred by investors and audit committees when gathering information to inform their decision-making could be further reduced. Investors would be able to look down from the auditor’s opinion and immediately review the final metrics. Moreover, this would serve as a prime opportunity for the firm to communicate critical context through narratives that might be beneficial for investors in reviewing the final metrics.

The disclosure of the proposed metrics in the audit report would not impair the usefulness of their disclosure through Form AP and Form FM. Indeed, such additional reporting may enhance their usefulness by setting the proposed metrics within the full context of the issuer’s financial reporting. However, some investors and audit committees may prefer to obtain the information from Form AP and Form FM, or from other sources (*e.g.*, a subscription-based data provider), and hence may find little use for metrics in the audit report. There likely would not be appreciable costs associated with this additional reporting, outside of costs to include the

report in the filing of the audit opinion. Firms will already be required to collate information and compute the final metrics for reporting to the PCAOB in their relevant forms.

Many commenters disagreed with this approach citing that, for example, it could potentially detract from the clarity and purpose of the report, could result in delays in the issuance of audit reports, and amendments to the audit report for corrections to metrics could create unnecessary burden for issuers and confusion for investors. One commenter suggested the proposed metrics would be better placed in audit committee reports in company proxy statements. One commenter said that the proposed metrics: (i) would create a misimpression that the metrics are indicative of audit quality; (ii) would be impractical to implement in a timely manner; and (iii) could distract auditors. However, several commenters, primarily investor-related groups, were supportive of reporting in the auditor’s report. One commenter said that the proposed engagement performance metrics are as important to understanding audit risks as CAMs and thus merit inclusion in the auditor’s report. The Board is persuaded by commenter feedback that this alternative would be burdensome and could diminish the value of the auditor’s report. Therefore, the Board is not adopting this alternative at this time.

The Board also considered requiring firms subject to the final firm-level reporting requirements to disclose the firm-level metrics on Form 2 rather than Form FM. This approach could benefit some investors or audit committees because the firm-level metrics would appear in the context of other firm-level information. It could also reduce compliance costs for firms because firms are already familiar with Form 2. However, information reported on Form 2 is currently not downloadable as a structured data set. This could reduce the accessibility of the final firm-level metrics to investors and audit committees. Furthermore, the final firm-level metrics use terms that have different meanings in the context of Form 2 (*e.g.*, “Partners”). This could lead some investors or audit committees to misunderstand the final firm-level metrics or lead some firms to mistakenly provide incorrect information in Form 2. Finally, the due date of Form 2, June 30, falls after the general timing of shareholder meanings and therefore would generally arrive too late to inform shareholders’ voting decisions. This alternative and commenter feedback are discussed above. Overall, the Board is persuaded by commenters’ concerns

Reporting Companies from the reported statistics. Lastly, not all issuers, particularly smaller issuers, trade on exchanges observed in the CRSP data set—as a result the Board’s sample may be biased towards larger issuers, or issuers that trade on exchanges observed by CRSP.

⁴⁷⁰ For a discussion of “thinly traded” markets, see *Division of Trading and Markets: Background Paper on the Market Structure for Thinly Traded Securities*, Roundtable on Market Structure for Thinly Traded Securities (April 23, 2018), available at <https://www.sec.gov/rules/policy/2019/thinly-traded-securities-tm-background-paper.pdf>.

⁴⁷¹ See above for additional discussion on commenters’ views on this alternative.

⁴⁷² See above for additional discussion on this policy alternative.

that this alternative would place burdens on firms during their busy season. Therefore, the Board is not adopting this alternative at this time.

While several commenters suggested that the Board limit the disclosure of engagement-level metrics to audit committees—citing audit committees' ability to engage in dialogue with the auditor and to understand the context of the metrics—the Board believes public disclosure will provide the benefits associated with investor decision-making as well as some benefits related to improved audit committee decision-making. For example, public disclosure allows investors to make more informed decisions regarding board directors (including audit committee members), and auditor ratification. It also will provide audit committees with comparative information about other firms and engagements which may improve their auditor selection and oversight decisions. Furthermore, the Board believes that the public nature of the metrics will be a key driver of the pro-competitive effects in the auditing market, by making it easier to compare an existing auditor's metrics to the same metrics for other potential auditors. The Board therefore believes public transparency will foster a competitive auditing environment and support robust governance by providing all stakeholders, not just audit committees, with information to make well-informed decisions.

Two commenters suggested the Board refer to work performed by the SEC when it considered requiring additional audit committee disclosures.⁴⁷³ One commenter suggested that the 2015 SEC Concept Release could inform the Board's consideration of requiring auditors to disclose engagement-level metrics to audit committees only. Staff reviewed the 2015 Concept Release. The 2015 SEC Concept Release sought comment on, among other things, whether the reporting of additional information by the audit committee with respect to its oversight of the audit may provide useful information to investors as they evaluate the audit committee's performance in connection with, among other things, their vote for or against directors who are members of the audit committee, the ratification of the auditor, or their investment decisions. The Board believes this request for comment is consistent with the questions included in the Board's proposal, the feedback from investor-

related groups the Board received, and the Board's view that investors need more information to: (i) evaluate the performance of auditors and audit committees; (ii) vote for or against directors who are members of the audit committee; (iii) ratify the appointment of the auditor; and (iv) invest capital. The 2015 SEC Concept Release also stated that to the extent the audit committee uses indicators or metrics in assessing the quality of the auditor and the audit, disclosure about the use and consideration of such metrics may provide useful information about the audit committee's process for assessing the auditor. The Board notes that the relevance of the 2015 SEC Concept Release is limited by the fact that it: (i) contemplates public disclosures by audit committees rather than by auditors; and (ii) aims to solicit feedback rather than provide a cost-benefit analysis. As explained previously, the Board believes that restricting the disclosure of these metrics solely to audit committees would cause investors and other stakeholders to forgo the benefits of disclosure.

Some commenters suggested a more flexible approach to engagement-level reporting, such as voluntary disclosure. One commenter suggested that competition among auditors should be the primary source of practice enhancements as opposed to regulatory control. One commenter suggested that voluntary disclosure allows for refinements and innovation in response to the evolving auditing environment. Another commenter suggested that voluntary disclosure could facilitate a market for enhanced disclosures. Relatedly, referring academic research, one commenter said that relevant metrics could evolve over time and that many metrics could be useful.⁴⁷⁴ Also citing academic research, another commenter recommended a principles-based approach.⁴⁷⁵ The Board recognizes that a purely voluntary or

principles-based approach could foster innovation. However, for reasons discussed above the Board believes the benefits associated with a mandatory approach, with clearly articulated calculations relative to the current practice baseline of voluntary disclosure, are substantial. For example, as discussed above, the Board believes that the market does not provide sufficient incentives for auditors to disclose information akin to the metrics voluntarily. Furthermore, even under the mandatory framework the Board is adopting, firms would still have the freedom to innovate beyond the required metrics through additional voluntary disclosures.

One commenter suggested that an analysis of analogous initiatives in foreign jurisdictions would inform the PCAOB of potential alternatives to the final rules that may be less costly or present less risk of unintended consequences. One commenter suggested that the Board more carefully consider the context in which those metrics are used, emphasizing their voluntary nature. As discussed in the proposal, PCAOB staff reviewed initiatives in foreign jurisdictions and noted their generally less prescriptive approaches compared to the metrics the Board is adopting. While these international approaches may involve lower costs and possibly fewer unintended consequences, 'they are also likely to mean that metrics are less comparable and less comprehensively available, implying less-substantial benefits. The Board believes that the Board's approach, although potentially more prescriptive, is necessary to achieve the desired level of transparency and oversight in audit practices.

Two commenters representing investor groups suggested that, if the Board adopts the final rules, the PCAOB could amplify the value of the final metrics by providing tools, research, or periodic reviews of the information. The Board will consider these suggestions. However, the Board notes that, under the final rules, users will be able to analyze the data using tools of their choice. Additionally, the PCAOB plans to have programs to sponsor research which may consider the final metrics. The Board will be alert to how the metrics are utilized and their impact.

iv. Alternative Firm and Engagement Metrics Considered

The Board considered but at this time are not adopting metrics related to: (i) auditor proficiency testing; surveys of firms and audit committees; and auditor absenteeism; (ii) legal proceedings

⁴⁷⁴ See Gillian Rose Barnes and Dana R. Hermanson, *Fraud Brainstorming Sessions and Interviews in a Remote World: Initial Evidence*, 15 *Journal of Forensic and Investigative Accounting* 248 (2023); Lazarus Elad Fotoh and Johan Ingemar Lorentzon, *Audit Digitalization and its Consequences on the Audit Expectation Gap: A Critical Perspective*, 37 *Accounting Horizons* 43 (2023); Jean C. Bedard, Karla M. Johnstone, and Edward F. Smith, *Audit Quality Indicators: A Status Update on Possible Public Disclosures and Insights from Audit Practice*, 4 *Current Issues in Auditing* C12 (2010); Knechel, et al., *Audit Quality*; and Christensen et al., *Understanding Audit Quality*.

⁴⁷⁵ See Arianna S. Pinello, Ara G. Volkan, Justin Franklin, Michael Levatino, and Kimberlee Tiernan, *The PCAOB Audit Quality Indicator Framework Project: Feedback from Stakeholders*, 16 *Journal of Business & Economics Research* 1 (2019).

⁴⁷³ See *SEC Concept Release on Possible Revisions to Audit Committee Disclosures*, SEC Rel. No. 33-9862 (July 1, 2015) ("2015 SEC Concept Release").

against audit firms and firm ownership structures; (iii) engagement-level PCAOB deficiencies; (iv) access to national office or other technical resources and staff and investments in infrastructure to support audit quality; (v) auditor independence and financial reporting quality; (vi) timely issuance of internal controls weaknesses and going concern opinions and fraud or other financial reporting misconduct; (vii) audit fees, effort, and client risk; (viii) audit personnel; (ix) allocation of audit hours; and (x) internal monitoring and incentives. In the following discussion the Board briefly describes and evaluates the literature on these metrics and provides the Board's rationale for not adopting them.

a. Metrics Related to Auditor Proficiency Testing, Surveys of Firms and Audit Committees, and Auditor Absenteeism

Metrics related to proficiency testing, surveys of firms and audit committees, and auditor absenteeism would generally speak to the "Tone at the Top" or workplace culture of the audit firm. There is a lack of literature covering the economic impacts that disclosure of these metrics might engender. While some academic literature suggests strong work culture and a "Tone at the Top" is associated with audit quality,⁴⁷⁶ it is unclear how an informative metric could be constructed. Similarly, while some academic literature suggests competence is associated with audit quality, there is limited research related to proficiency testing per se and it is unclear how an informative metric on proficiency testing could be constructed.⁴⁷⁷ Finally, the Board is unaware of any literature related to auditor absenteeism. At this time, the Board is not requiring disclosure of these metrics under the final rules.

b. Metrics Related to Legal Proceedings Against Audit Firms and Firm Ownership Structures

Some academic literature suggests there may be no relationship between the quality of audit services or the auditor's provision of reasonable assurance and the likelihood that an

auditor could be sued, have a case settled, or be taken through court.⁴⁷⁸ Many cases brought against auditors fail to meet the threshold of fault required to show the auditor is liable for the damages incurred by investors. Information related to legal proceedings may also be confidential or otherwise sensitive. Furthermore, the incidence of lawsuits against auditors has declined in recent years.⁴⁷⁹ One investor survey finds that investors perceive private litigation as being unrelated to audit quality.⁴⁸⁰ Additionally, information regarding proceedings initiated by government entities against firms and certain of their personnel is already reported on PCAOB Form 3. Metrics related to firm ownership structure are being considered by the PCAOB's Firm Reporting rulemaking project. At this time, the Board is not requiring disclosure of these metrics under the final rules.

c. Metrics Related to Engagement-Level PCAOB Deficiencies

The Board's considerations regarding potential metrics related to engagement-level PCAOB deficiencies are discussed above. Several commenters suggested the Board include metrics related to deficiencies identified during PCAOB inspections. Several commenters suggested the Board require firms to report the percentage of their reviewed audits that received Part I.A deficiencies in their PCAOB inspection reports. These commenters highlighted the critical nature of Part I.A deficiencies and suggested that requiring this information to be disclosed along with the other final metrics would increase its prominence. While the Board acknowledges the significance of Part I.A deficiencies—indicating deficiencies that were of such significance that the Board believes the firm, at the time it issued its audit report, had not obtained sufficient appropriate audit evidence to support its opinion on the issuer's financial statements and/or ICFR—the Board notes that this information is already publicly available and stakeholders already utilize this information, compiling it in their analyses.

One commenter suggested that the Board consider requiring auditors to disclose which of their audits had Part I.A deficiencies included in their

PCAOB inspection reports. The commenter suggested that this disclosure would obviate need for most, if not all, of the proposed firm- and engagement-level metrics. The Board acknowledges that information on engagement deficiencies identified through PCAOB inspection could provide investors and other stakeholders with additional insight on audit quality. However, PCAOB inspection reports are typically published well after the reporting deadlines for engagement-level metrics on Form AP, making it impractical to include such inspection results in that form. The Board also disagrees that disclosure of PCAOB inspection findings would obviate the need for the metrics. The final metrics will be available for the full population of accelerated filer and large accelerated filer issuers, whereas the presence of Part I.A deficiencies are available for the much more limited sample of inspected firm engagements. Furthermore, the Board believes the final metrics would provide information on aspects of audit quality not entirely captured by Part I.A deficiencies. While academic literature suggests that engagement-level PCAOB auditing deficiencies are indicative of low audit quality, Sarbanes-Oxley already provides a robust framework for making PCAOB inspection findings and sanctions public.⁴⁸¹ At this time, the Board is not requiring the disclosure of engagement-level PCAOB auditing deficiencies under the final rules.

d. Metrics Related to Access to the National Office or Other Technical Resources and Staff and Investments in Infrastructure To Support Audit Quality

The Board's considerations regarding potential metrics related to access to technical resources is discussed above. Overall, metrics related to audit teams' access to such technical resources and staff could indicate how accessible individuals, decision aids, or technical audit-process manuals are to audit teams. For example, in larger firms, individuals in the national office may provide consultation on complex, unusual, or unfamiliar issues. One study using PCAOB data found that national office consultations are common among PCAOB-inspected engagements and that national office consultation use is associated with engagement characteristics and proxies for audit quality.⁴⁸² Smaller firms may retain

⁴⁷⁶ See, e.g., Stephen Perreault, James Wainberg, and Benjamin L. Luippold, *The Impact of Client Error-Management Climate and the Nature of the Auditor-Client Relationship on External Auditor Reporting Decisions*, 29 Behavioral Research in Accounting 37 (2017) and Donna D. Bobek, Derek W. Dalton, Brian E. Daugherty, Amy M. Hageman, Robin R. Radtke, *An Investigation of Ethical Environments of CPAs: Public Accounting versus Industry*, 29 Behavioral Research in Accounting 43 (2017).

⁴⁷⁷ See, e.g., Christensen et al., *Understanding Audit Quality*.

⁴⁷⁸ See, e.g., Colleen Honigsberg, Shivaram Rajgopal, and Suraj Srinivasan, *The Changing Landscape of Auditors' Liability*, 63 The Journal of Law and Economics 367 (2020).

⁴⁷⁹ See Honigsberg et al., *The Changing Landscape*.

⁴⁸⁰ See Christensen et al., *Understanding Audit Quality*.

⁴⁸¹ See, e.g., Aobdia et al., *Practitioner Assessments*.

⁴⁸² See, e.g., Matthew G. Sherwood, Miguel Minutti-Meza, and Aleksandra B. Zimmerman, *Auditors' National Office Consultations*, SSRN

individuals with such expertise from outside the firm. Metrics related to infrastructure that supports audit quality could provide information on resources audit teams have available to them that could support audit quality. However, due to the variety of ways firms provide technical resources and infrastructure to support audit quality, the Board believes that metrics related to these areas would likely not be informative or comparable for all firms. Furthermore, disclosures related to network relationships currently being considered as part of the PCAOB's Firm Reporting rulemaking project would provide some information to investors and audit committees regarding firms' access to technical resources. At this time, the Board is not requiring disclosure of metrics related to access to technical resources under the final rules.

The Board's considerations regarding potential metrics related to investment in audit infrastructure is discussed above. In particular, one commenter suggested that the Board consider requiring firms to report the percentage of the firm's revenues invested in technology accessible by audit teams. The Board believes the broad range of what constitutes "technology" and how it is used across different firms could lead to inconsistencies in how such a metric is calculated and reported. Overall, the Board does not believe such a metric would be informative and comparable. At this time, the Board is not requiring disclosure of metrics related to access to investment in audit infrastructure under the final rules.

e. Metrics Related to Auditor Independence and Financial Reporting Quality

Disclosures related to audit fees and non-audit fees are being considered as part of the PCAOB's Firm Reporting rulemaking project. Furthermore, the final rules already include a metric for restatements, a well-accepted proxy for financial reporting quality. Therefore, the Board does not think there is a need to expand disclosures related to this information under the final rules.

f. Metrics Related to the Timely Issuance of Internal Controls Weaknesses and Going Concern Opinions, and Fraud or Other Financial Reporting Misconduct

Academic research suggests that (i) markets react to going concern reporting and (ii) timely reporting of a going concern opinion is an indicator of audit

quality.⁴⁸³ However, there is a lack of academic research related to timely reporting of internal control weaknesses. The final rules include metrics related to restatement history, which the Board believes will provide a clearer signal of audit quality. Firms' reporting of internal control weaknesses and their inclusion of going concern explanatory paragraphs in the audit report are also publicly available already, as are indicators of auditors' timeliness (e.g., subsequent restatements or bankruptcies). Additionally, the Board is considering other standard-setting opportunities related to the reporting of fraud or other financial reporting misconduct as well as the auditor's going concern evaluation. At this time, the Board does not think there is a need to require disclosure of these metrics under the final rules.

g. Metrics Related to Audit Fees, Effort, and Client Risk

Regarding audit fees, the Board notes that engagement-level audit fees are already publicly available and firm-level audit fees may be constructed by summing engagement-level audit fees. Regarding audit effort, the Board notes that, while some academic research finds that proxies for audit effort are associated with audit quality, the level of association diminishes in certain settings when considered jointly with other information correlated with audit effort.⁴⁸⁴ Indeed, stakeholders will have access to information correlated to audit effort. For example, engagement-level audit hours, a commonly used proxy for audit effort, are highly correlated with engagement-level audit fees which are publicly available.⁴⁸⁵ Additionally, the final metrics related to Partner and Manager Involvement, Workload, Training Hours for Audit Personnel, and Allocation of Audit Hours will provide information related to audit effort. Regarding client risk, the Board has observed through the Board's oversight activities that firms classify clients as

high risk in various ways. At this time, the Board is not requiring disclosure of these metrics under the final rules.

h. Metrics Related To Audit Personnel

The Board proposed but are not adopting engagement-level metrics related to turnover (i.e., Retention and Tenure). Academic literature related to turnover generally and commenters' views on the proposed metric are discussed above. Overall, commenters generally did not support engagement-level metrics in this area. Several commenters said that mandatory partner rotation, personal issues, and strategic resource management concerns could drive the proposed engagement-level metric related to turnover. Commenters said that for these and other reasons the metrics would be especially difficult for stakeholders to interpret and would need to be considered in conjunction with other metrics. After considering these comments, and in light of the Board's original analysis, the Board is not adopting the proposed engagement-level Retention and Tenure metric under the final rules.

i. Certain Metrics Related to the Allocation of Audit Hours

The Board proposed but is not adopting several metrics related to the allocation of audit hours (i.e., Audit Hours and Risk Areas, Audit Resources—Use of Auditor's Specialists and Shared Service Centers). These proposed metrics predominantly focus on whether the audit team is being efficiently and effectively deployed. The proposed metrics were intended to improve transparency into the audit process and help investors and audit committees to review: (i) whether the auditor is effectively allocating hours in response to areas of significant risk, (ii) whether the auditor is efficiently and effectively deploying individuals with expertise to address areas that require their specialized knowledge; and (iii) whether the auditor is efficiently and effectively using SSCs. Section IV.C.1.iv.b of the proposal provides additional discussion on the potential benefits of these metrics and relevant academic literature. Comments related to the discussion of academic literature are addressed above. The Board addresses below more specific comments related to the impacts of these metrics.

Commenters' views on the proposed Audit Hours and Risk Areas metric including alternative approaches suggested are discussed above. Overall, many commenters did not support the proposed metric and said that it would be challenging to calculate. Several

⁴⁸³ See DeFond and Zhang, *A Review of Archival Auditing Research*.

⁴⁸⁴ See, e.g., Aobdia et al., *The Economics of Audit Production*, Table 3 and Table 4 (finding that audit effort is not related to various proxies for audit quality after holding other factors constant); Constantinou Caramanis and Clive Lennox, *Audit Effort and Earnings Management*, 45 *Journal of Accounting and Economics* 116 (2008) (studying Greek audit firms, finding that lower audit hours are associated with decreases in various proxies for audit quality) and Dafydd Mali and Hyoung-Joo Lim, *Can Audit Effort (Hours) Reduce a Firm's Cost of Capital? Evidence from South Korea*, 45 *Accounting Forum* 171 (2020) (finding, using data on Korean audit firms, that audit effort is negatively associated with weighted average cost of capital).

⁴⁸⁵ See, e.g., Aobdia, *Practitioner Assessments*, Table 4.

commenters said that, because risk assessment is an iterative process, high-risk areas could change over the course of the audit, leading to challenges tracking the required hours information. Several commenters also said that calculating the proposed metric would require extensive coordination among other auditors. Several commenters also said that hours charged to particular accounts may include work that is unrelated to an identified significant risk. After considering these comments, and in light of the Board's original analysis, the Board is not adopting the proposed Audit Hours and Risk Areas metric under the final rules.

Commenters' views on the proposed Audit Resources metrics including alternative approaches suggested are discussed above. Overall, commenters generally opposed these metrics. For example, one commenter said that the use of auditor's specialists would not be comparable across firms of different sizes without sufficient context. The same commenter said that smaller firms are more likely to engage outside specialists compared to larger firms with in-house specialists. One commenter said firms are already required to communicate their use of specialists to audit committees on an engagement. One commenter said that the use of specialists is highly contextual. One commenter said it would be difficult to obtain the hours information to calculate the proposed use of specialists metric. Referring to several academic articles, one commenter suggests that smaller firms and larger firms' metrics related to the use of specialists would not be comparable because smaller firms feel regulatory pressure to use specialists and typically retain outside specialists.⁴⁸⁶ One commenter said that the SSC metric would be misinterpreted as indicating that greater SSC hours indicated lower quality. After considering these comments, and in light of the Board's original analysis, the

Board is not adopting the proposed Audit Resources metrics under the final rules.

j. Metrics Related to Internal Monitoring and Incentives

The Board proposed but is not adopting metrics related to internal audit quality review (*i.e.* Audit Firms' Internal Monitoring) and incentive alignment (*i.e.*, Quality Performance Ratings and Compensation). Metrics related to internal audit quality review and incentive alignment focus on the positive and negative incentives auditors face. Unlike the final metrics related to audit personnel and allocation of audit hours, which would provide additional transparency into the inner workings and characteristics of the audit team, the disclosure of these proposed metrics would provide information related to audit outcomes and the incentives that led to those results. Section IV.C.1.iv.c of the proposal provides additional discussion on the potential benefits of these metrics and relevant academic literature. Comments related to the discussion of academic literature are addressed above. The Board addresses below more specific comments related to the impacts of these metrics.

Commenters' views on these proposed metrics including alternative approaches raised are discussed above. Two commenters agreed that the proposed metrics related to firms' internal monitoring would be useful for stakeholders. One firm reported that it provides similar firm-level information in its transparency report. However, others expressed several concerns, particularly regarding the engagement-level metrics. By way of background, survey research cited in the proposal finds that internal monitoring programs are valued by audit partners for their focus on the firm's audit methodology, their timeliness, and the quality of the feedback.⁴⁸⁷ Pointing to this research, one commenter suggested that the proposed internal monitoring metric would undermine the efficacy of audit firm internal inspection programs and audit quality. Some commenters said that the information would not be comparable due to differences in firms' monitoring programs. One commenter said that smaller firms would be disadvantaged because the results of their monitoring programs tend to be more variable. Regarding incentive alignment, some commenters supported

a metric for incentive alignment and agreed with the Board's rationale for proposing it. One commenter said that investors routinely evaluate executive compensation packages and understand that compensation may be driven by a variety of factors which could be discussed in the voluntary narrative discussion. However, other commenters said it would lack comparability, would not capture other important drivers of compensation, and would raise confidentiality concerns. After considering these comments, and in light of the Board's original analysis, the Board did not adopt these metrics under the final rules.

Special Considerations for Audits of Emerging Growth Companies

Section 104 of the Jumpstart Our Business Startups ("JOBS") Act imposes certain limitations to the application of the Board's standards to audits of Emerging Growth Companies ("EGCs"), as defined in Section 3(a)(80) of the Exchange Act. Under Section 104, the JOBS Act provides that any additional rules adopted by the Board subsequent to April 5, 2012, "shall not apply to an audit of any [EGC] unless the Commission determines that the application of such additional requirements is necessary or appropriate in the public interest, after considering the protection of investors, and whether the action would promote efficiency, competition, and capital formation."⁴⁸⁸ As a result, the final rules are subject to a separate determination by the SEC regarding their applicability to audits of EGCs.⁴⁸⁹

To inform consideration of the application of PCAOB standards and rules to audits of EGCs, the PCAOB staff publishes a white paper annually that provides general information about characteristics of EGCs. The data on EGCs outlined in the most recent white paper, released in February 2024, remains generally consistent with the data outlined in prior EGC white

⁴⁸⁶ See J. Efrim Boritz, Natalia Kochetova-Kozloski, and Linda Robinson, *Are Fraud Specialists Relatively More Effective Than Auditors at Modifying Audit Programs in the Presence of Fraud Risk?*, 90 *The Accounting Review* 881 (2015); Candice T. Hux, *Use of Specialists on Audit Engagements: A Research Synthesis and Directions for Future Research*, 39 *Journal of Accounting Literature* 23 (2017); Zimmerman, et al., *Auditor's Use; Dereck Barr-Pulliam, Stephani Mason, and Kerri Ann Sanderson, The Joint Effects of Work Content and Work Context on Valuation Specialists' Perceptions of Organizational-Professional Conflict*, SSRN Electronic Journal (2022); Aleksandra B. Zimmerman, Dereck Barr-Pulliam, Joon-Suk Lee, and Miguel Minutti-Mezza, *Auditors' Use of In-House Specialists*, 61 *Journal of Accounting Research* 1363 (2023). The Board notes that SSRN does not peer review its submissions.

⁴⁸⁷ See Richard W. Houston and Chad M. Stefaniak, *Audit Partner Perceptions of Post-Audit Review Mechanisms: An Examination of Internal Quality Reviews and PCAOB Inspections*, 27 *Accounting Horizons* 23, (2013).

⁴⁸⁸ See Pub. L. 112–106 (Apr. 5, 2012). Section 103(a)(3)(C) of Sarbanes-Oxley, as added by Section 104 of the JOBS Act. Section 104 of the JOBS Act also provides that any rules of the Board requiring (1) mandatory audit firm rotation or (2) a supplement to the auditor's report in which the auditor would be required to provide additional information about the audit and the financial statements of the issuer (auditor discussion and analysis) shall not apply to an audit of an EGC. The final mandatory disclosure rules do not fall within either of these two categories.

⁴⁸⁹ The Board provided this analysis of the impact on EGCs to assist the SEC in making the determination required under Section 104 to the extent that the requirements apply to "the audit of any emerging growth company" within the meaning of Section 104 of the JOBS Act.

papers.⁴⁹⁰ As of the November 15, 2022, measurement date, PCAOB staff identified 3,031 companies that self-identified with the SEC as EGCs and filed with the SEC audited financial statements in the 18 months preceding the measurement date.⁴⁹¹

The discussion of benefits, costs, and unintended consequences of the final rules above is generally applicable to all audits performed pursuant to PCAOB standards, including audits of EGCs. The economic impacts of the final rules on an individual EGC audit will depend on factors such as the auditor's ability to distribute implementation costs across its audit engagements and whether the auditor has already incorporated the final metrics into its audit approach. One survey of audit committees of smaller public companies found that five of the 28 metrics discussed in the Concept Release were evaluated by more than half of the audit committees surveyed.⁴⁹² EGCs are more likely to be newer companies, which are typically smaller in size and receive lower analyst coverage.⁴⁹³ For example, smaller companies have very little, if any, analyst coverage, which reduces the amount of information made available to financial statement users and therefore makes markets less efficient.⁴⁹⁴ These factors may increase the importance to investors of the higher audit quality expected to result from the final rules, as high-quality audits generally enhance the credibility of management disclosures.⁴⁹⁵ The costs of the final rules may disproportionately impact smaller audit firms, and in so much as smaller audit firms tend to audit smaller issuers, pass through of these costs may disproportionately impact EGCs.⁴⁹⁶

However, two important caveats will limit the impact of the final rules on EGCs. First, the vast majority of EGC engagements will not be subject to the final engagement-level reporting requirements because an EGC cannot be a large accelerated filer and few accelerated filers maintain the EGC status.⁴⁹⁷ The Board believes these EGCs will therefore not be impacted by the final engagement-level reporting requirements. Second, approximately 23% of EGC engagements (712 out of 3,031) will not be included in any final firm-level reporting because they are not audited by a firm that will be subject to the final firm-level reporting requirements. The Board believes these EGCs will therefore not be impacted by the final firm-level reporting requirements.

Overall, among the impacted EGCs, the final rules are expected to enhance the quality of EGC audits and financial reporting quality.⁴⁹⁸ To the extent the final rules will improve EGCs' financial reporting quality, it may also improve the efficiency of capital allocation, lower the cost of capital, and enhance capital formation. For example, investors may improve their capital allocation by more accurately identifying EGCs with the strongest prospects for generating future risk-adjusted returns and reallocating their capital accordingly. Investors may also perceive less risk in the impacted EGC capital markets generally, leading to an increase in the supply of capital to the impacted EGCs. This may increase capital formation and reduce the cost of capital to impacted EGCs. The final rules could reduce competition in an EGC's product market if the indirect costs to audited companies

disproportionately impact EGCs relative to their competitors.

As discussed above, the Board considered broadening the applicability of the final rules to include information from audits of EGCs generally. However, for the reasons described there, the Board is not doing so at this time. In particular, non-accelerated filer EGCs may be disproportionately impacted by cost passthrough and tend to be smaller than in-scope issuers. Comments related to this alternative are discussed above. There were no comments related to the EGC analysis specifically.

Accordingly, and for the reasons explained above, the Board recommends that the Commission determine that it is necessary or appropriate in the public interest, after considering the protection of investors and whether the action will promote efficiency, competition, and capital formation, to apply the final rules to audits of EGCs.

Appendix—Illustrative Examples of Metric Calculations

The examples below are based on hypothetical situations and have been prepared for illustrative purposes only, to show how metrics would be calculated based on the facts presented. They are not intended to provide guidance or suggestions regarding what the numerical values of the metrics themselves, or of the inputs on which they are based, are likely to be or should be. They are qualified in their entirety by reference to Rule 2203C, *Firm Metrics*, Rule 3211, *Audit Participants and Metrics*, Form FM, *Firm Metrics*, and Form AP, *Audit Participants and Metrics*.

I. Partner and Manager Involvement

⁴⁹⁰ See PCAOB, *White Paper on Characteristics of Emerging Growth Companies and Their Audit Firms* at November 15, 2022 (Feb. 20, 2024), available at <https://pcaobus.org/resources/other-research-projects> ("EGC White Paper").

⁴⁹¹ The EGC White Paper uses a lagging 18-month window to identify companies as EGCs. Please refer to the "Current Methodology" section in the EGC White Paper for details. Using an 18-month window enables PCAOB staff to analyze the characteristics of a fuller population in the EGC White Paper, but may tend to result in a larger number of EGCs being included for purposes of the present EGC analysis than would alternative methodologies. For example, an estimate using a lagging 12-month window would exclude some EGCs that are delinquent in making periodic filings. An estimate as of the measurement date would exclude EGCs that have terminated their registration, or that have exceeded the eligibility or time limits. See *id.*

⁴⁹² See, e.g., Harris and Williams, *Audit Quality Indicators*.

⁴⁹³ See EGC White Paper at Figure 9 and Figure 12 (indicating that exchange-listed EGCs have less market capitalization and revenue than exchange-listed non-EGCs).

⁴⁹⁴ See SEC, *Final Report of the Advisory Committee on Smaller Public Companies to the U.S. Securities and Exchange Commission* (Apr. 23, 2006) at 73.

⁴⁹⁵ Researchers have developed a number of proxies that are thought to be correlated with information asymmetry, including small issuer size, lower analyst coverage, larger insider holdings, and higher research and development costs. To the extent that EGCs exhibit one or more of these properties, there may be a greater degree of information asymmetry for EGCs than for the broader population of companies, which increases the importance to investors of the external audit to enhance the credibility of management disclosures. See, e.g., Steven A. Dennis and Ian G. Sharpe, *Firm Size Dependence in the Determinants of Bank Term Loan Maturity*, 32 *Journal of Business Finance and Accounting* 31 (2005); Michael J. Brennan and Avandhar Subrahmanyam, *Investment Analysis and Price Formation in Securities Markets*, 38 *Journal of Financial Economics* 361 (1995); David Aboody and Baruch Lev, *Information Asymmetry, R&D, and Insider Gains*, 55 *Journal of Finance* 2747 (2000); Raymond Chiang and P. C. Venkatesh, *Insider Holdings and Perceptions of Information*

Asymmetry: A Note, 43 *Journal of Finance* 1041 (1988); and Molly Mercer, *How Do Investors Assess the Credibility of Management Disclosures?*, 18 *Accounting Horizons* 185 (2004).

⁴⁹⁶ PCAOB staff analysis indicates that, compared to exchange-listed non-EGCs, exchange-listed EGCs are approximately 2.6 times as likely to be audited by an NAF and approximately 1.3 times as likely to be audited by a triennially inspected firm. Source: EGC White Paper and S&P.

⁴⁹⁷ As of November 15, 2022, among the 2,562 EGCs for which "accelerated filer" status information is available, just 163 identified as accelerated filers. See EGC White Paper at 26.

⁴⁹⁸ See above for a discussion on the link between audit quality and financial reporting quality.

⁴⁹⁹ As noted in Form FM and Form AP, hours worked are the sum of hours that are incurred on issuer and non-issuer engagements and include hours spent on training, practice development, personnel development, or other firm activities. Hours worked exclude hours that are not considered working hours (e.g., paid time off and holiday time).

Example firm-level calculation:Total audit hours of the firm's accelerated filer and large accelerated filer engagements

Accelerated filer and large accelerated filer engagements	Total Audit Hours	Total Audit Hours incurred by partners and managers on the engagement team
Company X	3,900	1,400
Company Y	2,500	625
Company Z	1,500	300
Total	7,900	2,325

Total audit hours incurred by partners and managers on the engagement team for all accelerated filer and large accelerated filer engagements / Total audit hours for all accelerated filer and large accelerated filer engagements

Calculation: $2,325 / 7,900 = 29\%$

Example firm-level reporting for Form FM:

Partner and Manager Involvement	Percentage of total audit hours for partners and managers for all accelerated filer and large accelerated filer engagements	29%

Example engagement-level calculation:Details for total audit hours of the accelerated filer or large accelerated filer engagement

- Lead auditor issues the audit report for Company X.
- Total audit hours for the engagement: **3,900**

Details for partners and managers

Company X	Total audit hours incurred by partners and managers on the engagement team
Engagement Partner	300
U.S. (partners other than the engagement partner and managers)	700
France (partners and managers)	150
Germany (managers)	125
Italy (managers)	60
China (managers)	15
India shared service center (managers)	50
Total	1,400

Total audit hours incurred by partners and managers on the engagement team / Total audit hours for the engagement

Calculation: 1,400/3,900 = **36%**

Example engagement-level reporting for Form AP:

Partner and Manager Involvement	Percentage of total audit hours for partners and managers	36%

II. Workload

Example firm-level calculations:

Details for hours worked⁴⁹⁹ by the firm's partners who worked on accelerated filer and large accelerated filer engagements

Quarter	Total hours worked for the quarter	Number of partners who incurred hours on accelerated filer and large accelerated filer engagements	Average number of hours worked in the quarter	Weeks in the quarter	Average weekly workload
Sep 30, 2024	5,400	10	540	13	42
Jun 30, 2024	5,300	10	530	13	41
Mar 31, 2024	6,700	10	670	13	52
Dec 31, 2023	5,750	10	575	13	44

Average number of hours worked by *partners* who incurred hours on accelerated filer and large accelerated filer engagements in the calendar quarter / Number of weeks in the calendar quarter

Calculation (September 30, 2024): $540/13 = 42$

Details for hours worked by the firm's managers who worked on accelerated filer and large accelerated filer engagements

Quarter	Total hours worked for the quarter	Number of managers who incurred hours on accelerated filer and large	Average number of hours	Weeks in the quarter	Average weekly workload

		accelerated filer engagements	worked in the quarter		
Sep 30, 2024	14,000	25	560	13	43
Jun 30, 2024	13,750	25	550	13	42
Mar 31, 2024	18,000	25	720	13	55
Dec 31, 2023	14,750	25	590	13	45

Average number of hours worked by *managers* who incurred hours on accelerated filer and large accelerated filer engagements in the calendar quarter / Number of weeks in the calendar quarter

Calculation (September 30, 2024): 560/13 = **43**

Example firm-level reporting for Form FM:

Workload		Average weekly hours worked	
	Quarter ended	Partners	Managers
	Sep 30, 2024	42	43
	Jun 30, 2024	41	42
	Mar 31, 2024	52	55
	Dec 31, 2023	44	45

Example engagement-level calculations:

Company A has a fiscal year end of December 31. The audit report was issued on March 1, 2024 and the firm filed Form AP on March 15, 2024.

Details for hours worked by the engagement partner

Quarter	Number of hours worked in the quarter	Number of weeks in the quarter	Average weekly workload

Jun 30, 2023	546	13	42
Sep 30, 2023	559	13	43
Dec 31, 2023	585	13	45
Mar 1, 2024 ⁵⁰⁰	468	8.6	54

Number of hours worked by the *engagement partner* in the fiscal quarter / Number of weeks in the fiscal quarter

Calculation (September 30, 2023): $559/13 = 43$

Details for hours worked by partners (excluding engagement partner) and managers on the core engagement team

Quarter	Total hours worked for the quarter	Number of partners (excluding the engagement partner) and managers on the core engagement team	Average number of hours worked in the quarter	Weeks in the quarter	Average weekly workload
Jun 30, 2023	2,260	4	565	13	43
Sep 30, 2023	2,300	4	575	13	44
Dec 31, 2023	2,400	4	600	13	46
Mar 1, 2024	1,975	4	494	8.65	57

Average number of hours worked by *partners* (excluding the *engagement partner*) and *managers* who are on the *core engagement team* in the fiscal quarter / Number of weeks in the fiscal quarter

Calculation (September 30, 2023): $575/13 = 44$

⁵⁰⁰ The number of weeks for the quarter ended March 1, 2024, represents the number of weeks through the issuance of the audit report.

Example engagement-level reporting for Form AP:

Workload		Average weekly hours worked during the engagement	
	Period ended	Engagement Partner	Partners (excluding the engagement partner) and Managers
	Jun 30, 2023	42	43
	Sep 30, 2023	43	44
	Dec 31, 2023	45	46
	March 1, 2024	54	57

III. Training Hours for Audit Personnel⁵⁰¹***Example firm-level calculation:*****Details for total professional development training hours**

The firm tracks its annual partner and staff training based on the calendar year.⁵⁰¹ The firm has a combined headcount of partners, managers, and staff of 1,400. Total professional development training hours recorded from January 1, 2024, through December 31, 2024, were 68,600. The hours were distributed as follows:

	Total Professional Development Training Hours	Total Audit Personnel
Partners	4,100	100
Managers	17,200	400
Staff	47,300	900
Total	68,600	1,400

Total professional development training hours incurred by *partners, managers* and *staff* of the firm / Total number of *partners, managers*, and *staff* of the firm

Calculation: $68,600/1,400 = 49$

Example reporting for Form FM:

Training Hours for Audit Personnel	Average annual professional development training hours	49

Example engagement-level calculation:**Details for total professional development training hours**

The firm tracks its annual partner and staff training based on the calendar year. The core engagement team has a combined headcount of partners, managers, and staff of 12. Total professional development training hours for all members of the core engagement team recorded from January 1, 2024, through December 31, 2024, were 564. The hours were distributed as follows:

⁵⁰¹ As noted in Form FM and Form AP, training metrics should be calculated for the same 12-month period, either ended September 30, or based on the firm's training calendar.

	Total Professional Development Training Hours	Total Audit Personnel
Partners	96	2
Managers	168	3
Staff	300	7
Total	564	12

Total professional development training hours incurred by *partners, managers* and *staff* on the *core engagement team* / Total number of *partners, managers*, and *staff* on the *core engagement team*

Calculation: 564/12 = 47

Example reporting for Form AP:

Training Hours for Audit Personnel	Average annual professional development training hours	47

IV. Experience of Audit Personnel

Example firm-level calculations:

- The Firm has 100 partners and 500 managers.

	Number	Years of experience
Partners	100	2,000
Managers	500	4,000

- (i) Average experience at a public accounting firm of the firm's partners:

Total experience at a public accounting firm of all *partners* / Total number of *partners*

Calculation: $2,000/100 = 20$

- (ii) Average experience at a public accounting firm of the firm's managers:

Total experience at a public accounting firm of *managers* / Total number of *managers*

Calculation: $4,000/500 = 8$

Example firm-level reporting for Form FM:

		Partners	Managers
Experience of Audit Personnel	Average years of experience at a public accounting firm	20	8

Example engagement-level calculations:

	Number	Total experience at a public accounting firm
Engagement Partner	1	23
Engagement Quality Reviewer	1	19
Core engagement team partners (excluding the engagement partner)	3	45

Core engagement team managers	8	80

(i) Total experience at a public accounting firm of the engagement partner:

Total experience at a public accounting firm of the *engagement partner*

Calculation: **23**

(ii) Total experience at a public accounting firm of the engagement quality reviewer:

Total experience at a public accounting firm of the *engagement quality reviewer*

Calculation: **19**

(iii) Average experience at a public accounting firm of the core engagement team members who are partners (excluding the engagement partner):

Total experience at a public accounting firm of the *core engagement team* members who are *partners* (excluding the *engagement partner*) / Total number of people on the *core engagement team* who are *partners* (excluding the *engagement partner*)

Calculation: $45/3 = 15$

(iv) Average experience at a public accounting firm of the core engagement team members who are managers:

Total experience at a public accounting firm of the *core engagement team* members who are *managers* / Total number of people on the *core engagement team* who are *managers*

Calculation: $80/8 = 10$

Example engagement-level reporting for Form AP:

Experience of Audit Personnel	Years of experience at a public accounting firm of the Engagement Partner	Years of experience at a public accounting firm of the Engagement Quality Reviewer	Average years of experience of Partners (excluding the engagement partner) on the Core Engagement Team	Average years of experience of Managers on the Core Engagement Team
	23	19	15	10

V. Industry Experience

Example firm-level calculation:

The top five industries based on revenue from audit services for the most recently completed fiscal year are the following:

- Consumer products and services,
- Banks,
- Health care providers,
- Industrial goods and services, and
- Government services

The firm took into account a number of factors in determining career industry experience, such as the extent to which non-audit experience and experience in auditing companies in adjacent industries could reasonably be considered as industry experience. The firm determined there were several partners and managers that had career industry experience of five or more years for partners and three or more years for managers in its top five industries.

Industry	% of firm revenue from audit services	1. Number of partners with 5 or more years of career industry experience	2. Number of managers with 3 or more years of career industry experience
Consumer products and services	18%	15	45
Banks	11%	10	30
Health care providers	9%	12	43
Industrial goods and services	8%	5	13
Government services	4%	4	6

Note: While not required, a firm may choose to report on additional industries that are not among its top five by revenue from audit services.

Example firm-level reporting for Form FM:

Industry Experience	Top five industries based on the firm's revenue from audit services	Number of Partners with 5 or more years of career industry experience	Number of Managers with 3 or more years of career industry experience
	Consumer products and services	15	45
	Finance: Banks	10	30
	Health care: Health Care Providers	12	43
	Industrial Goods and Services: General	5	13
	Government and Public Services: Government	4	6

Example engagement-level calculation:

The company's primary industry is Banks.

The engagement partner and the EQR have 16 and 24 years, respectively, of career industry experience. The core engagement team also has several other partners and managers who work on different aspects of the audit throughout the year, including those who have focused on other industries and have not yet met the five- and three-year requirements. The following table depicts their career industry experience:

	Bank career industry experience
Engagement partner	16 years
Engagement quality reviewer	24 years
IT partner	Does not meet criteria for five years
Tax partner	Meets criteria for 5 years
Actuarial partner	Does not meet criteria for five years
Other assisting partner	Meets criteria for five years
Audit lead senior manager	Meets criteria for three years
Manager 2	Meets criteria for three years

Manager 3	Meets criteria for three years
Manager 4	Does not meet criteria for three years
Manager 5	Does not meet criteria for three years
Tax senior manager	Meets criteria for three years
IT manager	Does not meet criteria for three years

Example engagement-level reporting for Form AP:

Industry Experience	Issuer's Primary Industry	Financial Services: Banks	
	Years of Career Industry Experience	Engagement Partner	Engagement Quality Reviewer
		16	24
	Number of core engagement team members with industry experience	Partners (excluding the engagement partner)	Managers
		2	4

VI. Retention of Audit Personnel^{502 503}

Example calculations (only manager calculations provided):

Firm A had 204 managers, 204 managers, and 200 managers as of September 30, 2023, October 1, 2023 and September 30, 2024, respectively. During the 12-month period, 38 managers left the firm, 2 managers did not participate in audits, 5 managers were promoted to partner, 37 staff were promoted to manager, and 4 managers were newly hired or served on audits and did not in the prior year.

- Average number of managers* – The total number of managers as of October 1, 2023 was 204 and the total number of managers as of September 30, 2024 was 200.

The number of [partners/managers] as of October 1 (Year 1) + the number of [partners/managers] as of September 30 (Year 2) / 2

Calculation: (204+200) / 2 = **202**

- Average annual retention rate*

Calculation of the numerator – Calculate the total number of managers who were continuously employed and held the same position from October 1, 2023 to September 30, 2024

Calculation of the numerator	
Managers as of October 1, 2023	204
Adjust for managers who were not continuously employed and holding the same position throughout the period	
Left the firm	(38)
Did not participate in audits	(2)
Promoted to partner	(5)
Staff promoted to manager ¹	37
	196

Because the 4 managers who were newly hired or transferred into the audit practice were not included in the beginning number of 204, no specific adjustment to the numerator relating to these 4 is necessary.²

⁵⁰² As provided in the Note to Item 4.6 of Form FM, promotion is treated as if it had occurred at the beginning of the period for the calculation of retention of audit personnel metric.

⁵⁰³ As noted in Form FM, only partners and managers with one or more years of service and who were employed continuously during the 12-month period are included in the numerator.

Calculation of the denominator – Adjust the number of managers as of October 1, 2023 (204 managers) for the promotions as if they had occurred at the beginning of the period (the denominator).

Calculation of the denominator	
Managers as of October 1, 2023	204
<i>Adjust for managers who did not continuously hold the same position</i>	
Promoted to partner	(5)
Staff promoted to manager	37
	236

The number of [*partners/managers*] continuously holding the same position from October 1 (Year 1) to September 30 (Year 2) / Number of [*partners/managers*] as of October 1 (Year 1)

Calculation: $196 / 236 = 83\%$

- *Average annual headcount change* --- The total number of current year-end managers was 200 and the total number of prior year managers was 204.

Number of [*partners/managers*] as of September 30 (Year 2) – Number of [*partners/managers*] as of September 30 (Year 1) / Number of [*partners/managers*] as of September 30 (Year 1)

Calculation: $(200-204) / 204 = -2\%$

Example firm-level reporting for Form FM:

Retention of Audit Personnel		Partners	Managers
	Average number	85	202
	Average annual retention rate	96%	83%
	Average annual headcount change	-1%	-2%

VII. Allocation of Audit Hours⁵⁰⁴

⁵⁰⁴ As noted in Form FM and Form AP, multi-year audits are excluded from both the firm- and engagement-level calculations.

Example firm-level calculations:

The firm issued audit reports with respect to eight accelerated filer or large accelerated filer engagements with various year ends during the reporting period ended September 30, 2024. The hours incurred by the engagement teams during the audits were:

	Issuer year end	Hours incurred prior to issuer year end	Hours incurred following issuer year end
Issuer A	December 31, 2023	20,415	12,056
Issuer B	December 31, 2023	7,856	3,020
Issuer C	March 31, 2024	10,583	8,023
Issuer D	June 30, 2024	5,570	3,502
Issuer E	March 31, 2024	4,508	3,752
Issuer F	December 31, 2023	1,575	1,208
Issuer G	December 31, 2023	3,301	1,833
Issuer H (Initial public offering engagement)	December 31, 2023, December 31, 2022, and December 31, 2021	- ¹	-
Total		53,808	33,394

Total audit hours incurred prior to *issuers'* year ends for all accelerated filer and large accelerated filer engagements / *Total audit hours* for all accelerated filer and large accelerated filer engagements

Calculation: $53,808 / (53,808 + 33,394) = 62\%$

Total audit hours incurred following *issuers'* year ends for all accelerated filer and large accelerated filer engagements / *Total audit hours* for all accelerated filer and large accelerated filer engagements

Calculation: $33,394 / (53,808 + 33,394) = 38\%$

Example firm-level reporting for Form FM:

Allocation of Audit Hours	Percentage of audit hours incurred prior to issuers' year ends for all accelerated filer and large accelerated filer engagements	62%
	Percentage of audit hours incurred following issuers' year ends for all accelerated filer and large accelerated filer engagements	38%

Example engagement-level calculations:

The firm audits Issuer G with a December 31 year end. The hours incurred by the engagement team during the audit were:

	Hours incurred prior to and including December 31	Hours incurred following December 31
U.S. (lead auditor)	2,015	1,350
Germany	682	265
China	452	163
South Africa	152	55
Total	3,301	1,833

Total audit hours incurred prior to the issuer's year end / Total audit hours

Calculation: $3,301 / (3,301 + 1,833) = 64\%$

Total audit hours incurred following the issuer's year end / Total audit hours

Calculation: $1,833 / (3,301 + 1,833) = 36\%$

Example engagement-level reporting for Form AP:

Allocation of Audit Hours	Percentage of total audit hours incurred prior to the issuer's year end	64%
	Percentage of total audit hours incurred following the issuer's year end	36%

Example calculation:

The following is true for Firm X's audit practice for the 12-month periods ended September 30 for the last three years:

- For 09/30/2022, Firm X issued 110 audit reports for its issuer engagements, 40 of which were integrated audits.
- For 09/30/2023, Firm X issued 105 audit reports for its issuer engagements, 35 of which were integrated audits.
- For 09/30/2024, Firm X issued 100 audit reports for its issuer engagements, 30 of which were integrated audits.

During the 12-month period ended September 30, 2024, Firm X had the following restatements for its issuer engagements:

- 9 revision restatements. These restatements relate to audit reports initially issued during the following reporting periods:
 - 2022 – 6
 - 2023 – 3
 - 2024 – 0*
- 4 reissuance restatements relate to the financial statements. These restatements relate to audit reports initially issued during the following reporting periods:
 - 2022 – 2
 - 2023 – 1
 - 2024 – 1
- 2 reissuance restatements of management's report on ICFR. These restatements relate to audit reports on ICFR initially issued during the following reporting periods:
 - 2022 – 1
 - 2023 – 1
 - 2024 – 0*

* Note that for the 12-month period ended September 30, 2024, there were no restatements of this type of audit report issued during that 12-month period.

Example reporting for Form FM:

		Audit Report Initially Issued		
		2024	2023	2022
Restatement History	Revision restatements of the financial statements for errors	0	3	6
	Reissuance restatements of the financial statements for errors	1	1	2
	Reissuance restatements of management's report on ICFR	0	1	1
	Total issuer engagements	100	105	110
	Total issuer engagements with audits of ICFR	30	35	40

III. Date of Effectiveness of the Proposed Rules and Timing for Commission*Action*

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Board consents, the Commission will:

(A) By order approve or disapprove such proposed rules; or

(B) Institute proceedings to determine whether the proposed rules should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rules are consistent with the requirements of Title I of 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/pcaob/>); or
- Send an email to rule-comments@sec.gov. Please include PCAOB-2024-06 on the subject line.

Paper Comments

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

All submissions should refer to PCAOB–2024–06. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission’s internet website (<https://www.sec.gov/rules/pcaob>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rules that are filed with the Commission, and all written communications relating to the proposed rules 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 such filing will also be available for inspection and copying at the principal office of the PCAOB. 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 PCAOB–2024–06 and should be submitted on or before January 2, 2025.

For the Commission, by the Office of the Chief Accountant.⁵⁰⁵

Vanessa A. Countryman,
Secretary.

[FR Doc. 2024–28142 Filed 12–10–24; 8:45 am]

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⁵⁰⁵ 17 CFR 200.30–11(b)(1) and (3).



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Part III

Environmental Protection Agency

40 CFR Part 62

Federal Plan Requirements for Commercial and Industrial Solid Waste Incineration Units That Commenced Construction On or Before June 4, 2010 and Have Not Been Modified or Reconstructed Since August 7, 2013; Final Rule

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 62****[EPA-HQ-OAR-2016-0664; FRL-5960-02-OAR]****RIN 2060-AT28****Federal Plan Requirements for Commercial and Industrial Solid Waste Incineration Units That Commenced Construction On or Before June 4, 2010 and Have Not Been Modified or Reconstructed Since August 7, 2013****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

SUMMARY: This action finalizes the Federal plan for existing commercial and industrial solid waste incineration units (CISWI). This final action implements the U.S. Environmental Protection Agency's (EPA) emission guidelines adopted on February 7, 2013, as amended on June 23, 2016, and on April 16, 2019, in states that do not have an approved state plan implementing the emission guidelines in place by the effective date of this Federal plan. The implementation of the emission guidelines will result in emissions reductions of the regulated pollutants including cadmium, hydrogen chloride, lead, mercury, carbon monoxide, nitrogen oxides, particulate matter, and sulfur dioxide from the affected CISWI. This final action is also revising the definition of "small, remote incinerator" to reflect new statutory prohibitions on the implementation of CISWI standards to units in the State of Alaska.

DATES: This final rule is effective January 10, 2025. The incorporation by reference of certain publications listed in the regulation is approved by the Director of the Federal Register as of January 10, 2025.

ADDRESSES: The EPA has established a docket for this rulemaking under Docket ID No. EPA-HQ-OAR-2016-0664. All documents in the docket are listed on the <https://www.regulations.gov/> website. Although listed, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through <https://www.regulations.gov/>.

FOR FURTHER INFORMATION CONTACT: Dr. Felica Davis, Sector Policies and

Programs Division (E14305), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, 109 T.W. Alexander Drive, P.O. Box 12055, Research Triangle Park, North Carolina 27711; telephone number: (919) 541-4857; and email address: davis.felica@epa.gov.

SUPPLEMENTARY INFORMATION: Preamble acronyms and abbreviations.

Throughout this document the use of "we," "us," or "our" is intended to refer to the EPA. We use multiple acronyms and terms in this preamble. While this list may not be exhaustive, to ease the reading of this preamble and for reference purposes, the EPA defines the following terms and acronyms here:

AG Attorney General
CAA Clean Air Act
CBI Confidential business information
Cd Cadmium
CFR Code of Federal Regulations
CISWI Commercial and industrial solid waste incineration units
CMS Continuous monitoring system
CO Carbon monoxide
EG Emission Guidelines
EPA U.S. Environmental Protection Agency
ERU Energy recovery unit
FF Fabric filter
HAP Hazardous air pollutants
HCl Hydrogen chloride
Hg Mercury
IBR Incorporation by reference
ICR Information collection request
mg/dscm Milligrams per dry standard cubic meter
NAICS North American Industrial Classification System
NESHAP National emission standards for hazardous air pollutants
ng/dscm Nanograms per dry standard cubic meter
NOX Nitrogen oxides
NSPS New source performance standards
NTTAA National Technology Transfer and Advancement Act
OAQPS Office of Air Quality Planning and Standards
Pb Lead
PCB hydrocarbons and polychlorinated biphenyls
PM Particulate matter (filterable, unless otherwise specified)
PM2.5 Particulate matter (diameter less than or equal to 2.5 micrometers)
PM CPMS Particulate matter Continuous Parameter Monitoring System
ppmv Parts per million by volume
RIN Regulatory Information Number
SRI Small, remote incinerators
SO2 Sulfur dioxide
the Court United States Court of Appeals for the District of Columbia Circuit
tpy Tons per year
UMRA Unfunded Mandates Reform Act
U.S.C. United States Code
VCS Voluntary consensus standards

Organization of this document. The information in this preamble is organized as follows:

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 - K. Congressional Review Act (CRA)

I. General Information**A. Does the action apply to me?**

Regulated entities. Owners or operators of existing CISWI that are

subject to the existing Federal plan implementing the December 1, 2000, emission guidelines (EG), and units not already subject to an EPA-approved and effective state plan implementing the February 7, 2013, EG (and subsequent 2016 and 2019 amendments made to the

EG), may be regulated by this final action. Existing CISWI are those that commenced construction on or before June 4, 2010, or that commenced modification or reconstruction after June 4, 2010, but no later than August 7, 2013. Regulated categories and

entities include those that operate CISWI. Although there is no specific North American Industry Classification System (NAICS) code for CISWI, these units may be operated by the categories of sources listed in table 1 of this preamble.

TABLE 1—EXAMPLES OF POTENTIALLY REGULATED ENTITIES

Category	NAICS code	Examples of potentially regulated entities
Any industrial or commercial facility using a solid waste incinerator.	211, 212, 486	Mining; oil and gas exploration operations; pipeline operators.
	221	Utility providers.
	321, 322, 337	Manufacturers of wood products; manufacturers of pulp, paper and paperboard; manufacturers of furniture and related products.
	325, 326	Manufacturers of chemicals and allied products; manufacturers of plastics and rubber products.
	327	Manufacturers of cement; nonmetallic mineral product manufacturing.
	333, 336	Manufacturers of machinery; manufacturers of transportation equipment.
	423, 44	Merchant wholesalers, durable goods; retail trade.

This table is not intended to be exhaustive, but rather provides a general guide for identifying entities likely to be affected by this action. To determine whether a facility would be affected by this action, please examine the applicability criteria in 40 Code of Federal Regulations (CFR) 62.14510 through 62.14525 (now at 40 CFR 62.14510a through 62.14530a) of subpart III (now subpart IIIa). Questions regarding the applicability of this action to a particular entity should be directed to the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. What action is the EPA taking?

In this action, the EPA is finalizing the Federal plan for existing CISWI in states that do not have an approved state plan implementing the CISWI EG. The CISWI Federal plan was proposed on January 11, 2017 (82 FR 3554), and received 13 public comments, some of which led to revisions that were made to this final rule. The comments on the proposal and changes the EPA made to finalize this Federal plan are discussed in more detail in section III. of this preamble.

C. How do I obtain a copy of this document and other related information?

The docket number for this final action regarding the CISWI Federal plan (40 CFR part 62, subpart IIIa) is Docket ID No. EPA-HQ-OAR-2016-0664. In addition to being available in the docket, an electronic copy of this final action is available on the internet at [https://www.epa.gov/stationary-sources-air-pollution/commercial-and-](https://www.epa.gov/stationary-sources-air-pollution/commercial-and-industrial-solid-waste-incineration-units-ciswi-new)

industrial-solid-waste-incineration-units-ciswi-new. Following publication in the **Federal Register**, the EPA will post the **Federal Register** version of the final rule and key technical documents on this same website.

D. Judicial Review

Under the Clean Air Act (CAA) section 307(b)(1), judicial review of this final rule is available only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit (the Court) by February 10, 2025. Under CAA section 307(d)(7)(B), “[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review.” This section also provides a mechanism for the EPA to convene a proceeding for reconsideration, “[i]f the person raising an objection can demonstrate to the EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule.” Any person seeking to make such a demonstration to us should submit a Petition for Reconsideration to the Office of the Administrator, U.S. Environmental Protection Agency, Room 3000, WJC West Building, 1200 Pennsylvania Ave. NW, Washington, DC 20460, with a copy to both the person(s) listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate

General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

E. What are the incremental costs and benefits of this action?

This Federal plan implements the CISWI EG that were promulgated on February 7, 2013, and amended on June 23, 2016, and April 16, 2019 (see the background discussion in section II.A. of this preamble for more detail), for the states (see table 2 of this preamble) that do not have approved state plans implementing the CISWI EG. Therefore, any costs and benefits associated with this Federal plan have already been quantified and attributed to the CISWI EG (*i.e.*, CISWI EG benefits and costs equal those for units covered by approved state plans plus those units covered by this Federal plan—see section II.C. of this preamble for more detailed discussion). Because the Consolidated Appropriations Act of 2024, H.R. 4366, section 432, precludes the EPA from expending funds to implement or enforce the EG codified under 40 CFR part 60, subpart DDDD, with respect to units in the State of Alaska that are defined as “small remote incinerators” (SRI) until a subsequent regulation is issued, neither costs nor emission reductions from SRIs located in Alaska are included in the portion of CISWI EG costs and emissions reduction expected due to the Federal plan implementation.

Incineration of solid waste at commercial and industrial facilities

causes the release of a wide array of air pollutants, some of which exist in the waste feed material and are released unchanged during combustion, and some of which are generated as a result of the combustion process itself.¹ The EPA estimated in the 2013 rule that once the state plans and the Federal plan become effective, a total emissions reduction of the regulated pollutants would occur as follows: acid gases (*i.e.*, hydrogen chloride (HCl) and sulfur dioxide (SO₂), about 7,046 tons per year (tpy); particulate matter (PM) about 2,401 tpy; non-Hg metals (*i.e.*, lead (Pb) and cadmium (Cd)) about 4.5 tpy; carbon monoxide (CO) about 20,000 tpy; nitrogen oxides (NO_x) about 5,399 tpy; and mercury (Hg) about 688 pounds per year. The EPA also estimated that air pollution control devices installed to comply with the 2013 rule would also effectively reduce emissions of pollutants such as 7-polycyclic aromatic hydrocarbons and polychlorinated biphenyls (PCB).²

II. Background Information

A. What is the statutory authority for this action?

Sections 111(b) and 129(a) of the CAA address emissions from new units (*i.e.*, New Source Performance Standards (NSPS)), and CAA sections 111(d) and 129(b) address emissions from existing units (*i.e.*, EG). The NSPS are Federal regulations which are directly enforceable upon CISWI, and, under CAA section 129(f)(1), become effective 6 months after promulgation. Unlike the NSPS, the EG provide direction for developing state plans, and are not themselves directly enforceable. For the EG to be enforceable, it must be implemented through either an EPA-approved state or tribal³ plan or through an EPA adopted Federal plan. The Federal plan regulates CISWI in states that do not have approved plans in effect to implement the EG. Although Congress required the EPA to promulgate a Federal plan for states that fail to submit approvable state plans, states may submit approvable state plans after promulgation of the Federal plan and become subject to the approved state plans. Congress established CAA sections 111 and 129 with the intent that the state and local agencies take the primary responsibility

for ensuring that the emissions limitations and other requirements in the EG are achieved.

CAA section 129(b)(2) directs states with existing CISWI(s) subject to the EG to submit plans to the EPA that implement and enforce the EG. The deadline for states to submit state plans to the EPA for review was February 7, 2014 (see 78 FR 9121–2, February 7, 2013).⁴ CAA sections 111 and 129(b)(3) and 40 CFR 60.27(c) and (d) require the EPA to develop, implement and enforce a Federal plan for CISWI in any state which has not submitted an approvable state plan within 2 years after promulgation of the EG. On January 11, 2017, the EPA proposed a Federal plan that would apply to any CISWI located in any state without an approved state plan as of the compliance date for existing CISWI (*i.e.*, 5 years after promulgation of the emission guidelines). The EPA did not reopen the underlying CISWI rule for public comment in this current action and the Agency does not address comments on the underlying CISWI rule.⁵

CAA section 129, titled “Solid Waste Combustion,” requires the EPA to develop and adopt standards for solid waste incineration units pursuant to CAA sections 111 and 129. On March 21, 2011, the EPA promulgated revised NSPS and EG for CISWI. At that time, the Administrator also announced that it identified certain issues that warranted further opportunity for public comment and that the Agency was planning to reconsider the CISWI rule. The EPA also received petitions for reconsideration of the final CISWI rule. On December 23, 2011, the EPA proposed revisions to the March 2011 final CISWI rule and requested comment on proposed changes to the NSPS and EG for CISWI (76 FR 80452).

On February 7, 2013, the EPA promulgated the final reconsideration of the 2011 NSPS and EG for CISWI (78 FR 9112). The 2013 final rule made some revisions to the December 2011 proposed reconsideration rule in response to comments and additional information received. Following that action, the EPA received petitions for reconsideration of the 2013 final rule. These petitions stated certain provisions should be reconsidered and that the

public lacked sufficient opportunity to comment on some of the provisions contained in the final 2013 CISWI rule. On January 21, 2015, the EPA reconsidered and requested comment on four provisions of the 2013 final NSPS and EG for CISWI. Additionally, the EPA proposed clarifying changes and corrections to the 2013 final rule, some of which were raised in petitions for reconsideration. On June 23, 2016, the EPA promulgated the final reconsideration of the 2013 NSPS and EG for CISWI (81 FR 40956) (2016 CISWI rule).

Following promulgation of the 2016 CISWI rule, the EPA received requests from industry interested parties and implementing agencies to clarify various issues with implementation of the standards. In addition, the EPA identified certain procedural issues, including testing and monitoring issues and inconsistencies within the rules,⁶ that required further clarification or correction. On June 15, 2018, the EPA proposed amendments to several provisions of the 2016 CISWI rule to address these issues (83 FR 28068). In addition, the EPA identified additional regulatory provisions, beyond those raised by the requests from industry interested parties and implementing agencies, that required clarification and editorial correction to address inconsistencies and errors in the final rule. The EPA promulgated these technical amendments on April 16, 2019 (84 FR 15846).

B. What is the purpose of this action?

CAA section 129(b)(2) requires states to implement the EG for existing solid waste incineration units, including CISWI. States with existing CISWI were required to submit to the EPA, within one year following promulgation of the EG (by February 7, 2014), state plans that are at least as protective as the EG. CAA sections 111 and 129 and 40 CFR 60.27(c) and (d) require the EPA to develop, implement, and enforce a Federal plan in states that have not submitted an approvable plan. The EPA is promulgating this CISWI Federal plan to be effective in any state that failed to provide an approvable state plan, thus ensuring implementation and enforcement of the final CISWI EG.

The regulations required states without any existing CISWI to submit to the Administrator a letter of negative

¹ See 78 FR 9131–9133 to reference the impacts of the EG adopted on February 7, 2013.

² See 75 FR 31970 (June 4, 2010), where polycyclic organic matter (POM) and polychlorinated biphenyl (PCB) emission reductions are discussed.

³ The EPA is not aware of any CISWI units owned or operated by Indian tribal governments at the time of the publication of this document.

⁴ Five states did not submit a draft or final state plan or negative declaration and one state indicated intent to submit a state plan to the EPA.

⁵ Many aspects of the CISWI rule were challenged in the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit or Court) in *American Forest and Paper Association (AFPA) v. EPA*, and the Court rejected all challenges to the standards and other provisions being implemented in this Federal plan. See *AFPA v. EPA*, 830 F.3d 579 (D.C. Cir. 2016).

⁶ The 2019 technical amendments addressed certain implementation issues and inconsistencies that required further clarification or correction to the 2016 EG. The technical amendments were not substantive and did not introduce any analytical changes to the emission guidelines; therefore, a supplemental proposal was not required.

declaration certifying that there are no CISWI in the state (see 40 CFR 62.06). No plan was required for states that do not have any CISWI. CISWI located in states that mistakenly submitted a letter of negative declaration are subject to the Federal plan, once effective, until a state plan regulating those CISWI is approved. State plans that have been submitted to implement the final CISWI EG,⁷ have either been approved or are currently undergoing EPA review. This CISWI Federal plan implements the final CISWI EG in those states that do

not have an approved state plan in place by January 10, 2025. If a state plan is approved in part, the Federal plan will apply to the affected CISWI in lieu of the disapproved portions of the state plan until the state addresses the deficiencies in the state or tribal plan and the revised state plan is approved by the EPA.

C. What is the status of state plan submittals?

The EPA anticipates that facilities in ten states and three U.S. territories⁸ will

be subject to the CISWI Federal plan. Table 2 of this preamble lists the status of state plans as of the signature date of this action. Additionally, table 2 of this preamble lists states and local agencies that submitted negative declarations and those that have indicated that they intend to take delegation of the Federal plan to directly implement and enforce the guidelines (see mechanisms for transferring authority discussion in section VI.B.2. of this preamble for more detail).

TABLE 2—STATUS OF STATE AND TERRITORY PLANS

Status	States
I. EPA-Approved State Plans	Alabama; Colorado; Louisiana; North Dakota; Oklahoma; Puerto Rico; Tennessee; Virginia; West Virginia.
II. Indicated intent to Submit Negative Declarations to the EPA.	
III. Negative Declaration Submitted to the EPA	Arkansas; Arizona; Connecticut; Delaware; District of Columbia; Idaho; Indiana; Kansas; Kentucky; Maine; Maryland; Massachusetts; Minnesota; Mississippi; Missouri; Montana; Nebraska; New Hampshire; New Jersey; New Mexico; New York; Nevada; Pennsylvania AMS; Rhode Island; South Dakota; Utah; Vermont; Virgin Islands; Wyoming.
IV. Final State Plans Submitted to the EPA	Florida; Georgia; Iowa; South Carolina; Texas.
V. Draft State Plans Submitted to the EPA	
VI. EPA Has Not Received a Draft or Final State Plan or Negative Declaration.	California; Hawaii; Michigan; Oregon; Washington.
VII. Indicated Intent to Submit State Plan to the EPA.	North Carolina.
VIII. Indicated Intent to Accept Delegation of Federal Plan	
IX. Indicated Intent to Accept Federal Plan Implementation by the EPA.	Alaska; American Samoa; Guam; Illinois; Northern Mariana Islands; Ohio; Wisconsin.

As the EPA Regional offices approve state plans, they will also, in the same action, amend the appropriate subpart of 40 CFR part 62 to codify their approvals. If the EPA approves a state plan after the Federal plan is

promulgated, the Federal plan will no longer apply to the CISWI covered by the state plan, upon the effective date of the state plan.

CISWI owners or operators can also contact the EPA Regional office for the state in which their CISWI are located

to determine whether there is an EPA-approved state plan in place. Table 3 of this preamble lists the names, email addresses, and telephone numbers of the EPA Regional office contacts and the states and territories that they cover.

TABLE 3—REGIONAL OFFICE CONTACTS

Region	Regional contact	Phone	States and territories
Region I	Jessica Kilpatrick, <i>kilpatrick.jessica@epa.gov</i> .	(617) 918–1652	Connecticut, Massachusetts, Maine, New Hampshire, Rhode Island, Vermont.
Region II	Fausto Taveras, <i>taveras.fausto@epa.gov</i> .	(212) 637–3378	New York, New Jersey, Puerto Rico, Virgin Islands.
Region III	Krystal Stankunas, <i>stankunas.krystal@epa.gov</i> .	(215) 814–5271	Virginia, Delaware, District of Columbia, Maryland, Pennsylvania, West Virginia.
Region IV	Mark Bloeth, <i>bloeth.mark@epa.gov</i> .	(404) 562–9013	Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee.
Region V	Margaret Sieffert, <i>sieffert.margaret@epa.gov</i> .	(312) 353–1151	Minnesota, Wisconsin, Illinois, Indiana, Michigan, Ohio.
Region VI	Karolina Ruan-Lei, <i>ruan-lei.karolina@epa.gov</i> .	(214) 665–7346	Arkansas, Louisiana, New Mexico, Oklahoma, Texas.
Region VII	Larry Gonzalez, <i>gonzalez.larry@epa.gov</i> .	(913) 551–7041	Iowa, Kansas, Missouri, Nebraska.

⁷ The “final CISWI EG” means the provision of 40 CFR part 60, subpart DDDD, including the revisions published on June 23, 2016 (81 FR 40956), and April 16, 2019 (84 FR 15846). As noted in the June 23, 2016, preamble, the final CISWI EG action granted reconsideration and addressed certain aspects of the February 7, 2013, rule, which itself

was issued to grant reconsideration of aspects of the March 21, 2011, rule. The April 16, 2019, technical amendments included clarifying revisions and general editorial corrections. See section II.A. of this preamble for more discussion on the background of the final CISWI EG.

⁸ 42 U.S.C. 7602. Definitions (d) The term “State” means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and includes the Commonwealth of the Northern Mariana Islands.

TABLE 3—REGIONAL OFFICE CONTACTS—Continued

Region	Regional contact	Phone	States and territories
Region VIII	Allison Reibach, <i>reibach.allison@epa.gov</i> .	(303) 312–6949	Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming.
Region IX	Shaheerah Kelly, <i>kelly.shaheerah@epa.gov</i> .	(415) 947–4156	Arizona, California, Hawaii, Nevada, American Samoa, Guam, Northern Mariana Islands.
Region X	Geoffrey Glass, <i>glass.geoffrey@epa.gov</i> .	(206) 553–1847	Alaska, Idaho, Oregon Washington.

III. Summary of Changes Since Proposal and Response to Comments

Based on our review of comments received on the 2017 proposed Federal plan and statutory prohibitions on the implementation of CISWI standards to units in the State of Alaska, the EPA is finalizing the Federal plan as proposed with a few minor exceptions, albeit we are finalizing the amendments as a new subpart IIIa. We are establishing the final compliance date for existing sources, implementing the 2019 technical amendments to the CISWI EG, and modifying the applicability of subpart DDDD to only apply to small, remote incinerators (SRIs) located outside the State of Alaska, and modifying equation 7 at 40 CFR 62.14670(y) (now at 40 CFR 62.14640a(y)) for waste-burning kilns that is used to calculate kiln-specific emission limit when kiln emissions are emitted through multiple stacks.

Since proposal of amendments to subpart III, the EPA determined that creating a new subpart will lessen confusion for affected sources and implementing agencies. Therefore, we have created a new subpart IIIa, which will replace subpart III once effective, which is January 10, 2025. By incorporating these amendments as a new subpart IIIa, we hope to alleviate any confusion that could be caused by making significant amendments to the current subpart III regulatory text. For one, subpart III only applies to incinerators but the emission guidelines that subpart IIIa will implement includes subcategories for incinerators, energy recovery units, waste-burning kilns, and small remote incinerators, with unique requirements and standards for each subcategory. Additionally, in creating a new subpart IIIa, we can omit transitional regulatory requirement language and make a “clean split” on a single date where subpart III ends effectiveness by January 10, 2025, and subpart IIIa begins effectiveness from that date onward. Finally, to better accommodate any potential future updates to the CISWI Federal plan, in subpart IIIa we are establishing section numbering increments of 5 so that there

is adequate numeric spacing to revise or add new regulatory text sections if needed in the future.

As noted above, the EPA is establishing the final compliance date to be the effective date of this final action, which is January 10, 2025. The CAA provides that owners or operators of affected CISWI must comply no later than 5 years after the effective date of the final CISWI EG (*i.e.*, February 7, 2018) or within 3 years from state plan approval (or promulgation of a Federal plan), whichever is earlier. The final compliance date remains as proposed as there is no statutory authority under CAA section 129 for providing compliance extensions (*i.e.*, allowing compliance after the compliance date). We believe that sources have had ample notification of this final compliance date and that they were aware of what measures they must take in order to comply.

Based on reviews of permits for units potentially subject to this Federal plan, the EPA has determined that sources in states and territories that would be subject to the Federal plan have either ceased burning waste or have made control device retrofits in the period of time since the 2017 proposed Federal plan was published. Furthermore, no adverse comments were received requesting additional time for compliance beyond the proposed February 7, 2018, final compliance date. Thus, the EPA has determined that no additional time is necessary for sources to comply with the standards.

We are also finalizing other provisions to be consistent with the 2019 technical amendments to the CISWI EG (84 FR 15848). Although these provisions were not included in the original proposed Federal plan, the EPA subsequently solicited comments on these modifications to the EG in the 2019 CISWI rulemaking. Therefore, the public had adequate opportunity to comment on these changes and had notice that sources subject to the Federal plan would be subject to these revised provisions. The technical amendments provided meaningful burden reduction by allowing regulated facilities additional time to complete

initial compliance demonstrations and adding production-based emission limits in lieu of the concentration-based limits in the 2016 CISWI rule. The requirement in 40 CFR 62.14535(a)(4) (now at 40 CFR 62.14535a(b)(4)) to perform the initial performance test within 90 days of the final compliance date has been revised to be within 180 days of the final compliance date, consistent with §§ 62.14665(a) and 62.14820(b) (now at §§ 62.14630a(a) and 62.14760a(b), respectively).

The Waste Management Plan (WMP) submittal due date has been changed from November 7, 2017, to the final compliance date, January 10, 2025, to be consistent with the EG (40 CFR part 60, subpart DDDD). The WMP is a component of compliance, and therefore it may be submitted together with operating procedures, operator training, and initial compliance testing to demonstrate initial compliance.

The EPA is finalizing revisions to 40 CFR 62.14755(b) (now at § 62.14730a(b)) to clarify that results of performance testing and CEMS performance evaluations occurring over multiple days may be submitted together up to 60 days after all performance evaluations are completed. The EPA is also finalizing the addition of an alternative equivalent emission limit for Hg for the waste-burning kiln subcategory to be consistent with the 2019 CISWI EG technical amendments (84 FR 15848). Specifically, the EPA is adding, to the Federal plan, a 58 lb/million (MM) ton clinker emission limit for Hg for the waste-burning kiln subcategory as an alternative equivalent emission limit to the 0.011 mg/dscm standard.

Consistent with the 2019 rule, the EPA is also finalizing clarifications regarding the Agency’s intent to allow CEMS for demonstrating initial compliance for any pollutant and clarification of continuous parameter monitoring requirements when CEMS are used for direct pollutant emissions monitoring. The EPA is also finalizing additional minor technical amendments consistent with the 2019 rule: Clarifications of other CEMS requirements; clarification of continuous opacity monitoring system

(COMS) requirements; clarification of reduced testing requirements; clarification of deviation reporting requirements for continuous monitoring data; and clarification of activated carbon injection (ACI) requirements.

The EPA is finalizing a revised definition of “small, remote incinerator” to reflect new prohibitions on the implementation of CISWI standards to units in the State of Alaska that were implemented by Congress after the EPA proposed the Federal plan. As specified in the Consolidated Appropriations Act of 2024, H.R. 4366, section 432,⁹ the EPA is precluded from “expending funds to implement or enforce 40 CFR part 60 subpart DDDD [the 2011 EG currently in effect] with respect to units in the state of Alaska that are defined as small remote incinerator until a subsequent regulation is issued.”

In the 2000 CISWI EG (65 FR 75351), we excluded combustion units at commercial or industrial facilities with a capacity less than 35 tons per day that combust more than 30 percent MSW from the rule. SRI means an incinerator that combusts solid waste (as that term is defined by the Administrator in 40 CFR part 241) and combusts 3 tons per day or less solid waste and is more than 25 miles driving distance to the nearest

municipal solid waste landfill. The SRIs were found to qualify for an exemption from CISWI based on their burning at least 30 percent MSW. In the 2011 CISWI EG we removed this exemption to ensure that any CISWI combustor any solid waste is subject to these standards. Therefore, commercial and industrial units that were previously exempt pursuant to this provision would be required to meet the emission limits and operating requirements of the rule. In this final action, we have revised the definition of “small, remote incinerator” consistent with the prohibition in the appropriations rider to mean “an incinerator located *outside the state of Alaska* that combusts solid waste (as that term is defined by the Administrator in 40 CFR part 241) and combusts 3 tons per day or less solid waste and is more than 25 miles driving distance to the nearest municipal solid waste landfill” (emphasis added).

Finally, based on review of the initial and continuous compliance requirements, the EPA has modified equation 7, used to calculate kiln-specific emission limit when kiln emissions are emitted through multiple stacks, at 40 CFR 62.14670(y) (now at 40 CFR 62.14640a(y)). When kiln emissions are emitted through multiple stacks

(e.g., there is an alkali bypass and/or an in-line coal mill that exhaust emissions through a separate stack(s)), the combined emissions are subject to the emission limits applicable to waste-burning kilns in table 8. At proposal, equation 7 only reflected a single configuration of emissions, a single alkali bypass and in-line coal mill, it did not reflect the multiple different stack configurations currently in use. Therefore, equation 7 has been modified to generalize the number and type of stacks and allow all configurations of sources to correctly calculate the kiln stack concentration limit for continuing compliance, irrespective of the number and type of emission points.

Public comments on the proposed rulemaking and the EPA’s responses to these comments are addressed in a separate response to comment document, available in docket EPA–HQ–OAR–2016–0664.

IV. Summary of Final CISWI Federal Plan Requirements

The CISWI Federal plan requirements are described below. Table 4 of this preamble lists each element and identifies where it is located or codified.

TABLE 4—ELEMENTS OF THE CISWI FEDERAL PLAN

Element of the CISWI Federal plan	Location
Legal authority and enforcement mechanism	Sections 129(b)(3), 111(d), 301(a), and 301(d)(4) of the CAA.
Inventory of affected CISWI	Docket ID No. EPA–HQ–OAR–2016–0664.
Inventory of emissions	Docket ID No. EPA–HQ–OAR–2016–0664.
Compliance schedules	40 CFR 62.14535 through 62.14575 (now at 40 CFR 62.14535a through 62.14545a).
Emissions limits and operating limits	40 CFR 62.14630 through 62.14645 (now at 40 CFR 62.14600a through 62.14610a).
Operator training and qualification	40 CFR 62.14595 through 62.14625 (now at 40 CFR 62.14565a through 62.14595a).
Testing, monitoring, recordkeeping and reporting.	40 CFR 62.14650 through 62.14760 (now at 40 CFR 62.14615a through 62.14735a).
Record of public hearings	Docket ID No. EPA–HQ–OAR–2016–0664.

A. What are the final applicability requirements?

The Federal plan applicability reflects the final CISWI EG. The Federal plan applies in whole or in part to existing CISWI meeting the applicability of 40 CFR 62.14510 (now at 40 CFR 62.14510a) that are located in any state, with the exception of SRIs located in Alaska, that does not currently have a fully approved state plan in place. Existing CISWI are all CISWI, including air curtain incinerators (ACIs), for which construction commenced on or before June 4, 2010, or that commenced modification or reconstruction after June 4, 2010, but no later than August

7, 2013. The Federal plan requirements apply to owners and/or operators of existing incineration units combusting solid waste (as defined under the Resource Conservation and Recovery Act (RCRA) and located at commercial or industrial facilities (*i.e.*, CISWI (as defined in 40 CFR 62.14840 now at 40 CFR 62.14780a). Four subcategories are defined for existing units: incinerators (*i.e.*, units designed to burn discarded waste materials for the purpose of disposal); SRIs; energy recovery units (ERU) (*i.e.*, units that would be boilers or process heaters if they did not combust solid waste); and waste burning kilns (*i.e.*, units that would be cement kilns if they did not combust

solid waste). The final CISWI EG further subcategorize ERUs into 3 subcategories and waste burning kilns into 2 subcategories.

The final CISWI EG establishes opacity limitations for ACI that burn 100 percent wood waste; 100 percent clean lumber; or a 100 percent mixture of only wood waste, clean lumber, and/or yard waste. If an ACI begins burning solid waste as defined in the Non Hazardous Secondary Materials rule (see 40 CFR part 241) in addition to, or instead of, wood waste, clean lumber, or a mixture of wood waste, clean lumber, and/or yard waste, it is a solid waste incineration unit that is subject to the

⁹ Consolidated Appropriations Act, 2024. Public Law 118–42 (2024, March 8). [https://](https://www.congress.gov/bill/118th-congress/house-bill/4366/text)

www.congress.gov/bill/118th-congress/house-bill/4366/text.

applicable numerical emission standards contained in CISWI.

B. What are the final compliance schedules?

The Federal plan requires owners or operators of CISWI to come into compliance by January 10, 2025. Although the final CISWI EG included increments of progress in the compliance schedule, the EPA is not including increments of progress as a compliance pathway for the final Federal plan. Increments of progress were included in the EG to establish obligations that would apply to sources planning to take more than one year from approval of the state plan to comply. The increments would help ensure that sources planning to take more than one year to comply would make some incremental progress toward compliance after the first year. The increments did not require any additional action within one year of approval of a state plan (or promulgation of a Federal plan). Because the increments of progress contained in the final EG do not require

any additional action within one year of promulgation of a Federal plan, including the increments of progress in this Federal plan would serve no meaningful purpose and may create confusion. For this reason, the EPA did not include increments of progress in the proposed Federal plan, and we are not including them in this final action.

If a CISWI does not achieve final compliance by January 10, 2025, the final Federal plan requires the CISWI to shut down by January 10, 2025, complete the retrofit while not operating, and be in compliance upon restarting. A CISWI that operates out of compliance after the final compliance date would be in violation of the Federal plan and subject to enforcement action.

C. What emissions and operating limits is the EPA incorporating into the final Federal plan?

The EPA is incorporating the EG emissions and operating limits from the final CISWI EG, 40 CFR part 60, subpart DDDD, into this final CISWI Federal plan. Table 5 of this preamble

summarizes the emissions limits that we are finalizing in the final Federal plan. Table 5 also includes the 2000 CISWI Federal plan emission limits (which applied only to units in the existing incinerator subcategory) for comparison. These standards apply at all times. Existing sources may comply with either the Polychlorinated dibenzo-p-dioxins/Polychlorinated dibenzofurans (PCDD/PCDF) toxicity equivalence or total mass balance emission limits.

Facilities will be required to establish site-specific operating limits derived from the results of performance testing. The site-specific operating limits are established as the minimum (or maximum, as appropriate) operating parameter value measured during the performance test. These operating limits will result in achievable operating ranges that will ensure that the control devices used for compliance will be operated to achieve continuous compliance with the emissions limits. Further discussion on performance testing can be found in section IV.D. of this preamble.

TABLE 5—SUMMARY OF EMISSIONS LIMITS PROMULGATED FOR EXISTING CISWI

Pollutant (units) ¹	Incinerators (2,000 CISWI limit)	CISWI subcategories				
		Incinerators	ERUs—solids	ERUs— liquid/gas	Waste-burning kilns	SRIs
HCl (parts per million by volume (ppmv))	62	29	0.20 (biomass units)/58 (coal units).	14	3.0	300
CO (ppmv)	157	17	260 (biomass units)/95 (coal units).	35	110 (long kilns)/790 (preheater/precalciner).	64
Pb (mg/dscm)	0.04	0.015	0.014 (biomass units)/0.057 (coal units).	0.096	0.014	2.1
Cd (mg/dscm)	0.004	0.0026	0.0014 (biomass units)/0.0017 (coal units).	0.023	0.0014	0.95
Hg (mg/dscm)	0.47	0.0048	0.0022 (biomass units)/0.013 (coal units).	0.0024	0.011 ²	0.0053
PM, filterable (mg/dscm)	70	34	11 (biomass units)/130 (coal units).	110	13.5	270
Dioxin, furans, total (ng/dscm)	(no limit)	4.6	0.52 (biomass units)/5.1 (coal units).	2.9	1.3	4,400
Dioxins and furans, TEQ (nanograms per dry standard cubic meter (ng/dscm)).	0.41	0.13	0.12 (biomass units)/0.075 (coal units).	0.32	0.075	180
NO _x (ppmv)	388	53	290 (biomass units)/460 (coal units).	76	630	190
SO ₂ (ppmv)	20	11	7.3 (biomass units)/850 (coal units).	720	600	150

¹ All emission limits are expressed as concentrations corrected to 7 percent O₂.

² Or alternative limit of 58 lb/MM ton clinker.

D. What are the final performance testing and monitoring requirements?

The EPA is finalizing several performance testing and monitoring provision amendments to the current 2003 CISWI Federal plan (see 68 FR 57518, October 3, 2003) that are consistent with the requirements of the final CISWI EG. The following paragraphs list a number of testing and monitoring requirements in the final CISWI EG that the EPA is including in the final CISWI Federal plan.

1. Performance Testing and Monitoring

The final Federal plan requires all CISWI to demonstrate initial and continuous compliance with the final emission limits. These provisions require initial and annual performance tests and initial and annual inspections of scrubbers, fabric filters (FF), and other air pollution control devices that are used to meet the emission limits. In addition, a Method 22 (40 CFR part 60, appendix A–7) visible emissions test of the ash handling operations is required

during the initial and annual compliance test for all subcategories except waste-burning kilns, which do not have ash handling systems. Furthermore, for any CISWI that operates a FF air pollution control device, we are requiring that a bag leak detection system be installed to monitor the device.

This Federal plan continues to require parametric monitoring of all other add-on air pollution control devices, such as wet scrubbers, dry scrubbers and

activated carbon injection. CISWI that install selective non-catalytic reduction technology to reduce NO_x emissions are required to monitor the reagent (*e.g.*, ammonia or urea) injection rate and secondary chamber temperature (if applicable to the CISWI). This final Federal plan also requires subcategory-specific monitoring requirements in addition to the aforementioned inspection, bag leak detection, and parametric monitoring requirements that are applicable to all CISWI. Existing incinerators, SRIs, and ERUs are required to have annual emissions testing for all 9 pollutants: PM, SO₂, HCl, NO_x, CO, Pb, Cd, Hg, and dioxins and furans. Waste-burning kilns are required to monitor Hg and HCl (if no

scrubber) emissions using a continuous emissions monitoring system, monitor PM emissions using a PM continuous parameter monitoring system (PM CPMS), and perform annual testing for the remaining pollutants.

The final Federal plan provides reduced annual testing requirements for all 9 pollutants when testing results are shown to be well below the limits. If an ERU has a design capacity greater than 250 Million British Thermal units per hour, we are requiring a PM CPMS for PM monitoring for these units. For the PM CPMS, the EPA is further requiring that a site-specific parametric operating limit be established during the performance test, that there be continuous monitoring of that parametric limit using a PM CPMS, and

that 4 deviations within a 12-month operating period constitutes a violation and triggers immediate corrective action and a Method 5 performance test within 30 days with an additional 15 days to reestablish a site-specific operating limit. Consistent with the final CISWI EG, all operating parameter averaging for ERU units must be on a 30-day rolling average and allow the sorbent injection parameter to be adjusted based on the ERU's load. These testing and monitoring provisions reflect those in the final CISWI EG.

The final Federal plan incorporates by reference two alternatives to the EPA reference test methods, and one EPA guidance document, as shown in table 6 below.

TABLE 6—LIST OF INCORPORATION BY REFERENCE (IBR)

Test method	Publisher	IBR in 40 CFR part 62, subpart IIIa
ANSI/ASME PTC 19.10–1981, Flue and Exhaust Gas Analyses [Part 10, Instruments and Apparatus], Issued August 31, 1981.	Available for purchase from the American Society of Mechanical Engineers (ASME), Two Park Avenue, New York, NY 10016–5990, (800) 843–2763, https://www.asme.org/ .	§ 62.14640a(s)(1)(i) and (ii), (t)(1)(ii), (t)(4)(i), and (z)(1)(i) and tables 4, 5, 6, and 7 to subpart IIIa of part 62.
ASTM D6784–24 Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury in Flue Gas Generated from Coal-Fired Stationary Sources (Ontario Hydro Method), approved March 1, 2024.	Available for purchase from at least one of the following addresses: American Society for Testing and Materials (ASTM), 100 Barr Harbor Drive, Post Office Box C700, West Conshohocken, PA 19428–2959; or ProQuest, 300 North Zeeb Road, Ann Arbor, MI 48106, (877) 909–2786, https://www.astm.org/ .	§ 62.14665a(j) and tables 4, 5, and 7 to subpart IIIa of part 62.
Fabric Filter Bag Leak Detection Guidance, EPA–454/R–98–015, September 1997.	Available from the U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460, (202) 272–0167, https://www.epa.gov/ or https://www3.epa.gov/ttnemc01/cem/tribo.pdf .	§ 62.14640a(r)(3) and (z)(2)(i).

These tests are discussed further in section VIII.I. of this preamble, titled “National Technology Transfer and Advancement Act (NTTAA) and 1 CFR part 51.”

2. Electronic Data Submittal

To increase the ease and efficiency of data submittal and data accessibility, the final Federal plan requires that owners and operators of CISWI submit electronic copies of required performance test, performance evaluation, initial, annual, and deviation reports through the EPA's Central Data Exchange (CDX) using the Compliance and Emissions Data Reporting Interface (CEDRI). This mirrors the final CISWI EG for CISWI. A description of the electronic data submission process is provided in the memorandum *Electronic Reporting Requirements for New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) Rules*, available in the docket for this

action. The final rule requires that performance test and performance evaluation results be submitted in the format generated through the use of the ERT or an electronic file consistent with the xml schema on the ERT website for initial, deviation, and annual reports, the final rule requires that owners and operators use the appropriate spreadsheet template to submit information to CEDRI. The final version of the templates for these reports will be located on the CEDRI website.¹⁰

Furthermore, the EPA is finalizing provisions that allow owners and operators the ability to seek extensions for submitting electronic reports for circumstances beyond the control of the facility, *i.e.*, for a possible outage in CDX or CEDRI or for a force majeure event, in the time just prior to a report's due date, as well as the process to assert such a claim. Examples of force majeure events are acts of nature, acts of war or

terrorism, or equipment failure or safety hazards beyond the control of the facility. The EPA is providing these potential extensions to protect owners and operators from noncompliance in cases where they cannot successfully submit a report by the reporting deadline for reasons outside of their control. In both circumstances, the decision to accept the claim of needing additional time to report is within the discretion of the Administrator, and reporting should occur as soon as possible. This also mirrors the final CISWI EG for CISWI.

E. What are the final recordkeeping and reporting requirements?

The EPA is finalizing requirements that reflect those promulgated in the final CISWI EG. The Federal plan requires that records of all initial and all subsequent performance tests, CEMS performance evaluations, deviation reports, operating parameter data, continuous monitoring data, maintenance and inspections of air

¹⁰ <https://www.epa.gov/electronic-reporting-air-emissions/cedri>.

pollution control devices, monitoring plan, and operator training and qualification must be maintained for 5 years. Any incident of deviation, resumed operation following shutdown, force majeure, intent to stop or start use of Continuous Monitoring Systems (CMS), and intent of conducting or rescheduling a performance test are required to be reported to the Administrator. Furthermore, final compliance reports are required following the completion of each requirement and identifying any missed requirement. See section IV.B. of this preamble for a more detailed discussion of the compliance schedules.

F. What are the other final requirements?

We are finalizing requirements for the Federal plan to make it consistent with the final CISWI EG, including technical amendments promulgated on April 16, 2019. For example, the final CISWI Federal plan includes the requirement for owners or operators of existing CISWI to meet operator training and qualification requirements, which include: ensuring that at least one operator or supervisor per facility complete the operator training course, that qualified operator(s) or supervisor(s) complete an annual review or refresher course specified in the regulation, and that they maintain plant-specific information, updated annually, regarding training.

Owners or operators of existing CISWI are also required to submit a monitoring plan for any CMS or bag leak detection system used to comply with the rule.

V. CISWI That Have or Will Shut Down

A. Units That Plan To Close

The final Federal plan establishes that if owners or operators plan to permanently close currently operating CISWI, they must do so and submit a closure notification to the Administrator by January 10, 2025. The final requirements for closing a CISWI are set forth at 40 CFR 62.14570 (subpart III) (now at 40 CFR 62.14540 (subpart IIIa)). Conversely, the CISWI requirements do apply to a “mothballed unit” or inactive unit, where a unit does not operate, but it is not rendered inoperable. Until such time as a unit is permanently closed, it must comply with any applicable requirements of the Federal plan. In addition, while still in operation, the CISWI is subject to the same requirements for title V operating permits that apply to units that will continue to operate.

B. Inoperable Units

The Federal plan provides that in cases where a CISWI has already shut down permanently and has been rendered inoperable (e.g., waste charge door is welded shut, stack is removed, combustion air blowers removed, burners or fuel supply equipment are removed), the CISWI may be left off the source inventory in a state plan or this final Federal plan. A CISWI that has been rendered inoperable would not be covered by the Federal plan.

C. CISWI That Have Shut Down

The unit inventory for this Federal plan includes any CISWI known to have already shut down (but not known to be inoperable).

1. Restarting Before the Final Compliance Date

If the owner or operator of an inactive CISWI plans to restart before the final compliance date, the owner or operator must achieve final compliance by January 10, 2025.

2. Restarting After the Final Compliance Date

Under the final Federal plan, if the owner or operator of a CISWI closes the CISWI, but restarts the unit after the final compliance date of January 10, 2025, the owner or operator must complete emission control retrofits and meet the emissions and operating limits on the date the CISWI restarts operation. Within 6 months of the unit startup, operator(s) of these CISWI would have to complete the operator training and qualification requirements. Within 60 days of installing an air pollution control device, operator(s) must conduct a unit inspection. Performance testing to demonstrate initial compliance would also be required as described at 40 CFR 62.14650 (now at 40 CFR 62.14615a). A CISWI may not use the provisions to close the CISWI and restart after the compliance date to gain an effective “extension” of the operator training and qualification requirements or initial compliance requirements. A CISWI that operates out of compliance after the final compliance date will be in violation of the Federal plan and subject to enforcement action.

VI. Implementation of the Federal Plan and Delegation

A. Background of Authority

Under sections 111(d) and 129(b) of the CAA, the EPA is required to adopt EG that are applicable to existing solid waste incineration units. These EG are implemented when the EPA approves a state plan or adopts a Federal plan that

implements and enforces the EG. As discussed above, the Federal plan regulates CISWI in states that do not have fully approved plans in effect to implement the EG.

Congress has determined that the primary responsibility for air pollution prevention and control rests with state and local agencies. (See section 101(a)(3) of the CAA.) Consistent with that overall determination, Congress established sections 111 and 129 of the CAA with the intent that the state and local agencies take the primary responsibility for ensuring that the emissions limitations and other requirements in the EG are achieved. Also, in section 111(d) of the CAA, Congress explicitly required that the EPA establish procedures that are similar to those under CAA section 110(c) for state implementation plans. Although Congress required the EPA to propose and promulgate a Federal plan for states that fail to submit approvable state plans on time, states may submit plans at any time that may replace the CISWI Federal plan. The EPA strongly encourages states that are unable to submit approvable plans to request delegation of the Federal plan so that they can have primary responsibility for implementing the final CISWI EG, consistent with the intent of Congress.

The preferred outcome under the statute and the regulations results when the state, tribal, and local agencies implement the EPA approved state (or tribal) plan because state, tribal, and local agencies not only have the responsibility to implement the final CISWI EG, but also have the practical knowledge and enforcement resources critical to achieving the highest rate of compliance. In cases where states are unable to develop and submit approvable state plans, it is still preferable for the state and local agencies to be the implementing agency. For these reasons, the EPA will do all that it can to expedite delegation of the Federal plan to state, tribal, and local agencies, whenever possible, in cases where states are unable to develop and submit approvable state plans. The EPA will also continue to review and act on state plans after promulgation of the CISWI Federal plan.

B. Mechanisms for Transferring Authority

There are 2 mechanisms for transferring implementation authority to state, tribal, and local agencies: (1) The EPA approval of a state plan after the Federal plan is in effect; and (2) if a state does not submit or obtain approval of its own plan, the EPA delegation to a state, tribe, or local agency with the authority

to implement certain portions of this Federal plan to the extent appropriate and if allowed by state law. Both of these options are described in more detail below.

1. Federal Plan Becomes Effective Prior to Approval of a State Plan

After a CISWI in a state without an approved state plan becomes subject to the Federal plan, the state or tribal agency may still adopt and submit a state or tribal plan to the EPA. If the EPA determines that the state or tribal plan is as protective as the final CISWI EG, the EPA will approve the state or tribal plan. If the EPA determines that the plan is not as protective as the final CISWI EG, the EPA may approve the portions of the plan that are consistent with the final CISWI EG. If a state or tribal plan is approved in part, the Federal plan will apply to the affected CISWI in lieu of the disapproved portions of the state plan until the state or tribe addresses the deficiencies in the state plan and the revised state plan is approved by the EPA. Prior to any disapproval, the EPA will work with states and tribes to attempt to reconcile areas of the plan that remain inconsistent with the EG.

Upon the effective date of a state or tribal plan, the Federal plan would no longer apply to CISWI covered by such a plan and the state, tribe, territory, or local agency would implement and enforce the state plan in lieu of the Federal plan. When an EPA regional office approves a state or tribal plan, it will amend the appropriate subpart of 40 CFR part 62 to indicate such approval.

2. State, Tribe, Territory, or Local Agency Taking Delegation of the Federal Plan

The EPA, in its discretion, may delegate to state, tribe, territorial, or local agencies the authority to implement this Federal plan. As discussed above, the EPA has concluded that it is advantageous and the best use of resources for states, tribes, territories, or local agencies to agree to undertake, on the EPA's behalf, administrative and substantive roles in implementing the Federal plan to the extent appropriate and where authorized by Federal, state, tribal, territorial, or local law. If a state, tribe, territory, or local agency requests delegation, the EPA will generally delegate the entire Federal plan to the state, tribe, territory, or local agency. These functions include administration and oversight of compliance, and reporting and recordkeeping requirements, CISWI inspections and preparation of draft notices of violation,

but will not include any authorities retained by the EPA. Agencies that have taken delegation, as well as the EPA, will have responsibility for bringing enforcement actions against sources violating Federal plan provisions.

C. Implementing Authority

The EPA Regional Administrators have been delegated the authority for implementing the CISWI Federal plan. All reports required by the Federal plan should be submitted to the appropriate Regional Administrator. Section II.C. of this preamble includes table 3 that lists names and addresses of the EPA regional office contacts and the states they cover.

D. Delegation of the Federal Plan and Retained Authorities

If a state, tribe, territory, or local agency intends to take delegation of the Federal plan, the state, tribe, territory, or local agency should submit to the appropriate EPA regional office a written request for delegation of authority. The state, tribe, territory, or local agency should explain how it meets the criteria for delegation. See generally "Good Practices Manual for Delegation of NSPS and NESHAP" (U.S. EPA, February 1983).¹¹ The letter requesting delegation of authority to implement the Federal plan should: (1) demonstrate that the state, tribe, territory, or local agency has adequate resources, as well as the legal authority to administer and enforce the program, (2) include an inventory of affected CISWI, which includes those that have ceased operation, but have not been dismantled or rendered inoperable, and an inventory of the affected units' air emissions and a provision for state progress reports to the EPA, (3) certify that a public hearing was held on the state, tribe, territory, or local agency delegation request, and (4) include a memorandum of agreement between the state, tribe, territory, or local agency and the EPA that sets forth the terms and conditions of the delegation, the effective date of the agreement and the mechanism to transfer authority. Upon signature of the agreement, the appropriate EPA Regional office would publish an approval document in the **Federal Register**, thereby incorporating the delegation of authority into the appropriate subpart of 40 CFR part 62.

If authority is not delegated to a state, tribe, territory, or local agency, the EPA will implement the Federal plan. Also,

¹¹ "Good Practices Manual for Delegation of NSPS and NESHAPS." U.S. EPA, Office of Air Quality Planning and Standards (February 1983). https://www.epa.gov/sites/default/files/2015-05/documents/epa_good_pract_man_ch1-5.pdf.

if a state, tribe, territory, or local agency fails to properly implement a delegated portion of the Federal plan, the EPA will assume direct implementation and enforcement of that portion. The EPA will continue to hold enforcement authority along with the state, tribe, territory, or local agency even when the agency has received delegation of the Federal plan. In all cases where the Federal plan is delegated, the EPA will retain and will not transfer authority to a state, tribe, or local agency to approve the items in 40 CFR 62.14838 (now at 40 CFR 62.14775) promulgated in the final CISWI EG. CISWI owners or operators who wish to petition the Agency for any alternative requirement should submit a request to the Regional Administrator with a copy sent to the appropriate state.

VII. Title V Operating Permits

All existing CISWI located at commercial or industrial facilities and regulated under state, tribal, or Federal plans implementing the final CISWI EG must operate in a manner consistent with a title V operating permit that assures compliance with all federally applicable requirements for any regulated CISWI, including all applicable CAA section 129 requirements.¹²

The permit application deadline for a CAA section 129 source applying for a title V operating permit depends on when the source first becomes subject to the relevant title V permit program. Because existing major sources are subject to title V,¹³ major source facilities that contain existing CISWI should already have a title V permit. In such cases, the source must comply with the title V permit revision provisions of the relevant state title V program instead of applying for a title V permit. In contrast, the application deadline would apply to CISWI at facilities that are not subject to the title V permit program for other reasons. Such sources with an existing CISWI or air curtain incinerator subject to this Federal plan must submit a complete title V permit application by the earliest of the following dates:

- Twelve (12) months after the effective date of any applicable EPA-approved CAA sections 111(d)/129 plan (*i.e.*, approved state or tribal plan that implements the final CISWI EG); or
- Twelve (12) months after the effective date of any applicable Federal plan; or

¹² 40 CFR 70.2, 70.6(a)(1), 71.2, and 71.6(a)(1).

¹³ CAA section 503(c) and 40 CFR 70.3(a) and (b), 70.5(a)(1)(i), 71.3(a) and (b), and 71.5(a)(1)(i).

• Thirty-six (36) months after promulgation of 40 CFR part 60, subpart DDDD (*i.e.*, February 7, 2016).

For any existing CISWI not subject to an earlier permit application deadline, the application deadline of February 7, 2016, which is in the past, applies regardless of whether or when any applicable Federal plan is effective, or whether or when any applicable CAA sections 111(d)/129 plan is approved by the EPA and becomes effective. (See CAA sections 129(e), 503(c), 503(d), 502(a), and 40 CFR 70.5(a)(1)(i) and 71.5(a)(1)(i).)

For more background information on the interface between CAA section 129 and title V, including the EPA's interpretation of CAA section 129(e), see the final Federal plan for Commercial and Industrial Solid Waste Incinerators, October 3, 2003 (68 FR 57518, 57532). See also the final Federal plan for Hospital Medical Infectious Waste Incinerators, August 15, 2000 (65 FR 49868, 49877).

Title V and Delegation of a Federal Plan

As noted previously, issuance of a title V permit is not itself equivalent to the approval of a state or tribal plan or delegation of a Federal plan.¹⁴ Legally, delegation of a standard or requirement results in a delegated state, local, or tribal agency standing in for the EPA as a matter of Federal law. This means that obligations a source may have to the EPA under a federally promulgated standard become obligations to a state, tribal, or local agency (except for functions that the EPA retains for itself) upon delegation.¹⁵ Although a state, local, or tribal agency must have the authority under state, local, or tribal law to incorporate CAA section 111/129 requirements into its title V permits, and implement and enforce these requirements in these permits without first taking delegation of the CAA section 111/129 Federal plan, the state, local, or tribal agency is not standing in for the EPA as a matter of Federal law in this situation. Where a state, local, or tribal agency does not take delegation of a section 111/129 Federal plan, obligations that a source has to the EPA under the Federal plan continue after a title V permit is issued to the source. As a result, the EPA maintains that an

approved 40 CFR part 70 operating permits program alone cannot be used as a mechanism to transfer the authority to implement and enforce the Federal plan from the EPA to a state, local, or tribal agency.

As mentioned above, a state, local, or tribal agency title V program necessarily includes the authority to incorporate CAA section 111/129 requirements into its title V permits, and implement and enforce these requirements in that context without first taking delegation of the CAA section 111/129 Federal plan.¹⁶ Some states, local governments, or tribes, however, may not be able to implement and enforce a CAA section 111/129 standard in a title V permit under state, local, or tribal law until the CAA section 111/129 standard has been delegated. In these situations, a state, local, or tribal agency should not issue a 40 CFR part 70 permit to a source subject to a Federal plan before taking delegation of the section 111/129 Federal plan.

However, if a state or tribe can provide an Attorney General's (AG) opinion delineating its authority to incorporate CAA section 111/129 requirements into its title V permits, and then implement and enforce these requirements through its title V permits without first taking delegation of the requirements, then a state, local, or tribal agency does not need to take delegation of the CAA section 111/129 requirements for purposes of title V permitting.¹⁷ In practical terms, without approval of a state or tribal plan, delegation of a Federal plan, or an adequate AG's opinion, states, local governments, and tribes with approved 40 CFR part 70 permitting programs open themselves up to potential questions regarding their authority to issue permits containing CAA section 111/129 requirements and to assure compliance with these requirements. Such questions could lead to the issuance of a notice of deficiency for a state's or tribe's 40 CFR part 70 program. As a result, prior to a state, local, or tribal permitting authority drafting a

part 70 permit for a source subject to a CAA section 111/129 Federal plan, the state, local government, or tribe, the EPA regional office and the source in question are advised to ensure that delegation of the relevant Federal plan has taken place or that the permitting authority has provided an adequate AG's opinion to the EPA Regional office.

In addition, if a permitting authority chooses to rely on an AG's opinion and not take delegation of a Federal plan, a CAA section 111/129 source subject to the Federal plan in that state must simultaneously submit to both the EPA and the state, local government, or tribe all reports required by the standard to be submitted to the EPA. Given that these reports are necessary to implement and enforce the CAA section 111/129 requirements when they have been included in title V permits, the permitting authority needs to receive these reports at the same time as the EPA.

In the situation where a permitting authority chooses to rely on an AG's opinion and not take delegation of a Federal plan, the EPA regional offices will be responsible for implementing and enforcing CAA section 111/129 requirements outside of any title V permits. Moreover, in this situation, the EPA regional offices will continue to be responsible for developing progress reports and conducting any other administrative functions required under this Federal plan or any other CAA section 111/129 Federal plan. See section IV.B of this preamble, titled "What are the final compliance schedules?"

It is important to note that the EPA is not using its authority under 40 CFR 70.4(i)(3) to request that all states, local governments, and tribes that do not take delegation of this Federal plan submit supplemental AG's opinions at this time. However, the EPA regional offices shall request, and permitting authorities shall provide, such opinions when the EPA questions a state's or tribe's authority to incorporate CAA section 111/129 requirements into a title V permit and implement and enforce these requirements in that context without delegation.

VIII. Statutory and Executive Order Reviews

Additional information about these statutes and Executive orders can be found at <https://www.epa.gov/laws-regulations/laws-and-executive-orders>.

¹⁴ See, *e.g.*, the "Title V and Delegation of a Federal Plan" section of the proposed Federal plan for CISWI, November 25, 2002 (67 FR 70640, 70652). The preamble language from this section in the proposed Federal plan for CISWI was reaffirmed in the final Federal plan for CISWI, October 3, 2003 (68 FR 57518, 57535).

¹⁵ If the Administrator chooses to retain certain authorities under a standard, those authorities cannot be delegated, *e.g.*, major alternatives to test alternative methods.

¹⁶ The EPA interprets the phrase "assure compliance" in CAA section 502(b)(5)(A) to mean that permitting authorities will implement and enforce each applicable standard, regulation, or requirement which must be included in the title V permits that the permitting authorities issue. See definition of "applicable requirement" in 40 CFR 70.2. See also 40 CFR 70.4(b)(3)(i) and 70.6(a)(1).

¹⁷ It is important to note that an AG's opinion submitted at the time of initial title V program approval is sufficient if it demonstrates that a state or tribe has adequate authority to incorporate CAA section 111/129 requirements into its title V permits and to implement and enforce these requirements through its title V permits without delegation and no subsequent state law or regulation has in some way limited that authority.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 14094: Modernizing Regulatory Review

This action is not a significant regulatory action as defined under section 3(f)(1) of Executive Order 12866, as amended by Executive Order 14094, and was therefore not subject to a requirement for Executive Order 12866 review.

B. Paperwork Reduction Act (PRA)

The information collection activities in this rule will be submitted for approval to the Office of Management and Budget (OMB) under the PRA. The Information Collection Request (ICR) document that the EPA prepared has been assigned EPA ICR number 2385.09. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here. The information collection requirements are not enforceable until OMB approves them.

This action finalizes the CISWI Federal plan to implement the EG adopted on February 7, 2013,¹⁸ for those states that do not have a fully approved state plan implementing the EG. While there were amendments to the 2013 rule on June 23, 2016, and April 16, 2019, neither of those final actions imposed any new information collection burden under the PRA (see 81 FR 40969 and 84 FR 15852, respectively). OMB has previously approved the information collection activities contained in the existing regulation and has assigned OMB Control number 2060–0664 for 40 CFR part 60, subpart DDDD. While this action is believed to result in no changes to the information collection requirements of the 2013 CISWI rule, it does implement the CISWI standards to a subset of existing units that will be regulated by implementing this final action. Therefore, in addition to the total burden, the EPA is presenting an estimate of the subset of the CISWI respondent universe and burden that will be subject to the CISWI Federal plan instead of being regulated under an approved state plan for the CISWI EG. These estimates are provided below.

Respondents/affected entities:

Owners and operators of existing CISWI.

Respondent's obligation to respond:

Mandatory (40 CFR part 60, subpart DDDD, and 40 CFR part 62, subpart III, now at 40 CFR part 62, subpart IIIa).

Estimated number of respondents:

The annual number of responding facilities complying with the requirements of the CISWI EG is 76. Of the total, 40 are subject to this final

rule's implementation of the CISWI EG per 40 CFR part 62, subpart III, now at 40 CFR part 62, subpart IIIa.

Frequency of response: Initially, annually, and semiannually.

Total estimated burden: The annual recordkeeping and reporting burden for responding facilities to comply with all of the requirements in the CISWI EG, averaged over the 3 years of this ICR, is estimated to be 8,660 hours. Of these, 4,420 hours (per year) is the portion of the burden to comply with this final rule's portion of implementing the CISWI EG. Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: The annual recordkeeping and reporting cost for responding facilities to comply with all of the requirements in the CISWI EG, averaged over the 3 years of this ICR, is estimated to be \$13,300,000 (per year), including \$12,300,000 annualized capital or operation and maintenance costs. Of the CISWI total, \$3,700,000 (per year) is the portion of the cost to comply with this final rule's portion of implementing the CISWI EG, including \$3,200,000 in annualized capital or operation and maintenance costs.

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 OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce the approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

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. In making this determination, the EPA concludes that the impact of concern for this rule is any significant adverse economic impact on small entities. The agency is certifying that this rule will not have a significant economic impact on a substantial number of small entities because the rule implements the EG for owners of existing CISWI that were established by the February 7, 2013, final rule (78 FR 9112), and that rule was certified as not having a significant economic impact on a substantial number of small entities. This action establishes a Federal plan to implement and enforce those requirements in those states that do not have their own EPA-approved state plan for implementing and enforcing the requirements. We have, therefore,

concluded that this action will have no net regulatory burden for all directly regulated small entities beyond those considered for the CISWI EG.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local, or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. The EPA is not aware of any CISWI owned or operated by Indian tribal governments at the time of the publication of this document. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2–202 of the Executive order.

Therefore, this action is not subject to Executive Order 13045 because it implements a previously promulgated emission guidelines.

Furthermore, the EPA's Policy on Children's Health does not apply to this action because it implements a technology-based standard and does not concern an environmental health risk or safety risk.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Orders 12866.

¹⁸ See 78 FR 9112, February 7, 2013.

I. National Technology Transfer and Advancement Act (NTTAA) and 1 CFR Part 51

This action involves technical standards. Please reference table 6 of this preamble for the locations where these standards are available. The EPA has decided to use ANSI/ASME PTC 19.10–1981, “Flue and Exhaust Gas Analyses,” for its manual methods of measuring the oxygen or carbon dioxide content of the exhaust gas. These parts of ASME PTC 19.10–1981 are acceptable alternatives to EPA Methods 6 and 7 for the manual procedures only. The manual method segment of the oxygen determination is performed through the absorption of oxygen. This method is available at the American National Standards Institute (ANSI), 1899 L Street NW, 11th Floor, Washington, DC 20036 and the American Society of Mechanical Engineers (ASME), Two Park Avenue, New York, NY 10016–5990. See <https://www.ansi.org> and <https://www.asme.org>. The standard is available to everyone at a cost determined by ANSI/ASME (\$80). ANSI/ASME also offer memberships or subscriptions for reduced costs. The cost of obtaining this method is not a significant financial burden, making the method reasonably available.

Another voluntary consensus standard (VCS), ASTM D6784–24, “Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury Gas Generated from Coal-Fired Stationary Sources (Ontario Hydro Method)”, for its manual method of measuring mercury is an acceptable alternative to Method 29 and 30B. Initially developed for the measurement of mercury in coal-fired power plants, this method has been used on other combustion sources such as the waste incinerators subject to this rule. This method is available for purchase from at least one of the following addresses: American Society for Testing and Materials (ASTM), 100 Barr Harbor Drive, Post Office Box C700, West Conshohocken, PA 19428–2959; or ProQuest, 300 North Zeeb Road, Ann Arbor, MI 48106, (877) 909–2786, <https://www.astm.org/>. The standard is available to everyone at a cost determined by ASTM (\$90). The cost of obtaining this method is not a significant financial burden, making the method reasonably available.

The EPA further determined to use Office of Air Quality Planning and Standards (OAQPS) Fabric Filter Bag Leak Detection Guidance, EPA–454/R–98–015, September 1997, for its guidance on the use of triboelectric monitors as bag leak detectors for a

fabric filter air pollution control device and monitoring system descriptions, selection, installation, set up, adjustment, operation, and quality assurance procedures. This standard is available from the U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460, (202) 272–0167, <https://www.epa.gov> or <https://www3.epa.gov/ttnemc01/cem/tribo.pdf>. The EPA determined that this standard is reasonably available because it is freely available from the EPA. Lastly, the EPA decided to use EPA Methods 5, 6, 6C, 7, 7E, 9, 10, 10A, 10B, 22, 23, 26A, 29, and 30B. No VCS were found for EPA Methods 9 and 22.

While the EPA has identified 23 VCS as being potentially applicable to the rule, we have decided not to use these VCS in this rulemaking. The use of these VCS would be impractical because they do not meet the objectives of the standards cited in this rule. See the docket for the final CISWI EG (Docket ID No. EPA–HQ–OAR–2003–0119), which are being implemented under this action, for further information.

Under 40 CFR 62.14838 (now at 40 CFR 62.14775a), the EPA Administrator retains the authority of approving alternate methods of demonstrating compliance as established under 40 CFR 60.8(b) and 60.13(i) (subpart A (NSPS General Provisions)). A source may apply to the EPA for permission to use alternative test methods or alternative monitoring requirements in place of any required EPA test methods, performance specifications, or procedures.

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

The EPA believes that it is not practicable to assess whether the human health or environmental conditions that exist prior to this action result in disproportionate and adverse effects on communities with environmental justice concerns. This action implements the final CISWI EG, which was published in 2013. At that time, no analysis was performed on the inventory of units and proximity to communities with existing environmental justice concerns.

The EPA believes that this action is not likely to result in new disproportionate and adverse effects on communities with environmental justice concerns.

The information supporting this Executive order review is contained in this preamble section, as well as the final CISWI EG discussion for Executive

Order 12898 (78 FR 9178, February 7, 2013). This Federal plan implements the final CISWI EG for states that do not have a fully approved state plan implementing the final CISWI EG. As discussed in the preamble to the 2013 CISWI rule, the final CISWI EG will not have disproportionately high and adverse human health or environmental effects on communities with EJ concerns because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any communities with EJ concerns.

The amendments finalized in 2013 (made to the 2011 CISWI final rule), as well as subsequent amendments made in 2016 and 2019, do not relax the control measures on sources regulated by the CISWI rule, and, therefore, will not cause emissions increases from these sources. The February 2013 final CISWI rule will reduce emissions of all the listed hazardous air pollutants (HAP) emitted from this source when implemented either through an approved state plan or this final Federal plan. This includes emissions of Cd, HCl, Pb, and Hg. Other emissions reductions include reductions of criteria pollutants such as CO, NO_x, PM (including particulate matter 2.5 microns or less), SO₂, and NO_x. SO₂ and NO_x are precursors for the formation of particulate matter (diameter less than or equal to 2.5 micrometers (PM_{2.5})) and NO_x is a precursor for ozone. Reducing these emissions will decrease the amount of such pollutants to which all affected populations are exposed.

K. Congressional Review Act (CRA)

This action is subject to the CRA and the 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).

List of Subjects in 40 CFR Part 62

Environmental protection, Administrative practice and procedure, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Michael S. Regan,
Administrator.

For the reasons stated in the preamble, title 40, chapter I, part 62 of the Code of Federal Regulations is amended as follows:

PART 62—APPROVAL AND PROMULGATION OF STATE PLANS FOR DESIGNATED FACILITIES AND POLLUTANTS

■ 1. The authority citation for part 62 continues to read as follows:

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

Subpart III—Federal Plan Requirements for Commercial and Industrial Solid Waste Incineration Units That Commenced Construction On or Before November 30, 1999

■ 2. Amend § 62.14510 by adding paragraph (d) to read as follows:

§ 62.14510 Am I subject to this subpart?

* * * * *

(d) On and after January 10, 2025, CISWI will no longer be subject to the requirements of this subpart and instead will be subject to the requirements of subpart IIIa of this part.

■ 3. Add subpart IIIa, consisting of §§ 62.14500a through 62.14780a, to read as follows:

Subpart IIIa—Federal Plan Requirements for Commercial and Industrial Solid Waste Incineration Units That Commenced Construction On or Before June 4, 2010, and Have Not Been Modified or Reconstructed Since August 7, 2013

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Table 5 to Subpart IIIa of Part 62—Model Rule—Emission Limitations That Apply to Energy Recovery Units After January 10, 2025

Table 6 to Subpart IIIa of Part 62—Model Rule—Emission Limitations That Apply to Waste-Burning Kilns After January 10, 2025

Table 7 to Subpart IIIa of Part 62—Model Rule—Emission Limitations That Apply to Small, Remote Incinerators After January 10, 2025

Introduction

§ 62.14500a What is the purpose of this subpart?

(a) This subpart establishes emission requirements and compliance schedules for the control of emissions from commercial and industrial solid waste incineration units (CISWI) that are not

covered, or are only partially covered, by an EPA approved and currently effective state or tribal plan. The pollutants addressed by the emission requirements in this subpart are listed in tables 4 through 7 to this subpart. The emission requirements in this subpart were developed in accordance with sections 111 and 129 of the Clean Air Act and 40 CFR part 60, subpart B.

(b) In this subpart, “you” means the owner or operator of a CISWI.

§ 62.14505a What are the principal components of this subpart?

This subpart contains the ten major components listed in paragraphs (a) through (j) of this section.

- (a) Waste management plan.
- (b) Operator training and qualification.
- (c) Emission limitations and operating limits.
- (d) Performance testing.
- (e) Initial compliance requirements.
- (f) Continuous compliance requirements.
- (g) Monitoring.
- (h) Recordkeeping and reporting.
- (i) Definitions.
- (j) Tables.

Applicability

§ 62.14510a Am I subject to this subpart?

(a) You are subject to this subpart if you own or operate a CISWI as defined in § 62.14780a or an air curtain incinerator as defined in § 62.14780a and the CISWI or air curtain incinerator meets the criteria described in paragraphs (a)(1) through (3) of this section.

(1) Construction of your CISWI or air curtain incinerator commenced on or before June 4, 2010, and have not been modified or reconstructed since August 7, 2013.

(2) Your CISWI is not exempt under § 62.14530a.

(3) Your CISWI is not regulated by an EPA approved and currently effective state or tribal plan, or your CISWI is located in any state whose approved state or tribal plan is only approved in part. In the case of a state or tribal program that is approved in part, the Federal plan applies to affected CISWI in lieu of the disapproved portions of the state or tribal program until the state or tribe plan addresses the deficiencies and the revised plan is approved by the EPA.

(b) If changes to the CISWI are made after August 7, 2013, that meet the definition of modification or reconstruction in this subpart, your CISWI is subject to 40 CFR part 60, subpart CCCC, and this subpart no longer applies to that unit.

(c) If you make physical or operational changes to your existing CISWI primarily to comply with this subpart, then such changes do not qualify as modifications or reconstructions under 40 CFR part 60, subpart CCCC.

§ 62.14515a Can my CISWI be covered by both a state plan and this subpart?

(a) If your CISWI is located in a state that does not have an EPA-approved state plan or your state’s plan has not become effective, this subpart applies to your CISWI until the EPA approves a state plan that covers your CISWI and that state plan becomes effective. However, a state may enforce the requirements of a state regulation while your CISWI is still subject to this subpart.

(b) After the EPA fully approves a state plan covering your CISWI, and after that state plan becomes effective, you will no longer be subject to this subpart and will only be subject to the approved and effective state plan. If the state or tribal plan are only approved in part, you will remain subject to the Federal plan to the extent necessary to address the deficiencies in the disapproved portions of the state or tribal plan.

§ 62.14520a How do I determine if my CISWI is covered by an approved and effective state or tribal plan?

This part contains a list of state and tribal areas with approved Clean Air Act section 111(d) and section 129 plans along with the effective dates for such plans. The list is published annually. If this part does not indicate that your state or tribal area has an approved and effective plan, you should contact your state environmental agency’s air director or your EPA Regional Office to determine if the EPA has approved a state plan covering your CISWI since publication of the most recent version of this subpart.

§ 62.14525a If my CISWI is not listed in the Federal plan inventory, am I exempt from this subpart?

Any CISWI that meets the applicability criteria in § 62.14510a is required to comply with the applicable emissions guidelines even if the source is not listed in the Federal plan or otherwise applicable state or tribal plan inventory. CISWI subject to this subpart are not limited to the inventory of sources listed in Docket EPA–HQ–OAR–2016–0664 for the Federal plan. If your CISWI meets the applicability criteria in § 62.14510a, this subpart applies to you whether or not your CISWI is listed in the Federal plan inventory in the docket.

§ 62.14530a Can my combustion unit be exempt from this subpart?

This subpart exempts 11 types of units, described in paragraphs (a) through (k) of this section, from complying with the requirements of this subpart with the exception of the requirements specified in this section.

(a) *Pathological waste incineration units.* Incineration units burning 90 percent or more by weight (on a calendar quarter basis and excluding the weight of auxiliary fuel and combustion air) of pathological waste, low-level radioactive waste, and/or chemotherapeutic waste as defined in § 62.14785a are not subject to this subpart if you meet the two requirements specified in paragraphs (a)(1) and (2) of this section.

(1) Notify the Administrator that the unit meets the criteria in this paragraph (a).

(2) Keep records on a calendar quarter basis of the weight of pathological waste, low-level radioactive waste, and/or chemotherapeutic waste burned, and the weight of all other fuels and wastes burned in the unit.

(b) *Municipal waste combustion units.* Incineration units that are regulated under 40 CFR part 60, subpart Ea, Eb, Cb, AAAA, or BBBB or subpart JJJ of this part.

(c) *Medical waste incineration units.* Incineration units regulated under 40 CFR part 60, subparts Ec and Ce and subpart HHH of this part.

(d) *Small power production facilities.* Units that meet the four requirements specified in paragraphs (d)(1) through (4) of this section.

(1) The unit qualifies as a small power-production facility under section 3(17)(C) of the Federal Power Act (16 U.S.C. 796(17)(C)).

(2) The unit burns homogeneous waste (not including refuse-derived fuel) to produce electricity.

(3) You submit documentation to the Administrator notifying the Agency that the qualifying small power production facility is combusting homogenous waste.

(4) You must maintain the records specified in § 62.14675a(t).

(e) *Cogeneration facilities.* Units that meet the four requirements specified in paragraphs (e)(1) through (4) of this section.

(1) The unit qualifies as a cogeneration facility under section 3(18)(B) of the Federal Power Act (16 U.S.C. 796(18)(B)).

(2) The unit burns homogeneous waste (not including refuse-derived fuel) to produce electricity and steam or other forms of energy used for

industrial, commercial, heating, or cooling purposes.

(3) You submit documentation to the Administrator notifying the Agency that the qualifying cogeneration facility is combusting homogenous waste.

(4) You maintain the records specified in § 62.14675a(u).

(f) *Hazardous waste combustion units.* Units for which you are required to get a permit under section 3005 of the Solid Waste Disposal Act.

(g) *Materials recovery units.* Units that combust waste for the primary purpose of recovering metals, such as primary and secondary smelters.

(h) *Air curtain incinerators.* Air curtain incinerators that burn 100 percent wood waste; 100 percent clean lumber; or a 100 percent mixture of only wood waste, clean lumber, and/or yard waste; are required to meet only the requirements under §§ 62.14740a through 62.14765a and 62.14770a.

(i) *Sewage treatment plants.* Incineration units regulated under 40 CFR part 60, subpart O.

(j) *Sewage sludge incineration units.* Incineration units combusting sewage sludge for the purpose of reducing the volume of the sewage sludge by removing combustible matter that are subject to 40 CFR part 60, subpart LLLL or MMMM.

(k) *Other solid waste incineration units.* Incineration units that are subject to 40 CFR part 60, subpart EEEE or FFFF.

(l) *Small, remote incinerators.* Incineration units located in the State of Alaska are not subject to this subpart as specified in the Consolidated Appropriations Act of 2024, H.R. 4366, section 432.

Compliance Schedule

§ 62.14535a What must I do if I plan to continue operation of my CISWI?

(a) If you plan to continue operation of your CISWI, then you must follow the requirements in paragraph (b) of this section.

(b) If you plan to continue operation and come into compliance with the requirements of this subpart by January 10, 2025, then you must complete the requirements of paragraphs (b)(1) through (5) of this section.

(1) You must comply with the operator training and qualification requirements and inspection requirements (if applicable) of this subpart by January 10, 2025.

(2) You must submit a waste management plan no later than January 10, 2025.

(3) You must achieve final compliance by January 10, 2025. To

achieve final compliance, you must incorporate all process changes and complete retrofit construction of control devices, so that, if the affected CISWI is brought online, all necessary process changes and air pollution control devices would operate as designed.

(4) You must conduct the initial performance test within 180 days after the date when you are required to achieve final compliance under paragraph (b)(3) of this section.

(5) You must submit an initial report including the results of the initial performance test no later than 60 days following the initial performance test (see §§ 62.14675a through 62.14735a for complete reporting and recordkeeping requirements).

§ 62.14540a What must I do if I plan to permanently close my CISWI?

If you plan to permanently close your CISWI rather than comply with the Federal plan, you must submit a legally binding closure agreement, including the date of closure, to the Administrator by January 10, 2025, for sources that will not operate on or after the compliance date under this subpart.

§ 62.14545a What must I do if I close my CISWI and then restart it?

If you close your CISWI but restart it after January 10, 2025, for the purpose of continuing operation of the your CISWI, you must complete emission control retrofits and meet the emission limitations and operating limits on the date your unit restarts operation.

Waste Management Plan

§ 62.14550a What is a waste management plan?

A waste management plan is a written plan that identifies both the feasibility and the methods used to reduce or separate certain components of solid waste from the waste stream in order to reduce or eliminate toxic emissions from incinerated waste.

§ 62.14555a When must I submit my waste management plan?

You must submit a waste management plan no later than January 10, 2025, or six months prior to commencing or recommencing burning solid waste, whichever is later.

§ 62.14560a What should I include in my waste management plan?

A waste management plan must include consideration of the reduction or separation of waste-stream elements such as paper, cardboard, plastics, glass, batteries, or metals; or the use of recyclable materials. The plan must identify any additional waste management measures, and the source

must implement those measures considered practical and feasible, based on the effectiveness of waste management measures already in place, the costs of additional measures, the emissions reductions expected to be achieved, and any other environmental or energy impacts they might have.

Operator Training and Qualification

§ 62.14565a What are the operator training and qualification requirements?

(a) You must have a fully trained and qualified CISWI operator accessible at all times when the unit is in operation, either at your facility or able to be at your facility within one hour. The trained and qualified CISWI operator may operate the CISWI directly or be the direct supervisor of one or more other plant personnel who operate the unit. If all qualified CISWI operators are temporarily not accessible, you must follow the procedures in § 62.14595a.

(b) Operator training and qualification must be obtained through a state-approved program or by completing the requirements included in paragraph (c) of this section.

(c) Training must be obtained by completing an incinerator operator training course that includes, at a minimum, the three elements described in paragraphs (c)(1) through (3) of this section.

(1) Training on the eleven subjects listed in paragraphs (c)(1)(i) through (xi) of this section.

(i) Environmental concerns, including types of emissions.

(ii) Basic combustion principles, including products of combustion.

(iii) Operation of the specific type of incinerator to be used by the operator, including proper startup, waste charging, and shutdown procedures.

(iv) Combustion controls and monitoring.

(v) Operation of air pollution control equipment and factors affecting performance (where applicable).

(vi) Inspection and maintenance of the incinerator and air pollution control devices.

(vii) Actions to correct malfunctions or conditions that may lead to malfunction.

(viii) Bottom and fly ash characteristics and handling procedures.

(ix) Applicable Federal, state, and local regulations, including Occupational Safety and Health Administration workplace standards.

(x) Pollution prevention.

(xi) Waste management practices.

(2) An examination designed and administered by the instructor.

(3) Written material covering the training course topics that can serve as

reference material following completion of the course.

§ 62.14570a When must the operator training course be completed?

The operator training course must be completed by the later of the three dates specified in paragraphs (a) through (c) of this section.

(a) January 10, 2025.

(b) Six months after CISWI startup; or

(c) Six months after an employee assumes responsibility for operating the CISWI or assumes responsibility for supervising the operation of the CISWI.

§ 62.14575a How do I obtain my operator qualification?

(a) You must obtain operator qualification by completing a training course that satisfies the criteria under § 62.14565a(b).

(b) Qualification is valid from the date on which the training course is completed and the operator successfully passes the examination required under § 62.14565a(c)(2).

§ 62.14580a How do I maintain my operator qualification?

To maintain qualification, you must complete an annual review or refresher course covering, at a minimum, the five topics described in paragraphs (a) through (e) of this section.

(a) Update of regulations.

(b) Incinerator operation, including startup and shutdown procedures, waste charging, and ash handling.

(c) Inspection and maintenance.

(d) Responses to malfunctions or conditions that may lead to malfunction.

(e) Discussion of operating problems encountered by attendees.

§ 62.14585a How do I renew my lapsed operator qualification?

You must renew a lapsed operator qualification by one of the two methods specified in paragraphs (a) and (b) of this section.

(a) For a lapse of less than 3 years, you must complete a standard annual refresher course described in § 62.14580a.

(b) For a lapse of 3 years or more, you must repeat the initial qualification requirements in § 62.14575a(a).

§ 62.14590a What site-specific documentation is required?

(a) Documentation must be available at the facility and readily accessible for all CISWI operators that addresses the ten topics described in paragraphs (a)(1) through (10) of this section. You must maintain this information and the training records required by paragraph (c) of this section in a manner that they

can be readily accessed and are suitable for inspection upon request.

(1) Summary of the applicable standards under this subpart.

(2) Procedures for receiving, handling, and charging waste.

(3) Incinerator startup, shutdown, and malfunction procedures.

(4) Procedures for maintaining proper combustion air supply levels.

(5) Procedures for operating the incinerator and associated air pollution control systems within the standards established under this subpart.

(6) Monitoring procedures for demonstrating compliance with the incinerator operating limits.

(7) Reporting and recordkeeping procedures.

(8) The waste management plan required under §§ 62.14550a through 62.14560a.

(9) Procedures for handling ash.

(10) A list of the wastes burned during the performance test.

(b) You must establish a program for reviewing the information listed in paragraph (a) of this section with each employee who operates your incinerator.

(1) The initial review of the information listed in paragraph (a) of this section must be conducted by the later of the three dates specified in paragraphs (b)(1)(i) through (iii) of this section.

(i) January 10, 2025.

(ii) Six months after CISWI startup.

(iii) Six months after being assigned to operate the CISWI.

(2) Subsequent annual reviews of the information listed in paragraph (a) of this section must be conducted no later than 12 months following the previous review.

(c) You must also maintain the information specified in paragraphs (c)(1) through (3) of this section.

(1) Records showing the names of all plant personnel who operate your CISWI who have completed review of the information in paragraph (a) of this section as required by paragraph (b) of this section, including the date of the initial review and all subsequent annual reviews.

(2) Records showing the names of all plant personnel who operate your CISWI who have completed the operator training requirements under § 62.14565a, met the criteria for qualification under § 62.14575a, and maintained or renewed their qualification under § 62.14580a or § 62.14585a. Records must include documentation of training, the dates of the initial refresher training, and the dates of their qualification and all subsequent renewals of such qualifications.

(3) For each qualified operator, the phone and/or pager number at which they can be reached during operating hours.

§ 62.14595a What if all the qualified operators are temporarily not accessible?

If all qualified operators are temporarily not accessible (*i.e.*, not at the facility and not able to be at the facility within 1 hour), you must meet one of the two criteria specified in paragraphs (a) and (b) of this section, depending on the length of time that a qualified operator is not accessible.

(a) When all qualified operators are not accessible for more than 8 hours, but less than 2 weeks, the CISWI may be operated by other plant personnel familiar with the operation of the CISWI who have completed a review of the information specified in § 62.14590a(a) within the past 12 months. However, you must record the period when all qualified operators were not accessible and include this deviation in the annual report as specified under § 62.14705a.

(b) When all qualified operators are not accessible for 2 weeks or more, you must take the two actions that are described in paragraphs (b)(1) and (2) of this section.

(1) Notify the Administrator of this deviation in writing within 10 days. In the notice, state what caused this deviation, what you are doing to ensure that a qualified operator is accessible, and when you anticipate that a qualified operator will be accessible.

(2) Submit a status report to the Administrator every 4 weeks outlining what you are doing to ensure that a qualified operator is accessible, stating when you anticipate that a qualified operator will be accessible and requesting approval from the Administrator to continue operation of the CISWI. You must submit the first status report 4 weeks after you notify the Administrator of the deviation under paragraph (b)(1) of this section. If the Administrator notifies you that your request to continue operation of the CISWI is disapproved, the CISWI may continue operation for 90 days, then must cease operation. Operation of the unit may resume if you meet the two requirements in paragraphs (b)(2)(i) and (ii) of this section.

(i) A qualified operator is accessible as required under § 62.14565a(a).

(ii) You notify the Administrator that a qualified operator is accessible and that you are resuming operation.

Emission Limitations and Operating Limits

§ 62.14600a What emission limitations must I meet and by when?

(a) You must meet the emission limitations for each CISWI, including bypass stack or vent, specified in tables 4 through 7 to this subpart by January 10, 2025. The emission limitations apply at all times the unit is operating including and not limited to startup, shutdown, or malfunction.

(b) Units that do not use wet scrubbers must maintain opacity to less than or equal to the percent opacity (three 1-hour blocks consisting of ten 6-minute average opacity values) specified in table 4 to this subpart, as applicable.

§ 62.14605a What operating limits must I meet and by when?

(a) If you use a wet scrubber to comply with the emission limitations in § 62.14600a, you must establish operating limits for up to four operating parameters (as specified in table 1 to this subpart) as described in paragraphs (a)(1) through (4) of this section during the initial performance test.

(1) Maximum charge rate, calculated using one of the two different procedures in paragraph (a)(1)(i) or (ii) of this section, as appropriate.

(i) For continuous and intermittent units, maximum charge rate is 110 percent of the average charge rate measured during the most recent performance test demonstrating compliance with all applicable emission limitations.

(ii) For batch units, maximum charge rate is 110 percent of the daily charge rate measured during the most recent performance test demonstrating compliance with all applicable emission limitations.

(2) Minimum pressure drop across the wet particulate matter scrubber, which is calculated as the lowest 1-hour average pressure drop across the wet scrubber measured during the most recent performance test demonstrating compliance with the particulate matter emission limitations; or minimum amperage to the wet scrubber, which is calculated as the lowest 1-hour average amperage to the wet scrubber measured during the most recent performance test demonstrating compliance with the particulate matter emission limitations.

(3) Minimum scrubber liquor flow rate, which is calculated as the lowest 1-hour average liquor flow rate at the inlet to the wet acid gas or particulate matter scrubber measured during the most recent performance test demonstrating compliance with all applicable emission limitations.

(4) Minimum scrubber liquor pH, which is calculated as the lowest 1-hour average liquor pH at the inlet to the wet acid gas scrubber measured during the most recent performance test demonstrating compliance with the hydrogen chloride (HCl) emission limitation.

(b) You must meet the operating limits established on the date that the performance test report is submitted to the EPA's Central Data Exchange or postmarked, per the requirements of § 62.14730a(b).

(c) If you use a fabric filter to comply with the emission limitations in § 62.14600a and you do not use a particulate matter (PM) continuous parameter monitoring system (CPMS) for monitoring PM compliance, you must operate each fabric filter system such that the bag leak detection system alarm does not sound more than 5 percent of the operating time during any 6-month period. In calculating this operating time percentage, if inspection of the fabric filter demonstrates that no corrective action is required, no alarm time is counted. If corrective action is required, each alarm shall be counted as a minimum of 1 hour. If you take longer than 1 hour to initiate corrective action, the alarm time shall be counted as the actual amount of time taken by you to initiate corrective action.

(d) If you use an electrostatic precipitator (ESP) to comply with the emission limitations in § 62.14600a and you do not use a PM CPMS for monitoring PM compliance, you must measure the (secondary) voltage and amperage of the electrostatic precipitator collection plates during the particulate matter performance test. Calculate the average electric power value (secondary voltage $\times$ secondary current = secondary electric power) for each test run. The operating limit for the electrostatic precipitator is calculated as the lowest 1-hour average secondary electric power measured during the most recent performance test demonstrating compliance with the particulate matter emission limitations.

(e) If you use activated carbon sorbent injection to comply with the emission limitations in § 62.14600a, you must measure the sorbent flow rate during the performance testing. The operating limit for the carbon sorbent injection is calculated as the lowest 1-hour average sorbent flow rate measured during the most recent performance test demonstrating compliance with the mercury emission limitations. For energy recovery units (ERU), when your unit operates at lower loads, multiply your sorbent injection rate by the load fraction, as defined in this subpart, to

determine the required injection rate (e.g., for 50 percent load, multiply the injection rate operating limit by 0.5).

(f) If you use selective noncatalytic reduction to comply with the emission limitations in § 62.14600a, you must measure the charge rate, the secondary chamber temperature (if applicable to your CISWI), and the reagent flow rate during the nitrogen oxides (NO_x) performance testing. The operating limits for the selective noncatalytic reduction are calculated as the highest 1-hour average charge rate, lowest secondary chamber temperature, and lowest reagent flow rate measured during the most recent performance test demonstrating compliance with the nitrogen oxides emission limitations.

(g) If you use a dry scrubber to comply with the emission limitations in § 62.14600a, you must measure the injection rate of each sorbent during the performance testing. The operating limit for the injection rate of each sorbent is calculated as the lowest 1-hour average injection rate of each sorbent measured during the most recent performance test demonstrating compliance with the hydrogen chloride emission limitations. For energy recovery units, when your unit operates at lower loads, multiply your sorbent injection rate by the load fraction, as defined in this subpart, to determine the required injection rate (e.g., for 50 percent load, multiply the injection rate operating limit by 0.5).

(h) If you do not use a wet scrubber, electrostatic precipitator, or fabric filter to comply with the emission limitations in § 62.14600a, and if you do not determine compliance with your particulate matter emission limitation with either a particulate matter continuous emission monitoring system (CEMS) or a particulate matter CPMS, you must maintain opacity to less than or equal to ten percent opacity (1-hour block average).

(i) If you use a PM CPMS to demonstrate compliance with this subpart, you must establish your PM CPMS operating limit and determine compliance with it according to paragraphs (i)(1) through (5) of this section:

(1) During the initial performance test or any subsequent performance test that demonstrates compliance with the PM limit, record all hourly average output values (milliamps, or the digital signal equivalent) from the PM CPMS for the periods corresponding to the test runs (e.g., three 1-hour average PM CPMS output values for three 1-hour test runs):

(i) Your PM CPMS must provide a 4–20 milliamp output, or the digital signal equivalent, and the establishment of its relationship to manual reference

method measurements must be determined in units of milliamps or digital bits;

(ii) Your PM CPMS operating range must be capable of reading PM concentrations from zero to a level equivalent to at least two times your allowable emission limit. If your PM CPMS is an auto-ranging instrument capable of multiple scales, the primary range of the instrument must be capable of reading PM concentration from zero to a level equivalent to two times your allowable emission limit; and

(iii) During the initial performance test or any subsequent performance test that demonstrates compliance with the PM limit, record and average all milliamp output values, or their digital equivalent, from the PM CPMS for the periods corresponding to the compliance test runs (e.g., average all your PM CPMS output values for three corresponding 2-hour PM test runs under Method 5 of 40 CFR part 60,

appendix A–3, or Method 29 of 40 CFR part 60, appendix A–8).

(2) If the average of your three PM performance test runs are below 75 percent of your PM emission limit, you must calculate an operating limit by establishing a relationship of PM CPMS signal to PM concentration using the PM CPMS instrument zero, the average PM CPMS output values corresponding to the three compliance test runs, and the average PM concentration from the performance tests under Method 5 of 40 CFR part 60, appendix A–3, or Method 29 of 40 CFR part 60, appendix A–8, with the procedures in (i)(1) through (5) of this section:

(i) Determine your instrument zero output with one of the following procedures:

(A) Zero point data for *in-situ* instruments should be obtained by removing the instrument from the stack and monitoring ambient air on a test bench;

(B) Zero point data for extractive instruments should be obtained by removing the extractive probe from the stack and drawing in clean ambient air;

(C) The zero point can also be established by performing manual reference method measurements when the flue gas is free of PM emissions or contains very low PM concentrations (e.g., when your process is not operating, but the fans are operating or your source is combusting only natural gas) and plotting these with the compliance data to find the zero intercept; and

(D) If none of the steps in paragraphs (i)(2)(i)(A) through (C) of this section are possible, you must use a zero output value provided by the manufacturer.

(ii) Determine your PM CPMS instrument average in milliamps, or the digital equivalent, and the average of your corresponding three PM compliance test runs, using equation 1 to this paragraph (i)(2)(ii):

Equation 1 to Paragraph (i)(2)(ii)

$$\bar{x} = \frac{1}{n} \sum_{i=1}^n X_i, \bar{y} = \frac{1}{n} \sum_{i=1}^n Y_i \quad (\text{Eq. 1})$$

Where:

X_i = The PM CPMS output data points for the three runs constituting the performance test;

Y_i = The PM concentration value for the three runs constituting the performance test; and

n = The number of data points.

(iii) With your instrument zero expressed in milliamps, or the digital equivalent, your three run average PM CPMS milliamp value, or its digital equivalent, and your three run average

PM concentration from your three compliance tests, determine a relationship of mg/dscm per milliamp or digital signal equivalent, with equation 2 to this paragraph (i)(2)(iii):

Equation 2 to Paragraph (i)(2)(iii)

$$R = Z + \frac{Y_i}{(X_i - z)} \quad (\text{Eq. 2})$$

Where:

R = The relative mg/dscm per milliamp, or the digital equivalent, for your PM CPMS;

Y_i = The three run average mg/dscm PM concentration;

X_i = The three run average milliamp output, or the digital equivalent, from your PM CPMS; and

Z = The milliamp or digital signal equivalent of your instrument zero determined from paragraph (i)(2)(i) of this section.

(iv) Determine your source specific 30-day rolling average operating limit using the mg/dscm per milliamp value, or per digital signal equivalent from equation 2 to paragraph (i)(2)(iii) of this

section, in equation 3 to this paragraph (i)(2)(iv). This sets your operating limit at the PM CPMS output value corresponding to 75 percent of your emission limit:

Equation 3 to Paragraph (i)(2)(iv)

$$O_1 = Z + \frac{0.75(L)}{R} \quad (\text{Eq. 3})$$

Where:

O_1 = The operating limit for your PM CPMS on a 30-day rolling average, in milliamps or their digital signal equivalent;

L = Your source emission limit expressed in mg/dscm;

z = Your instrument zero in milliamps or digital equivalent, determined from paragraph (i)(2)(i) of this section; and

R = The relative mg/dscm per milliamp, or per digital signal output equivalent, for your PM CPMS, from equation 2 to paragraph (i)(2)(iii) of this section.

(3) If the average of your three PM compliance test runs is at or above 75 percent of your PM emission limit you must determine your operating limit by averaging the PM CPMS milliamp or

digital signal output corresponding to your three PM performance test runs that demonstrate compliance with the emission limit using equation 4 to this paragraph (i)(3) and you must submit all

compliance test and PM CPMS data according to the reporting requirements in paragraph (i)(5) of this section:

Equation 4 to Paragraph (i)(3)

$$O_h = \frac{1}{n} \sum_{i=1}^n X_i \quad (\text{Eq. 4})$$

Where:

X_i = The PM CPMS data points for all runs i ;

n = The number of data points; and

O_h = Your site specific operating limit, in milliamps or digital signal equivalent.

(4) To determine continuous compliance, you must record the PM CPMS output data for all periods when the process is operating and the PM CPMS is not out-of-control. You must demonstrate continuous compliance by using all quality-assured hourly average data collected by the PM CPMS for all operating hours to calculate the arithmetic average operating parameter in units of the operating limit (*e.g.*, milliamps or digital signal bits, PM concentration, raw data signal) on a 30-day rolling average basis.

(5) For PM performance test reports used to set a PM CPMS operating limit, the electronic submission of the test report must also include the make and model of the PM CPMS instrument, serial number of the instrument, analytical principle of the instrument (*e.g.*, beta attenuation), span of the instruments primary analytical range, milliamp or digital signal value equivalent to the instrument zero output, technique by which this zero value was determined, and the average milliamp or digital signals corresponding to each PM compliance test run.

§ 62.14610a What if I do not use a wet scrubber, fabric filter, activated carbon injection, selective noncatalytic reduction, an electrostatic precipitator, or a dry scrubber to comply with the emission limitations?

If you use an air pollution control device other than a wet scrubber, activated carbon injection, selective noncatalytic reduction, fabric filter, an electrostatic precipitator, or a dry scrubber or limit emissions in some other manner, including mass balances, to comply with the emission limitations under § 62.14600a, you must petition the EPA Administrator for specific operating limits to be established during the initial performance test and continuously monitored thereafter. You must submit the petition at least sixty days before the performance test is scheduled to begin. Your petition must

include the five items listed in paragraphs (a) through (e) of this section.

(a) Identification of the specific parameters you propose to use as additional operating limits.

(b) A discussion of the relationship between the parameters required by paragraph (a) of this section and emissions of regulated pollutants, identifying how emissions of regulated pollutants change with changes in the parameters, and how limits on the parameters will serve to limit emissions of regulated pollutants.

(c) A discussion of how you will establish the upper and/or lower values for the parameters required by paragraph (a) of this section that will establish the operating limits on the parameters.

(d) A discussion identifying the methods you will use to measure and the instruments you will use to monitor the parameters required by paragraph (a) of this section, as well as the relative accuracy and precision of these methods and instruments.

(e) A discussion identifying the frequency and methods for recalibrating the instruments you will use for monitoring the parameters required by paragraph (a) of this section.

Performance Testing

§ 62.14615a How do I conduct the initial and annual performance test?

(a) All performance tests must consist of a minimum of three test runs conducted under conditions representative of normal operations.

(b) You must document that the waste burned during the performance test is representative of the waste burned under normal operating conditions by maintaining a log of the quantity of waste burned (as required in § 62.14675a(b)(1)) and the types of waste burned during the performance test.

(c) All performance tests must be conducted using the minimum run duration specified in tables 4 through 7 to this subpart.

(d) Method 1 of 40 CFR part 60, appendix A–1, must be used to select the sampling location and number of traverse points.

(e) Method 3A of 40 CFR part 60, appendix A–1, must be used for gas

composition analysis, including measurement of oxygen concentration. Method 3A must be used simultaneously with each method (except when using Method 9 of 40 CFR part 60, appendix A–4, and Method 22 of 40 CFR part 60, appendix A–7).

(f) All pollutant concentrations, except for opacity, must be adjusted to 7 percent oxygen using equation 1 to this paragraph (f):

Equation 1 to Paragraph (f)

$$C_{adj} = C_{meas} (20.9 - 7) / (20.9 - \%O_2) \quad (\text{Eq. 1})$$

Where:

C_{adj} = Pollutant concentration adjusted to 7 percent oxygen;

C_{meas} = Pollutant concentration measured on a dry basis;

$(20.9 - 7)$ = 20.9 percent oxygen – 7 percent oxygen (defined oxygen correction basis);

20.9 = Oxygen concentration in air, percent; and

$\%O_2$ = Oxygen concentration measured on a dry basis, percent.

(g) You must determine dioxins/furans toxic equivalency by following the procedures in paragraphs (g)(1) through (4) of this section.

(1) Measure the concentration of each dioxin/furan (tetra- through octa-) isomer emitted using EPA Method 23 of 40 CFR part 60, appendix A–7.

(2) Quantify isomers meeting identification criteria in section 11.4.3.4 of Method 23 of 40 CFR part 60, appendix A–7, regardless of whether the isomers meet identification criteria in section 11.4.3.4.1 of Method 23. You must quantify the isomers per section 11.4.3.5 of Method 23. Note that you may reanalyze the sample aliquot or split to reduce the number of isomers not meeting identification criteria in section 11.4.3.4 of Method 23.

(3) For each dioxin/furan (tetra-through octa-chlorinated) isomer measured in accordance with paragraph (g)(1) and (2) of this section, multiply the isomer concentration by its corresponding toxic equivalency factor specified in table 2 to this subpart; and

(4) Sum the products calculated in accordance with paragraph (g)(3) of this section to obtain the total concentration

of dioxins/furans emitted in terms of toxic equivalency.

(h) Method 22 of 40 CFR part 60, appendix A–7, must be used to determine compliance with the fugitive ash emission limit in table 4, 5, or 7 to this subpart.

(i) If you have an applicable opacity operating limit, you must determine compliance with the opacity limit using Method 9 of 40 CFR part 60, appendix A–4, based on three 1-hour blocks consisting of ten 6-minute average opacity values, unless you are required to install a continuous opacity monitoring system, consistent with §§ 62.14640a and 62.14665a.

(j) You must determine dioxins/furans total mass basis by following the procedures in paragraphs (j)(1) through (3) of this section:

(1) Measure the concentration of each dioxin/furan tetra- through octa-chlorinated isomer emitted using EPA Method 23 of 40 CFR part 60, appendix A–7;

(2) Quantify isomers meeting identification criteria in section 11.4.3.4 of Method 23 of 40 CFR part 60, appendix A–7, regardless of whether the isomers meet identification criteria in section 11.4.3.4.1 of Method 23. Note that you may reanalyze the sample aliquot or split to reduce the number of isomers not meeting identification criteria in section 11.4.3.4 of Method 23; and

(3) Sum the quantities measured in accordance with paragraphs (j)(1) and (2) of this section to obtain the total concentration of dioxins/furans emitted in terms of total mass basis.

§ 62.14620a How are the performance test data used?

You use results of performance tests to demonstrate compliance with the emission limitations in tables 4 through 7 to this subpart.

Initial Compliance Requirements

§ 62.14625a How do I demonstrate initial compliance with the emission limitations and establish the operating limits?

(a) You must conduct an initial performance test to determine compliance with the emission limitations in tables 4 through 7 to this subpart, to establish compliance with any opacity operating limits in § 62.14605a(h), to establish the kiln-specific emission limit in § 62.14640a(y), as applicable, and to establish operating limits using the procedure in § 62.14605a or § 62.14610a. The initial performance test must be conducted using the test methods listed in tables 4 through 7 to this subpart and the procedures in

§ 62.14615a. The use of the bypass stack during a performance test shall invalidate the performance test.

(b) As an alternative to conducting a performance test, as required under §§ 62.14615a and 62.14600a, you may use a 30-day rolling average of the 1-hour arithmetic average CEMS data, including CEMS data during startup and shutdown as defined in this subpart, to determine compliance with the emission limitations in tables 4 through 7 to this subpart. You must conduct a performance evaluation of each continuous monitoring system within 180 days of installation of the monitoring system. The initial performance evaluation must be conducted prior to collecting CEMS data that will be used for the initial compliance demonstration.

§ 62.14630a By what date must I conduct the initial performance test?

(a) The initial performance test must be conducted no later than 180 days after your final compliance date. Your final compliance date is January 10, 2025, or the date you restart your CISWI if later than January 10, 2025.

(b) If you commence or recommence combusting a solid waste at an existing combustion unit at any commercial or industrial facility and you conducted a test consistent with the provisions of this subpart while combusting the given solid waste within the 6 months preceding the reintroduction of that solid waste in the combustion chamber, you do not need to retest until 6 months from the date you reintroduce that solid waste.

(c) If you commence or recommence combusting a solid waste at an existing combustion unit at any commercial or industrial facility and you have not conducted a performance test consistent with the provisions of this subpart while combusting the given solid waste within the 6 months preceding the reintroduction of that solid waste in the combustion chamber, you must conduct a performance test within 60 days from the date you reintroduce solid waste.

§ 62.14635a By what date must I conduct the initial air pollution control device inspection?

(a) The initial air pollution control device inspection must be conducted within 60 days after installation of the control device and the associated CISWI reaches the charge rate at which it will operate, but no later than 180 days after January 10, 2025.

(b) Within 10 operating days following an air pollution control device inspection, all necessary repairs must be completed unless the owner or operator

obtains written approval from the state agency establishing a date whereby all necessary repairs of the designated facility must be completed.

Continuous Compliance Requirements

§ 62.14640a How do I demonstrate continuous compliance with the emission limitations and the operating limits?

(a)(1) The emission standards and operating requirements set forth in this subpart apply at all times.

(2) If you cease combusting solid waste you may opt to remain subject to the provisions of this subpart. Consistent with the definition of CISWI in this subpart, you are subject to the requirements of this subpart at least 6 months following the last date of solid waste combustion. Solid waste combustion is ceased when solid waste is not in the combustion chamber (*i.e.*, the solid waste feed to the combustor has been cut off for a period of time not less than the solid waste residence time).

(3) If you cease combusting solid waste you must be in compliance with any newly applicable standards on the effective date of the waste-to-fuel switch. The effective date of the waste-to-fuel switch is a date selected by you, that must be at least 6 months from the date that you ceased combusting solid waste, consistent with paragraph (a)(2) of this section. Your source must remain in compliance with this subpart until the effective date of the waste-to-fuel switch.

(4) If you own or operate an existing commercial or industrial combustion unit that combusted a fuel or non-waste material, and you commence or recommence combustion of solid waste, you are subject to the provisions of this subpart as of the first day you introduce or reintroduce solid waste to the combustion chamber, and this date constitutes the effective date of the fuel-to-waste switch. You must complete all initial compliance demonstrations for any standards under section 112 of the Clean Air Act that are applicable to your facility before you commence or recommence combustion of solid waste. You must provide 30 days prior notice of the effective date of the waste-to-fuel switch. The notification must identify:

(i) The name of the owner or operator of the CISWI, the location of the source, the emissions unit(s) that will cease burning solid waste, and the date of the notice;

(ii) The currently applicable subcategory under this subpart, and any subpart and subcategory under 40 CFR part 63 that will be applicable after you cease combusting solid waste;

(iii) The fuel(s), non-waste material(s) and solid waste(s) the CISWI is currently combusting and has combusted over the past 6 months, and the fuel(s) or non-waste materials the unit will commence combusting;

(iv) The date on which you became subject to the currently applicable emission limits; and

(v) The date upon which you will cease combusting solid waste, and the date (if different) that you intend for any new requirements to become applicable (*i.e.*, the effective date of the waste-to-fuel switch), consistent with paragraphs (a)(2) and (3) of this section.

(5) All air pollution control equipment necessary for compliance with any newly applicable emissions limits which apply as a result of the cessation or commencement or recommencement of combusting solid waste must be installed and operational as of the effective date of the waste-to-fuel, or fuel-to-waste switch.

(6) All monitoring systems necessary for compliance with any newly applicable monitoring requirements which apply as a result of the cessation or commencement or recommencement of combusting solid waste must be installed and operational as of the effective date of the waste-to-fuel, or fuel-to-waste switch. All calibration and drift checks must be performed as of the effective date of the waste-to-fuel, or fuel-to-waste switch. Relative accuracy tests must be performed as of the performance test deadline for PM CEMS (if PM CEMS are elected to demonstrate continuous compliance with the particulate matter emission limits). Relative accuracy testing for other CEMS need not be repeated if that testing was previously performed consistent with monitoring requirements under section 112 of the Clean Air Act or monitoring requirements under this subpart.

(b) You must conduct an annual performance test for the pollutants listed in tables 4 through 7 to this subpart and opacity for each CISWI as required under § 62.14615a. The annual performance test must be conducted using the test methods listed in tables 4 through 7 to this subpart and the procedures in § 62.14615a. Opacity must be measured using EPA Reference Method 9 of 40 CFR part 60, appendix A-4. Annual performance tests are not required if you use CEMS or continuous opacity monitoring systems to determine compliance.

(c) You must continuously monitor the operating parameters specified in § 62.14605a or established under § 62.14610a. Operation above the established maximum or below the

established minimum operating limits constitutes a deviation from the established operating limits. Three-hour block average values are used to determine compliance (except for baghouse leak detection system alarms) unless a different averaging period is established under § 62.14610a or, for energy recovery units, where the averaging time for each operating parameter is a 30-day rolling average, calculated each hour as the average of the previous 720 operating hours. Operation above the established maximum, below the established minimum, or outside the allowable range of the operating limits specified in paragraph (a) of this section constitutes a deviation from your operating limits established under this subpart, except during performance tests conducted to determine compliance with the emission and operating limits or to establish new operating limits. Operating limits are confirmed or reestablished during performance tests.

(d) You must burn only the same types of waste and fuels used to establish subcategory applicability (for ERUs) and operating limits during the performance test.

(e) For energy recovery units, incinerators, and small remote units, you must perform annual visual emissions tests for ash handling.

(f) For energy recovery units, you must conduct an annual performance test for opacity using EPA Reference Method 9 of 40 CFR part 60, appendix A-4 (except where particulate matter continuous monitoring system or CPMS are used), and the pollutants listed in table 5 to this subpart.

(g) For facilities using a CEMS to demonstrate compliance with the carbon monoxide emission limit, compliance with the carbon monoxide emission limit may be demonstrated by using the CEMS, as described in § 62.14665a(o).

(h) Coal and liquid/gas energy recovery units with annual average heat input rates greater than 250 MMBtu/hr may elect to demonstrate continuous compliance with the particulate matter emissions limit using a particulate matter CEMS according to the procedures in § 62.14665a(n) instead of the CPMS specified in paragraph (i) of this section. Coal and liquid/gas energy recovery units with annual average heat input rates less than 250 MMBtu/hr, incinerators, and small, remote incinerators may also elect to demonstrate compliance using a particulate matter CEMS according to the procedures in § 62.14665a(n) instead of particulate matter testing with EPA Method 5 of 40 CFR part 60, appendix

A-3, and, if applicable, the continuous opacity monitoring requirements in paragraph (i) of this section.

(i) For energy recovery units with annual average heat input rates greater than or equal to 10 MMBtu/hr but less than 250 MMBtu/hr that do not use a wet scrubber, fabric filter with bag leak detection system, an electrostatic precipitator, particulate matter CEMS, or particulate matter CPMS, you must install, operate, certify, and maintain a continuous opacity monitoring system (COMS) according to the procedures in § 62.14665a(m).

(j) For waste-burning kilns, you must conduct an annual performance test for the pollutants (except mercury and hydrogen chloride if no acid gas wet scrubber or dry scrubber is used) listed in table 6 to this subpart, unless you choose to demonstrate initial and continuous compliance using CEMS, as allowed in paragraph (u) of this section. If you do not use an acid gas wet scrubber or dry scrubber, you must determine compliance with the hydrogen chloride emissions limit using a HCl CEMS according to the requirements in paragraph (j)(1) of this section. You must determine compliance with the mercury emissions limit using a mercury CEMS or an integrated sorbent trap monitoring system according to paragraph (j)(2) of this section. You must determine compliance with particulate matter using a PM CPMS according to paragraph (x) of this section.

(1) If you monitor compliance with the HCl emissions limit by operating an HCl CEMS, you must do so in accordance with Performance Specification 15 (PS 15) of 40 CFR part 60, appendix B, or, PS 18 of 40 CFR part 60, appendix B. You must operate, maintain, and quality assure a HCl CEMS installed and certified under PS 15 according to the quality assurance requirements in Procedure 1 of 40 CFR part 60, appendix F, except that the Relative Accuracy Test Audit requirements of Procedure 1 must be replaced with the validation requirements and criteria of sections 11.1.1 and 12.0 of PS 15. You must operate, maintain and quality assure a HCl CEMS installed and certified under PS 18 according to the quality assurance requirements in Procedure 6 of 40 CFR part 60, appendix F. For any performance specification that you use, you must use Method 321 of 40 CFR part 63, appendix A, as the reference test method for conducting relative accuracy testing. The span value and calibration requirements in paragraphs (j)(1)(i) and (ii) of this section apply to all HCl CEMS used under this subpart:

(i) You must use a measurement span value for any HCl CEMS of 0–10 ppmv unless the monitor is installed on a kiln without an inline raw mill. Kilns without an inline raw mill may use a higher span value sufficient to quantify all expected emissions concentrations. The HCl CEMS data recorder output range must include the full range of expected HCl concentration values which would include those expected during “mill off” conditions. The corresponding data recorder range shall be documented in the site-specific monitoring plan and associated records;

(ii) In order to quality assure data measured above the span value, you must use one of the three options in paragraphs (j)(1)(ii)(A) through (C) of this section:

(A) Include a second span that encompasses the HCl emission concentrations expected to be encountered during “mill off” conditions. This second span may be rounded to a multiple of 5 ppm of total HCl. The requirements of the appropriate HCl monitor performance specification shall be followed for this second span with the exception that a relative accuracy test audit (RATA) with the mill off is not required;

(B) Quality assure any data above the span value by proving instrument linearity beyond the span value established in paragraph (j)(1)(i) of this section using the following procedure. Conduct a weekly “above span linearity” calibration challenge of the monitoring system using a reference gas with a certified value greater than your highest expected hourly concentration or greater than 75 percent of the highest measured hourly concentration. The “above span” reference gas must meet the requirements of the applicable performance specification and must be

introduced to the measurement system at the probe. Record and report the results of this procedure as you would for a daily calibration. The “above span linearity” challenge is successful if the value measured by the HCl CEMS falls within 10 percent of the certified value of the reference gas. If the value measured by the HCl CEMS during the above span linearity challenge exceeds 10 percent of the certified value of the reference gas, the monitoring system must be evaluated and repaired and a new “above span linearity” challenge met before returning the HCl CEMS to service, or data above span from the HCl CEMS must be subject to the quality assurance procedures established in (j)(1)(ii)(D) of this section. In this manner values measured by the HCl CEMS during the above span linearity challenge exceeding ± 20 percent of the certified value of the reference gas must be normalized using equation 1 to paragraph (j)(1)(ii)(D)(1) of this section;

(C) Quality assure any data above the span value established in paragraph (j)(1)(i) of this section using the following procedure. Any time two consecutive one-hour average measured concentration of HCl exceeds the span value you must, within 24 hours before or after, introduce a higher, “above span” HCl reference gas standard to the HCl CEMS. The “above span” reference gas must meet the requirements of the applicable performance specification and target a concentration level between 50 and 150 percent of the highest expected hourly concentration measured during the period of measurements above span, and must be introduced at the probe. While this target represents a desired concentration range that is not always achievable in practice, it is expected that the intent to meet this range is demonstrated by the

value of the reference gas. Expected values may include above span calibrations done before or after the above-span measurement period. Record and report the results of this procedure as you would for a daily calibration. The “above span” calibration is successful if the value measured by the HCl CEMS is within 20 percent of the certified value of the reference gas. If the value measured by the HCl CEMS is not within 20 percent of the certified value of the reference gas, then you must normalize the stack gas values measured above span as described in paragraph (j)(1)(ii)(D) of this section. If the “above span” calibration is conducted during the period when measured emissions are above span and there is a failure to collect the one data point in an hour due to the calibration duration, then you must determine the emissions average for that missed hour as the average of hourly averages for the hour preceding the missed hour and the hour following the missed hour. In an hour where an “above span” calibration is being conducted and one or more data points are collected, the emissions average is represented by the average of all valid data points collected in that hour; and

(D)(1) In the event that the “above span” calibration is not successful (*i.e.*, the HCl CEMS measured value is not within 20 percent of the certified value of the reference gas), then you must normalize the one-hour average stack gas values measured above the span during the 24-hour period preceding or following the “above span” calibration for reporting based on the HCl CEMS response to the reference gas as shown in equation 1 to this paragraph (j)(1)(ii)(D)(1):

Equation 1 to paragraph (j)(1)(ii)(D)(1)

$$\frac{\text{Certified reference gas value}}{\text{Measured value of reference gas}} = \text{Measured stack gas} = \text{Normalized stack gas result (Eq. 1)}$$

(2) Only one “above span” calibration is needed per 24-hour period.

(2) Compliance with the mercury emissions limit must be determined using a mercury CEMS or integrated sorbent trap monitoring system according to the following requirements:

(i) You must operate a mercury CEMS in accordance with performance specification 12A of 40 CFR part 60, appendix B, or an integrated sorbent trap monitoring system in accordance with Performance Specification 12B of 40 CFR part 60, appendix B; these monitoring systems must be quality assured according to Procedure 5 of

appendix F to 40 CFR part 60. For the purposes of emissions calculations when using an integrated sorbent trap monitoring system, the mercury concentration determined for each sampling period must be assigned to each hour during the sampling period. If you choose to comply with the production-rate based mercury limit for your waste-burning kiln, you must also monitor hourly clinker production and determine the hourly mercury emissions rate in pounds per million ton of clinker produced. You must demonstrate compliance with the mercury emissions limit using a 30-day rolling average of

these 1-hour mercury concentrations or mass emissions rates, including CEMS data during startup and shutdown as defined in this subpart, calculated using equation 19–19 in section 12.4.1 of EPA Reference Method 19 of 40 CFR part 60, appendix A–7. CEMS data during startup and shutdown, as defined in this subpart, are not corrected to 7 percent oxygen, and are measured at stack oxygen content;

(ii) Owners or operators using a mercury CEMS or integrated sorbent trap monitoring system to determine mass emission rate must install, operate, calibrate and maintain an instrument for

continuously measuring and recording the mercury mass emissions rate to the atmosphere according to the requirements of Performance Specification 6 (PS 6) of 40 CFR part 60, appendix B, and conducting an annual relative accuracy test of the continuous emission rate monitoring system according to section 8.2 of PS 6; and

(iii) The owner or operator of a waste-burning kiln must demonstrate initial compliance by operating a mercury CEMS or integrated sorbent trap monitoring system while the raw mill of the in-line kiln/raw mill is operating under normal conditions and including at least one period when the raw mill is off.

(k) If you use an air pollution control device to meet the emission limitations in this subpart, you must conduct an initial and annual inspection of the air pollution control device. The inspection must include, at a minimum, the following:

(1) Inspect air pollution control device(s) for proper operation; and
(2) Develop a site-specific monitoring plan according to the requirements in paragraph (l) of this section. This requirement also applies to you if you petition the EPA Administrator for alternative monitoring parameters under § 60.13(i) of this chapter.

(l) For each CMS required in this section, you must develop and submit to the EPA Administrator for approval a site-specific monitoring plan according to the requirements of this paragraph (l) that addresses paragraphs (l)(1)(i) through (vi) of this section:

(1) You must submit this site-specific monitoring plan at least 60 days before your initial performance evaluation of your continuous monitoring system:

(i) Installation of the continuous monitoring system sampling probe or other interface at a measurement location relative to each affected process unit such that the measurement is representative of control of the exhaust emissions (e.g., on or downstream of the last control device);

(ii) Performance and equipment specifications for the sample interface, the pollutant concentration or parametric signal analyzer and the data collection and reduction systems;

(iii) Performance evaluation procedures and acceptance criteria (e.g., calibrations);

(iv) Ongoing operation and maintenance procedures in accordance with the general requirements of § 60.11(d) of this chapter;

(v) Ongoing data quality assurance procedures in accordance with the general requirements of § 60.13 of this chapter; and

(vi) Ongoing recordkeeping and reporting procedures in accordance with the general requirements of § 60.7(b), (c) introductory text, (c)(1) and (4), and (d) through (g) of this chapter.

(2) You must conduct a performance evaluation of each continuous monitoring system in accordance with your site-specific monitoring plan.

(3) You must operate and maintain the continuous monitoring system in continuous operation according to the site-specific monitoring plan.

(m) If you have an operating limit that requires the use of a flow monitoring system, you must meet the requirements in paragraphs (l) and (m)(1) through (4) of this section:

(1) Install the flow sensor and other necessary equipment in a position that provides a representative flow;

(2) Use a flow sensor with a measurement sensitivity at full scale of no greater than 2 percent;

(3) Minimize the effects of swirling flow or abnormal velocity distributions due to upstream and downstream disturbances; and

(4) Conduct a flow monitoring system performance evaluation in accordance with your monitoring plan at the time of each performance test but no less frequently than annually.

(n) If you have an operating limit that requires the use of a pressure monitoring system, you must meet the requirements in paragraphs (l) and (n)(1) through (6) of this section:

(1) Install the pressure sensor(s) in a position that provides a representative measurement of the pressure (e.g., PM scrubber pressure drop);

(2) Minimize or eliminate pulsating pressure, vibration, and internal and external corrosion;

(3) Use a pressure sensor with a minimum tolerance of 1.27 centimeters of water or a minimum tolerance of 1 percent of the pressure monitoring system operating range, whichever is less;

(4) Perform checks at the frequency outlined in your site-specific monitoring plan to ensure pressure measurements are not obstructed (e.g., check for pressure tap plugging daily);

(5) Conduct a performance evaluation of the pressure monitoring system in accordance with your monitoring plan at the time of each performance test but no less frequently than annually; and

(6) If at any time the measured pressure exceeds the manufacturer's specified maximum operating pressure range, conduct a performance evaluation of the pressure monitoring system in accordance with your monitoring plan and confirm that the pressure monitoring system continues to

meet the performance requirements in your monitoring plan. Alternatively, install and verify the operation of a new pressure sensor.

(o) If you have an operating limit that requires a pH monitoring system, you must meet the requirements in paragraphs (l) and (o)(1) through (4) of this section:

(1) Install the pH sensor in a position that provides a representative measurement of scrubber effluent pH;

(2) Ensure the sample is properly mixed and representative of the fluid to be measured;

(3) Conduct a performance evaluation of the pH monitoring system in accordance with your monitoring plan at least once each process operating day; and

(4) Conduct a performance evaluation (including a two-point calibration with one of the two buffer solutions having a pH within 1 of the pH of the operating limit) of the pH monitoring system in accordance with your monitoring plan at the time of each performance test but no less frequently than quarterly.

(p) If you have an operating limit that requires a secondary electric power monitoring system for an electrostatic precipitator, you must meet the requirements in paragraphs (l) and (p)(1) and (2) of this section:

(1) Install sensors to measure (secondary) voltage and current to the precipitator collection plates; and

(2) Conduct a performance evaluation of the electric power monitoring system in accordance with your monitoring plan at the time of each performance test but no less frequently than annually.

(q) If you have an operating limit that requires the use of a monitoring system to measure sorbent injection rate (e.g., weigh belt, weigh hopper, or hopper flow measurement device), you must meet the requirements in paragraphs (l) and (q)(1) and (2) of this section:

(1) Install the system in a position(s) that provides a representative measurement of the total sorbent injection rate; and

(2) Conduct a performance evaluation of the sorbent injection rate monitoring system in accordance with your monitoring plan at the time of each performance test but no less frequently than annually.

(r) If you elect to use a fabric filter bag leak detection system to comply with the requirements of this subpart, you must install, calibrate, maintain, and continuously operate a bag leak detection system as specified in paragraphs (l) and (r)(1) through (5) of this section:

(1) Install a bag leak detection sensor(s) in a position(s) that will be representative of the relative or absolute particulate matter loadings for each exhaust stack, roof vent, or compartment (e.g., for a positive pressure fabric filter) of the fabric filter;

(2) Use a bag leak detection system certified by the manufacturer to be capable of detecting particulate matter emissions at concentrations of 10 milligrams per actual cubic meter or less;

(3) Conduct a performance evaluation of the bag leak detection system in accordance with your monitoring plan and consistent with the guidance provided in OAQPS Fabric Filter Bag Leak Detection Guidance, EPA-454/R-98-015 (incorporated by reference, see paragraph (z) of this section).

(4) Use a bag leak detection system equipped with a device to continuously record the output signal from the sensor; and

(5) Use a bag leak detection system equipped with a system that will sound an alarm when an increase in relative particulate matter emissions over a preset level is detected. The alarm must be located where it is observed readily by plant operating personnel.

(s) For facilities using a CEMS to demonstrate initial and continuous compliance with the sulfur dioxide (SO₂) emission limit, compliance with the sulfur dioxide emission limit may be demonstrated by using the CEMS specified in § 62.14665a(l) to measure sulfur dioxide. The sulfur dioxide CEMS must follow the procedures and methods specified in this paragraph (s). For sources that have actual inlet emissions less than 100 parts per million dry volume, the relative accuracy criterion for inlet sulfur dioxide CEMS should be no greater than 20 percent of the mean value of the reference method test data in terms of the units of the emission standard, or 5 parts per million dry volume absolute value of the mean difference between the reference method and the CEMS, whichever is greater:

(1) During each relative accuracy test run of the CEMS required by Performance Specification 2 of 40 CFR part 60, appendix B, collect sulfur dioxide and oxygen (or carbon dioxide) data concurrently (or within a 30- to 60-minute period) with both the CEMS and the test methods specified in paragraphs (s)(1)(i) and (ii) of this section:

(i) For sulfur dioxide, EPA Reference Method 6 or 6C of 40 CFR part 60, appendix A-4, or as an alternative ANSI/ASME PTC 19.10-1981, Flue and Exhaust Gas Analyses [Part 10, Instruments and Apparatus] must be

used (incorporated by reference, see paragraph (z) of this section); and

(ii) For oxygen (or carbon dioxide), EPA Reference Method 3A of 40 CFR part 60, appendix A-2, or as an alternative ANSI/ASME PTC 19.10-1981, Flue and Exhaust Gas Analyses [Part 10, Instruments and Apparatus], as applicable, must be used (incorporated by reference, see paragraph (z) of this section).

(2) The span value of the CEMS at the inlet to the sulfur dioxide control device must be 125 percent of the maximum estimated hourly potential sulfur dioxide emissions of the unit subject to this subpart. The span value of the CEMS at the outlet of the sulfur dioxide control device must be 50 percent of the maximum estimated hourly potential sulfur dioxide emissions of the unit subject to this subpart.

(3) Conduct accuracy determinations quarterly and calibration drift tests daily in accordance with Procedure 1 of 40 CFR part 60, appendix F.

(t) For facilities using a CEMS to demonstrate initial and continuous compliance with the nitrogen oxides emission limit, compliance with the nitrogen oxides emission limit may be demonstrated by using the CEMS specified in § 62.14665a to measure nitrogen oxides. The nitrogen oxides CEMS must follow the procedures and methods specified in paragraphs (t)(1) through (4) of this section:

(1) During each relative accuracy test run of the CEMS required by Performance Specification 2 of 40 CFR part 60, appendix B, collect nitrogen oxides and oxygen (or carbon dioxide) data concurrently (or within a 30- to 60-minute period) with both the CEMS and the test methods specified in paragraphs (t)(1)(i) and (ii) of this section:

(i) For nitrogen oxides, EPA Reference Method 7 or 7E of 40 CFR part 60, appendix A-4, must be used; and

(ii) For oxygen (or carbon dioxide), EPA Reference Method 3A of 40 CFR part 60, appendix A-2, or as an alternative ANSI/ASME PTC 19.10-1981, Flue and Exhaust Gas Analyses [Part 10, Instruments and Apparatus], as applicable, must be used (incorporated by reference, see paragraph (z) of this section).

(2) The span value of the CEMS must be 125 percent of the maximum estimated hourly potential nitrogen oxide emissions of unit.

(3) Conduct accuracy determinations quarterly and calibration drift tests daily in accordance with Procedure 1 of 40 CFR part 60, appendix F.

(4) The owner or operator of an affected facility may request that compliance with the nitrogen oxides

emission limit be determined using carbon dioxide measurements corrected to an equivalent of 7 percent oxygen. If carbon dioxide is selected for use in diluent corrections, the relationship between oxygen and carbon dioxide levels must be established during the initial performance test according to the procedures and methods specified in paragraphs (t)(4)(i) through (iv) of this section. This relationship may be reestablished during performance compliance tests:

(i) The fuel factor equation in Method 3B of 40 CFR part 60, appendix A-2, must be used to determine the relationship between oxygen and carbon dioxide at a sampling location. Method 3A of 40 CFR part 60, appendix A-2, or as an alternative ANSI/ASME PTC 19.10-1981, Flue and Exhaust Gas Analyses [Part 10, Instruments and Apparatus], as applicable, must be used to determine the oxygen concentration at the same location as the carbon dioxide monitor (incorporated by reference, see paragraph (z) of this section);

(ii) Samples must be taken for at least 30 minutes in each hour;

(iii) Each sample must represent a 1-hour average; and

(iv) A minimum of 3 runs must be performed.

(u) For facilities using a CEMS or an integrated sorbent trap monitoring system for mercury to demonstrate initial and continuous compliance with any of the emission limits of this subpart, you must complete the following:

(1) Demonstrate compliance with the appropriate emission limit(s) using a 30-day rolling average of 1-hour arithmetic average emission concentrations, including CEMS or an integrated sorbent trap monitoring system data during startup and shutdown, as defined in this subpart, calculated using equation 19-19 in section 12.4.1 of EPA Reference Method 19 of 40 CFR part 60, appendix A-7. The 1-hour arithmetic averages for CEMS must be calculated using the data points required under § 60.13(e)(2) of this chapter. Except for CEMS or an integrated sorbent trap monitoring system data during startup and shutdown, the 1-hour arithmetic averages used to calculate the 30-day rolling average emission concentrations must be corrected to 7 percent oxygen (dry basis). Integrated sorbent trap monitoring system or CEMS data during startup and shutdown, as defined in this subpart, are not corrected to 7 percent oxygen, and are measured at stack oxygen content; and

(2) Operate all CEMS and integrated sorbent trap monitoring systems in

accordance with the applicable procedures under of 40 CFR part 60, appendices B and F.

(v) Use of the bypass stack at any time is an emissions standards deviation for PM, HCl, lead, cadmium, mercury, nitrogen oxides, sulfur dioxide, and dioxin/furans.

(w) For energy recovery units with a design heat input capacity of 100 MMBtu/hr or greater that do not use a carbon monoxide CEMS, you must install, operate, and maintain an oxygen analyzer system as defined in § 62.14785a according to the procedures in paragraphs (w)(1) through (4) of this section:

(1) The oxygen analyzer system must be installed by the initial performance test date specified in § 62.14605a;

(2) You must operate the oxygen trim system within compliance with paragraph (w)(3) of this section at all times;

(3) You must maintain the oxygen level such that the 30-day rolling average that is established as the operating limit for oxygen is not below the lowest hourly average oxygen concentration measured during the most recent carbon monoxide (CO) performance test; and

(4) You must calculate and record a 30-day rolling average oxygen concentration using equation 19–19 in section 12.4.1 of EPA Reference Method 19 of 40 CFR part 60, appendix A–7.

(x) For energy recovery units with annual average heat input rates greater than or equal to 250 MMBtu/hr and waste-burning kilns, you must install, calibrate, maintain, and operate a PM CPMS and record the output of the system as specified in paragraphs (x)(1) through (8) of this section. For other energy recovery units, you may elect to use PM CPMS operated in accordance with this section. PM CPMS are suitable in lieu of using other CMS for monitoring PM compliance (e.g., bag leak detectors, electrostatic precipitator secondary power, PM scrubber pressure):

(1) Install, calibrate, operate, and maintain your PM CPMS according to the procedures in your approved site-specific monitoring plan developed in accordance with paragraphs (l) and (x)(1)(i) through (iii) of this section:

(i) The operating principle of the PM CPMS must be based on in-stack or extractive light scatter, light scintillation, beta attenuation, or mass accumulation of the exhaust gas or representative sample. The reportable measurement output from the PM CPMS

must be expressed as milliamperes or the digital signal equivalent;

(ii) The PM CPMS must have a cycle time (i.e., period required to complete sampling, measurement, and reporting for each measurement) no longer than 60 minutes; and

(iii) The PM CPMS must be capable of detecting and responding to particulate matter concentrations increments no greater than 0.5 mg/actual cubic meter.

(2) During the initial performance test or any such subsequent performance test that demonstrates compliance with the PM limit, you must adjust the site-specific operating limit in accordance with the results of the performance test according to the procedures specified in § 62.14605a.

(3) Collect PM CPMS hourly average output data for all energy recovery unit or waste-burning kiln operating hours. Express the PM CPMS output as milliamperes or the digital signal equivalent.

(4) Calculate the arithmetic 30-day rolling average of all of the hourly average PM CPMS output collected during all energy recovery unit or waste-burning kiln operating hours data (milliamperes or their digital equivalent).

(5) You must collect data using the PM CPMS at all times the energy recovery unit or waste-burning kiln is operating and at the intervals specified in paragraph (x)(1)(ii) of this section, except for periods of monitoring system malfunctions, repairs associated with monitoring system malfunctions, required monitoring system quality assurance or quality control activities (including, as applicable, calibration checks and required zero and span adjustments), and any scheduled maintenance as defined in your site-specific monitoring plan.

(6) You must use all the data collected during all energy recovery unit or waste-burning kiln operating hours in assessing the compliance with your operating limit except:

(i) Any data collected during monitoring system malfunctions, repairs associated with monitoring system malfunctions, or required monitoring system quality assurance or quality control activities conducted during monitoring system malfunctions are not used in calculations (report any such periods in your annual deviation report);

(ii) Any data collected during periods when the monitoring system is out of control as specified in your site-specific monitoring plan, repairs associated with periods when the monitoring system is out of control, or required monitoring

system quality assurance or quality control activities conducted during out-of-control periods are not used in calculations (report emissions or operating levels and report any such periods in your annual deviation report); and

(iii) Any PM CPMS data recorded during periods of CEMS data during startup and shutdown, as defined in this subpart.

(7) You must record and make available upon request results of PM CPMS system performance audits, as well as the dates and duration of periods from when the PM CPMS is out of control until completion of the corrective actions necessary to return the PM CPMS to operation consistent with your site-specific monitoring plan.

(8) For any deviation of the 30-day rolling average PM CPMS average value from the established operating parameter limit, you must:

(i) Within 48 hours of the deviation, visually inspect the air pollution control device;

(ii) If inspection of the air pollution control device identifies the cause of the deviation, take corrective action as soon as possible and return the PM CPMS measurement to within the established value;

(iii) Within 30 days of the deviation or at the time of the annual compliance test, whichever comes first, conduct a PM emissions compliance test to determine compliance with the PM emissions limit. Within 45 days of the deviation, you must re-establish the CPMS operating limit. You are not required to conduct additional testing for any deviations that occur between the time of the original deviation and the PM emissions compliance test required under this paragraph (x); and

(iv) PM CPMS deviations leading to more than four required performance tests in a 12-month process operating period (rolling monthly) constitute a violation of this subpart.

(y) When kiln emissions are emitted through multiple stacks (e.g., there is an alkali bypass and/or an in-line coal mill that exhaust emissions through a separate stack(s)), the combined emissions are subject to the emission limits applicable to waste-burning kilns. To determine the kiln-specific emission limit for demonstrating compliance, you must:

(1) Calculate a kiln-specific emission limit using equation 2 to this paragraph (y)(1):

Equation 2 to paragraph (y)(1)

$$C_{ks} = \frac{(Emission\ Limit \times \sum_1^n Q_i) - \sum_1^m (Q_i \times C_i)}{Q_{ks}} \quad (\text{Eq. 2})$$

Where:

C_{ks} = Kiln stack concentration (ppmvd, mg/dscm, ng/dscm, depending on pollutant. Each corrected to 7% O₂).

Q_{ks} = Kiln stack flow rate (volume/hr).

Q_i = Flow rate of stack i (volume/hr).

n = Number of stacks kiln emissions are being emitted from including the kiln stack.

m = Number of stacks excluding the kiln stack that kiln emissions are being emitted from.

C_i = Concentration in stack i (ppmvd, mg/dscm, ng/dscm, depending on pollutant. Each corrected to 7% O₂).

(2) Particulate matter concentration must be measured downstream of the in-line coal mill. All other pollutant concentrations must be measured either upstream or downstream of the in-line coal mill.

(3) For purposes of determining the combined emissions from kilns equipped with an alkali bypass or that exhaust kiln gases to a coal mill that exhausts through a separate stack, instead of installing a CEMS or PM CPMS on the alkali bypass stack or in-line coal mill stack, the results of the initial and subsequent performance test can be used to demonstrate compliance with the relevant emissions limit. A performance test must be conducted on an annual basis (between 11 and 13 calendar months following the previous performance test).

(z) These standards are incorporated by reference into this section with the approval of the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. All approved material is available for inspection at the U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460, (202) 272-0167, <https://www.epa.gov>. You may also inspect a copy at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, visit <https://www.archives.gov/federal-register/cfr/ibr-locations.html> or email fr.inspection@nara.gov.

(1) American Society of Mechanical Engineers (ASME), Two Park Avenue, New York, NY 10016-5990; phone: 1-800-843-2763; website: <https://www.asme.org/>.

(i) ANSI/ASME PTC 19.10-1981, Flue and Exhaust Gas Analyses [Part 10, Instruments and Apparatus], Issued August 31, 1981.

(ii) [Reserved]

(2) U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue

NW, Washington, DC 20460; phone (202) 272-0167; website <https://www.epa.gov>.

(i) Fabric Filter Bag Leak Detection Guidance, EPA-454/R-98-015, September 1997. (Available from www3.epa.gov/ttnemc01/cem/tribo.pdf.)

(ii) [Reserved]

§ 62.14645a By what date must I conduct the annual performance test?

You must conduct annual performance tests between 11 and 13 calendar months of the previous performance test.

§ 62.14650a By what date must I conduct the annual air pollution control device inspection?

On an annual basis (no more than 12 months following the previous annual air pollution control device inspection), you must complete the air pollution control device inspection as described in § 62.14635a.

§ 62.14655a May I conduct performance testing less often?

You must conduct annual performance tests according to the schedule specified in § 62.14645a, with the following exceptions:

(a) You may conduct a repeat performance test at any time to establish new values for the operating limits, as specified in § 62.14660a. New operating limits become effective on the date that the performance test report is submitted to the EPA's Central Data Exchange or postmarked, per the requirements of § 62.14730a(b). The Administrator may request a repeat performance test at any time;

(b) You must repeat the performance test within 60 days of a process change, as defined in § 62.14780a; and

(c) You can conduct performance tests less often if you meet the following conditions: your performance tests for the pollutant for at least 2 consecutive performance tests demonstrates that the emission level for the pollutant is no greater than the emission level specified in paragraph (c)(1) or (2) of this section, as applicable; there are no changes in the operation of the affected source or air pollution control equipment that could increase emissions; and you are not required to conduct a performance test for the pollutant in response to a request by the Administrator in paragraph (a) of this section or a process change in paragraph (b) of this section. In this case, you do not have to conduct a performance test for that pollutant for

the next 2 years. You must conduct a performance test for the pollutant no more than 37 months following the previous performance test for the pollutant. If the emission level for your CISWI continues to meet the emission level specified in paragraph (c)(1) or (2), as applicable, you may choose to conduct performance tests for the pollutant every third year, as long as there are no changes in the operation of the affected source or air pollution control equipment that could increase emissions. Each such performance test must be conducted no more than 37 months after the previous performance test.

(1) For particulate matter, hydrogen chloride, mercury, carbon monoxide, nitrogen oxides, sulfur dioxide, cadmium, lead, and dioxins/furans, the emission level equal to 75 percent of the applicable emission limit in tables 4 through 7 to this subpart, as applicable; and

(2) For fugitive emissions, visible emissions (of combustion ash from the ash conveying system) for 2 percent of the time during each of the three 1-hour observation periods.

(3) If you are conducting less frequent testing for a pollutant as provided in this paragraph (c) and a subsequent performance test for the pollutant indicates that your CISWI does not meet the emission level specified in paragraph (c)(1) or (2) of this section, as applicable, you must conduct annual performance tests for the pollutant according to the schedule specified in this section until you qualify for less frequent testing for the pollutant as specified in this paragraph (c).

§ 62.14660a May I conduct a repeat performance test to establish new operating limits?

(a) Yes. You may conduct a repeat performance test at any time to establish new values for the operating limits. The Administrator may request a repeat performance test at any time.

(b) You must repeat the performance test if your feed stream is different than the feed streams used during any performance test used to demonstrate compliance.

Monitoring

§ 62.14665a What monitoring equipment must I install and what parameters must I monitor?

(a) If you are using a wet scrubber to comply with the emission limitation

under § 62.14600a, you must install, calibrate (to manufacturers' specifications), maintain, and operate devices (or establish methods) for monitoring the value of the operating parameters used to determine compliance with the operating limits listed in table 1 to this subpart. These devices (or methods) must measure and record the values for these operating parameters at the frequencies indicated in table 1 to this subpart at all times except as specified in § 62.14670a(a).

(b) If you use a fabric filter to comply with the requirements of this subpart and you do not use a PM CPMS or PM CEMS for monitoring PM compliance, you must install, calibrate, maintain, and continuously operate a bag leak detection system as specified in paragraphs (b)(1) through (8) of this section.

(1) You must install and operate a bag leak detection system for each exhaust stack of the fabric filter.

(2) Each bag leak detection system must be installed, operated, calibrated, and maintained in a manner consistent with the manufacturer's written specifications and recommendations.

(3) The bag leak detection system must be certified by the manufacturer to be capable of detecting particulate matter emissions at concentrations of 10 milligrams per actual cubic meter or less.

(4) The bag leak detection system sensor must provide output of relative or absolute particulate matter loadings.

(5) The bag leak detection system must be equipped with a device to continuously record the output signal from the sensor.

(6) The bag leak detection system must be equipped with an alarm system that will alert automatically an operator when an increase in relative particulate matter emissions over a preset level is detected. The alarm must be located where it is observed easily by plant operating personnel.

(7) For positive pressure fabric filter systems, a bag leak detection system must be installed in each baghouse compartment or cell. For negative pressure or induced air fabric filters, the bag leak detector must be installed downstream of the fabric filter.

(8) Where multiple detectors are required, the system's instrumentation and alarm may be shared among detectors.

(c) If you are using something other than a wet scrubber, activated carbon, selective non-catalytic reduction, an electrostatic precipitator, or a dry scrubber to comply with the emission limitations under § 62.14600a, you must install, calibrate (to the manufacturers'

specifications), maintain, and operate the equipment necessary to monitor compliance with the site-specific operating limits established using the procedures in § 62.14610a.

(d) If you use activated carbon injection to comply with the emission limitations in this subpart, you must measure the minimum sorbent flow rate once per hour.

(e) If you use selective noncatalytic reduction to comply with the emission limitations in this subpart, you must complete the following:

(1) Following the date on which the initial performance test is completed or is required to be completed under § 62.14615a, whichever date comes first, ensure that the affected facility does not operate above the maximum charge rate, or below the minimum secondary chamber temperature (if applicable to your CISWI) or the minimum reagent flow rate measured as 3-hour block averages at all times; and

(2) Operation of the affected facility above the maximum charge rate, below the minimum secondary chamber temperature and below the minimum reagent flow rate simultaneously constitute a violation of the nitrogen oxides emissions limit.

(f) If you use an electrostatic precipitator to comply with the emission limits of this subpart and you do not use a PM CPMS for monitoring PM compliance, you must monitor the secondary power to the electrostatic precipitator collection plates and maintain the 3-hour block averages at or above the operating limits established during the mercury or particulate matter performance test.

(g) For waste-burning kilns not equipped with a wet scrubber or dry scrubber, you must install, calibrate, maintain, and operate a CEMS for monitoring hydrogen chloride emissions discharged to the atmosphere, as specified in § 62.14640a(j), and record the output of the system. You may substitute use of a HCl CEMS for conducting the HCl initial and annual testing with EPA Method 321 of 40 CFR part 63, appendix A. for units other than waste-burning kilns not equipped with a wet scrubber or dry scrubber, a facility may substitute use of a HCl CEMS for conducting the HCl initial and annual performance test. For units equipped with a HCl CEMS, you are not required to monitor the minimum hydrogen chloride sorbent flow rate, monitoring the minimum scrubber liquor pH, and monitoring minimum injection rate.

(h) To demonstrate continuous compliance with the particulate matter emissions limit in this subpart, a facility may substitute use of either a particulate

matter CEMS or a particulate matter CPMS for conducting the particulate matter annual performance test. For units equipped with a particulate matter CEMS, you are not required to use other CMS monitoring for PM compliance (e.g., bag leak detectors, electrostatic precipitator secondary power, PM scrubber pressure). A facility may also substitute use of a particulate matter CEMS for conducting the PM initial performance test.

(i) To demonstrate initial and continuous compliance with the dioxin/furan emissions limit in this subpart, a facility may substitute use of a continuous automated sampling system for the dioxin/furan initial and annual performance test. You must record the output of the system and analyze the sample according to EPA Method 23 of 40 CFR part 60, appendix A–7. This option to use a continuous automated sampling system takes effect on the date a final performance specification applicable to dioxin/furan from continuous monitors is published in the **Federal Register**. The owner or operator who elects to continuously sample dioxin/furan emissions instead of sampling and testing using EPA Method 23 must install, calibrate, maintain and operate a continuous automated sampling system and must comply with the requirements specified in § 60.58b(p) and (q) of this chapter. A facility may substitute continuous dioxin/furan monitoring for the minimum sorbent flow rate, if activated carbon sorbent injection is used solely for compliance with the dioxin/furan emission limit.

(j)(1) To demonstrate initial and continuous compliance with the mercury emissions limit in this subpart, a facility may substitute use of a mercury CEMS or and integrated sorbent trap monitoring system for the mercury initial and annual performance test. The owner or operator who elects to continuously sample mercury emissions instead of sampling and testing using EPA Method 29 or 30B of 40 CFR part 60, appendix A–8, ASTM D6784–24, Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury in Flue Gas Generated from Coal-Fired Stationary Sources (Ontario Hydro Method), approved March 1, 2024 (ASTM D6784–24), or an approved alternative method for measuring mercury emissions, must install, calibrate, maintain and operate the mercury CEMS or integrated sorbent trap monitoring system and must comply with Performance Specification 12A or 12B of 40 CFR part 60, appendix B, respectively, and quality assurance requirements of Procedure 5 of 40 CFR

part 60, appendix F. For the purposes of emissions calculations when using an integrated sorbent trap monitoring system, the mercury concentration determined for each sampling period must be assigned to each hour during the sampling period. For units equipped with a mercury CEMS or an integrated sorbent trap monitoring system, you are not required to monitor the minimum sorbent flow rate, if activated carbon sorbent injection is used solely for compliance with the mercury emission limit. Waste-burning kilns must install, calibrate, maintain, and operate a mercury CEMS or an integrated sorbent trap monitoring system as specified in § 62.14640a(j).

(2) ASTM D6784–24 is incorporated by reference into this section with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. This material is available for inspection at the U.S. Environmental Protection Agency (EPA) and at the National Archives and Records Administration (NARA). Contact the EPA at: 1200 Pennsylvania Avenue NW, Washington, DC 20460, (202) 272–0167, <https://www.epa.gov>. For information on the availability of this material at NARA, visit <https://www.archives.gov/federal-register/cfr/ibr-locations> or email fr.inspection@nara.gov. This material may be obtained from ASTM International (ASTM) at: 100 Barr Harbor Drive, Post Office Box C700, West Conshohocken, PA 19428–2959; phone: +1–610–832–9500; website: <https://www.astm.org/>.

(k) To demonstrate initial and continuous compliance with the nitrogen oxides emissions limit in this subpart, a facility may substitute use of a CEMS for the nitrogen oxides initial and annual performance test to demonstrate compliance with the nitrogen oxides emissions limits. For units equipped with a nitrogen oxides CEMS, you are not required to monitor the charge rate, secondary chamber temperature and reagent flow for selective noncatalytic reduction, if applicable:

(1) Install, calibrate, maintain and operate a CEMS for measuring nitrogen oxides emissions discharged to the atmosphere and record the output of the system. The requirements under Performance Specification 2 of 40 CFR part 60, appendix B, the quality assurance requirements of Procedure 1 of 40 CFR part 60, appendix F, and the procedures under § 60.13 of this chapter must be followed for installation, evaluation and operation of the CEMS; and

(2) Compliance with the emission limit in this subpart for nitrogen oxides

must be determined based on the 30-day rolling average of the hourly emission concentrations using CEMS outlet data, as outlined in § 62.14640a(u).

(l) To demonstrate initial and continuous compliance with the sulfur dioxide emissions limit in this subpart, a facility may substitute use of a CEMS for the sulfur dioxide initial and annual performance test to demonstrate compliance with the sulfur dioxide emissions limits:

(1) Install, calibrate, maintain and operate a CEMS for measuring sulfur dioxide emissions discharged to the atmosphere and record the output of the system. The requirements under Performance Specification 2 of 40 CFR part 60, appendix B, the quality assurance requirements of Procedure 1 of 40 CFR part 60, appendix F, and the procedures under § 60.13 of this chapter must be followed for installation, evaluation and operation of the CEMS; and

(2) Compliance with the sulfur dioxide emission limit in this subpart shall be determined based on the 30-day rolling average of the hourly arithmetic average emission concentrations using CEMS outlet data, as outlined in § 62.14640a(u).

(m) For energy recovery units over 10 MMBtu/hr but less than 250 MMBtu/hr annual average heat input rates that do not use a wet scrubber, fabric filter with bag leak detection system, an electrostatic precipitator, particulate matter CEMS, or particulate matter CPMS, you must install, operate, certify and maintain a continuous opacity monitoring system according to the procedures in paragraphs (m)(1) through (5) of this section by the compliance date specified in § 62.14600a. Energy recovery units that use a particulate matter CEMS to demonstrate initial and continuing compliance according to the procedures in § 62.14665a(n) are not required to install a continuous opacity monitoring system and must perform the annual performance tests for opacity consistent with § 62.14640a(f):

(1) Install, operate and maintain each continuous opacity monitoring system according to Performance Specification 1 (PS 1) of 40 CFR part 60, appendix B;

(2) Conduct a performance evaluation of each continuous opacity monitoring system according to the requirements in § 60.13 of this chapter and according to PS 1 of 40 CFR part 60, appendix B;

(3) As specified in § 60.13(e)(1) of this chapter, each continuous opacity monitoring system must complete a minimum of one cycle of sampling and analyzing for each successive 10-second period and one cycle of data recording for each successive 6-minute period;

(4) Reduce the continuous opacity monitoring system data as specified in § 60.13(h)(1) of this chapter; and

(5) Determine and record all the 6-minute averages (and 1-hour block averages as applicable) collected.

(n) For coal and liquid/gas energy recovery units, incinerators, and small remote incinerators, an owner or operator may elect to install, calibrate, maintain and operate a CEMS for monitoring particulate matter emissions discharged to the atmosphere and record the output of the system. The owner or operator of an affected facility who continuously monitors particulate matter emissions instead of conducting performance testing using EPA Method 5 of 40 CFR part 60, appendix A–3, or monitoring with a particulate matter CPMS according to paragraph (r) of this section, must install, calibrate, maintain and operate a PM CEMS and must comply with the requirements specified in paragraphs (n)(1) through (10) of this section:

(1) The PM CEMS must be installed, evaluated, and operated in accordance with the requirements of Performance Specification 11 of 40 CFR part 60, appendix B, and quality assurance requirements of Procedure 2 of 40 CFR part 60, appendix F, and § 60.13 of this chapter;

(2) The initial performance evaluation must be completed no later than 180 days after January 10, 2025, as specified under § 62.14615a or within 180 days of notification to the Administrator of use of the continuous monitoring system if the owner or operator was previously determining compliance by Method 5 of 40 CFR part 60, appendix A–3, performance tests, whichever is later;

(3) The owner or operator of an affected facility may request that compliance with the particulate matter emission limit be determined using carbon dioxide measurements corrected to an equivalent of 7 percent oxygen. The relationship between oxygen and carbon dioxide levels for the affected facility must be established according to the procedures and methods specified in § 62.14640a(t)(4)(i) through (iv);

(4) The owner or operator of an affected facility must conduct an initial performance test for particulate matter emissions. If PM CEMS are elected for demonstrating compliance, and the initial performance test has not yet been conducted, then initial compliance must be determined by using the CEMS specified in this paragraph (n) to measure particulate matter. You must calculate a 30-day rolling average of 1-hour arithmetic average emission concentrations, including CEMS data during startup and shutdown, as

defined in this subpart, using equation 19–19 in section 12.4.1 of EPA Reference Method 19 of 40 CFR part 60, appendix A–7;

(5) Continuous compliance with the particulate matter emission limit must be determined based on the 30-day rolling average calculated using equation 19–19 in section 12.4.1 of EPA Reference Method 19 of 40 CFR part 60, appendix A–7, from the 1-hour arithmetic average of the CEMS outlet data;

(6) At a minimum, valid continuous monitoring system hourly averages must be obtained as specified § 62.14670a;

(7) The 1-hour arithmetic averages required under paragraph (n)(5) of this section must be expressed in milligrams per dry standard cubic meter (mg/dscm) corrected to 7 percent oxygen (or carbon dioxide)(dry basis) and must be used to calculate the 30-day rolling average emission concentrations. CEMS data during startup and shutdown, as defined in this subpart, are not corrected to 7 percent oxygen, and are measured at stack oxygen content. The 1-hour arithmetic averages must be calculated using the data points required under § 60.13(e)(2) of this chapter;

(8) All valid CEMS data must be used in calculating average emission concentrations even if the minimum CEMS data requirements of paragraph (n)(6) of this section are not met;

(9) The CEMS must be operated according to Performance Specification 11 of 40 CFR part 60, appendix B; and

(10) Quarterly and yearly accuracy audits and daily drift, system optics, and sample volume checks must be performed in accordance with Procedure 2 of 40 CFR part 60, appendix F.

(o) To demonstrate initial and continuous compliance with the carbon monoxide emissions limit in this subpart, a facility may substitute use of a CEMS for the carbon monoxide initial and annual performance test to demonstrate compliance with the carbon monoxide emissions limits:

(1) Install, calibrate, maintain, and operate a CEMS for measuring carbon monoxide emissions discharged to the atmosphere and record the output of the system. The requirements under Performance Specification 4A or 4B of 40 CFR part 60, appendix B, the quality assurance requirements of Procedure 1 of 40 CFR part 60, appendix F, and the procedures under § 60.13 of this chapter must be followed for installation, evaluation, and operation of the CEMS; and

(2) Compliance with the carbon monoxide emission limit shall be

determined based on the 30-day rolling average of the hourly arithmetic average emission concentrations, including CEMS data during startup and shutdown as defined in this subpart, using CEMS outlet data, as outlined in § 62.14640a(u).

(p) The owner/operator of an affected source with a bypass stack shall install, calibrate (to manufacturers' specifications), maintain and operate a device or method for measuring the use of the bypass stack including date, time and duration.

(q) For energy recovery units with a heat input capacity of 100 MMBtu/hr or greater that do not use a carbon monoxide CEMS, you must install, operate and maintain the continuous oxygen monitoring system as defined in § 62.14780a according to the procedures in paragraphs (q)(1) through (4) of this section:

(1) The oxygen analyzer system must be installed by the initial performance test date specified in § 62.14605a;

(2) You must operate the oxygen trim system within compliance with paragraph (q)(3) of this section at all times;

(3) You must maintain the oxygen level such that the 30-day rolling average that is established as the operating limit for oxygen according to paragraph (q)(4) of this section is not below the lowest hourly average oxygen concentration measured during the most recent CO performance test; and

(4) You must calculate and record a 30-day rolling average oxygen concentration using equation 19–19 in section 12.4.1 of EPA Reference Method 19 of 40 CFR part 60, appendix A–7.

(r) For energy recovery units with annual average heat input rates greater than or equal to 250 MMBtu/hr and waste-burning kilns, you must install, calibrate, maintain, and operate a PM CPMS and record the output of the system as specified in paragraphs (r)(1) through (8) of this section. For other energy recovery units, you may elect to use PM CPMS operated in accordance with this section. PM CPMS are suitable in lieu of using other CMS for monitoring PM compliance (e.g., bag leak detectors, electrostatic precipitator secondary power, PM scrubber pressure):

(1) Install, calibrate, operate, and maintain your PM CPMS according to the procedures in your approved site-specific monitoring plan developed in accordance with § 62.14640a(l) and (r)(1)(i) through (iii) of this section:

(i) The operating principle of the PM CPMS must be based on in-stack or extractive light scatter, light scintillation, beta attenuation, or mass

accumulation of the exhaust gas or representative sample. The reportable measurement output from the PM CPMS must be expressed as milliamps or the digital signal equivalent;

(ii) The PM CPMS must have a cycle time (i.e., period required to complete sampling, measurement, and reporting for each measurement) no longer than 60 minutes; and

(iii) The PM CPMS must be capable of detecting and responding to particulate matter concentrations increments no greater than 0.5 mg/actual cubic meter.

(2) During the initial performance test or any such subsequent performance test that demonstrates compliance with the PM limit in this subpart, you must adjust the site-specific operating limit in accordance with the results of the performance test according to the procedures specified in § 62.14605a.

(3) Collect PM CPMS hourly average output data for all energy recovery unit or waste-burning kiln operating hours. Express the PM CPMS output as milliamps or the digital signal equivalent.

(4) Calculate the arithmetic 30-day rolling average of all of the hourly average PM CPMS output collected during all energy recovery unit or waste-burning kiln operating hours data (milliamps or digital bits).

(5) You must collect data using the PM CPMS at all times the energy recovery unit or waste-burning kiln is operating and at the intervals specified in paragraph (r)(1)(ii) of this section, except for periods of monitoring system malfunctions, repairs associated with monitoring system malfunctions, required monitoring system quality assurance or quality control activities (including, as applicable, calibration checks and required zero and span adjustments), and any scheduled maintenance as defined in your site-specific monitoring plan.

(6) You must use all the data collected during all energy recovery unit or waste-burning kiln operating hours in assessing the compliance with your operating limit except:

(i) Any data collected during monitoring system malfunctions, repairs associated with monitoring system malfunctions, or required monitoring system quality assurance or quality control activities conducted during monitoring system malfunctions are not used in calculations (report any such periods in your annual deviation report);

(ii) Any data collected during periods when the monitoring system is out of control as specified in your site-specific monitoring plan, repairs associated with periods when the monitoring system is

out of control, or required monitoring system quality assurance or quality control activities conducted during out-of-control periods are not used in calculations (report emissions or operating levels and report any such periods in your annual deviation report); and

(iii) Any PM CPMS data recorded during periods of CEMS data during startup and shutdown, as defined in this subpart.

(7) You must record and make available upon request results of PM CPMS system performance audits, as well as the dates and duration of periods from when the PM CPMS is out of control until completion of the corrective actions necessary to return the PM CPMS to operation consistent with your site-specific monitoring plan.

(8) For any deviation of the 30-day rolling average PM CPMS average value from the established operating parameter limit, you must:

(i) Within 48 hours of the deviation, visually inspect the air pollution control device;

(ii) If inspection of the air pollution control device identifies the cause of the deviation, take corrective action as soon as possible and return the PM CPMS measurement to within the established value;

(iii) Within 30 days of the deviation or at the time of the annual compliance test, whichever comes first, conduct a PM emissions compliance test to determine compliance with the PM emissions limit in this subpart and to verify the operation of the emissions control device(s). Within 45 days of the deviation, you must re-establish the CPMS operating limit. You are not required to conduct additional testing for any deviations that occur between the time of the original deviation and the PM emissions compliance test required under this paragraph (r)(8)(iii); and

(iv) PM CPMS deviations leading to more than four required performance tests in a 12-month process operating period (rolling monthly) constitute a violation of this subpart.

(s) If you use a dry scrubber to comply with the emission limits of this subpart, you must monitor the injection rate of each sorbent and maintain the 3-hour block averages at or above the operating limits established during the hydrogen chloride performance test.

(t) If you are required to monitor clinker production because you comply with the production-rate based mercury limit in this subpart for your waste-burning kiln, you must:

(1) Determine hourly clinker production by one of two methods:

(i) Install, calibrate, maintain, and operate a permanent weigh scale system to measure and record weight rates in tons-mass per hour of the amount of clinker produced. The system of measuring hourly clinker production must be maintained within ± 5 percent accuracy; or

(ii) Install, calibrate, maintain, and operate a permanent weigh scale system to measure and record weight rates in tons-mass per hour of the amount of feed to the kiln. The system of measuring feed must be maintained within ± 5 percent accuracy. Calculate your hourly clinker production rate using a kiln-specific feed to clinker ratio based on reconciled clinker production determined for accounting purposes and recorded feed rates. Update this ratio monthly. Note that if this ratio changes at clinker reconciliation, you must use the new ratio going forward, but you do not have to retroactively change clinker production rates previously estimated.

(2) Determine the accuracy of the system of measuring hourly clinker production (or feed mass flow if applicable) before the final compliance date under this subpart and during each quarter of source operation.

(3) Conduct accuracy checks in accordance with the procedures outlined in your site-specific monitoring plan under § 62.14640a(l).

§ 62.14670a Is there a minimum amount of monitoring data I must obtain?

For each continuous monitoring system required or optionally allowed under § 62.14665a, you must monitor and collect data according to this section:

(a) You must operate the monitoring system and collect data at all required intervals at all times compliance is required except for periods of monitoring system malfunctions or out-of-control periods, repairs associated with monitoring system malfunctions or out-of-control periods (as specified in § 62.14705a(o)), and required monitoring system quality assurance or quality control activities including, as applicable, calibration checks and required zero and span adjustments. A monitoring system malfunction is any sudden, infrequent, not reasonably preventable failure of the monitoring system to provide valid data. Monitoring system failures that are caused in part by poor maintenance or careless operation are not malfunctions. You are required to effect monitoring system repairs in response to monitoring system malfunctions or out-of-control periods and to return the monitoring system to operation as expeditiously as practicable.

(b) You may not use data recorded during monitoring system malfunctions, repairs associated with monitoring system malfunctions or out-of-control periods, or required monitoring system quality assurance or control activities in calculations used to report emissions or operating levels. You must use all the data collected during all other periods, including data normalized for above scale readings, in assessing the operation of the control device and associated control system.

(c) Except for periods of monitoring system malfunctions or out-of-control periods, repairs associated with monitoring system malfunctions or out-of-control periods, and required monitoring system quality assurance or quality control activities including, as applicable, calibration checks and required zero and span adjustments, failure to collect required data is a deviation of the monitoring requirements.

Recordkeeping and Reporting

§ 62.14675a What records must I keep?

You must maintain the items (as applicable) as specified in paragraphs (a) through (c) of this section for a period of at least 5 years:

(a) Calendar date of each record.

(b) Records of the data described in paragraphs (b)(1) through (7) of this section:

(1) The CISWI charge dates, times, weights, and hourly charge rates;

(2) Liquor flow rate to the wet scrubber inlet every 15 minutes of operation, as applicable;

(3) Pressure drop across the wet scrubber system every 15 minutes of operation or amperage to the wet scrubber every 15 minutes of operation, as applicable; and

(4) Liquor pH as introduced to the wet scrubber every 15 minutes of operation, as applicable.

(5) For affected CISWI that establish operating limits for controls other than wet scrubbers under § 62.14610a, you must maintain data collected for all operating parameters used to determine compliance with the operating limits. For energy recovery units using activated carbon injection or a dry scrubber, you must also maintain records of the load fraction and corresponding sorbent injection rate records; and

(6) If a fabric filter is used to comply with the emission limitations, you must record the date, time, and duration of each alarm and the time corrective action was initiated and completed, and a brief description of the cause of the alarm and the corrective action taken.

You must also record the percent of operating time during each 6-month period that the alarm sounds, calculated as specified in § 62.14605a(c).

(7) If you monitor clinker production in accordance with § 62.14665a(t):

(i) Hourly clinker rate produced if clinker production is measured directly;

(ii) Hourly measured kiln feed rates and calculated clinker production rates if clinker production is not measured directly;

(iii) Thirty (30)-day rolling averages for mercury in pounds per million tons of clinker produced; and

(iv) The initial and quarterly accuracy of the system of measuring hourly clinker production (or feed mass flow).

(c) Identification of calendar dates and times for which data show a deviation from the operating limits in table 1 to this subpart or a deviation from other operating limits established under § 62.14605a(d) through (g) or § 62.14610a with a description of the deviations, reasons for such deviations, and a description of corrective actions taken.

(d) The results of the initial, annual, and any subsequent performance tests conducted to determine compliance with the emission limits and/or to establish operating limits, as applicable. Retain a copy of the complete test report including calculations.

(e) Records showing the names of CISWI operators who have completed review of the information in § 62.14590a(a) as required by § 62.14590a(b), including the date of the initial review and all subsequent annual reviews.

(f) Records showing the names of the CISWI operators who have completed the operator training requirements under § 62.14565a, met the criteria for qualification under § 62.14575a, and maintained or renewed their qualification under § 62.14580a or § 62.14585a. Records must include documentation of training, the dates of the initial and refresher training, and the dates of their qualification and all subsequent renewals of such qualifications.

(g) For each qualified operator, the phone and/or pager number at which they can be reached during operating hours.

(h) Records of calibration of any monitoring devices as required under § 62.14665a.

(i) Equipment vendor specifications and related operation and maintenance requirements for the incinerator, emission controls, and monitoring equipment.

(j) The information listed in § 62.14590a(a).

(k) On a daily basis, keep a log of the quantity of waste burned and the types of waste burned (always required).

(l) Maintain records of the annual air pollution control device inspections that are required for each CISWI subject to the emissions limits in tables 4 through 7 to this subpart, any required maintenance and any repairs not completed within 10 days of an inspection or the timeframe established by the state regulatory agency.

(m) For continuously monitored pollutants or parameters, you must document and keep a record of the following parameters measured using continuous monitoring systems. If you monitor emissions with a CEMS, you must indicate which data are CEMS data during startup and shutdown:

(1) All 6-minute average levels of opacity;

(2) All 1-hour average concentrations of sulfur dioxide emissions;

(3) All 1-hour average concentrations of nitrogen oxides emissions;

(4) All 1-hour average concentrations of carbon monoxide emissions;

(5) All 1-hour average concentrations of particulate matter emissions;

(6) All 1-hour average concentrations of mercury emissions;

(7) All 1-hour average concentrations of HCl CEMS outputs;

(8) All 1-hour average percent oxygen concentrations; and

(9) All 1-hour average PM CPMS readings or particulate matter CEMS outputs.

(n) Records indicating use of the bypass stack, including dates, times and durations.

(o) If you choose to stack test less frequently than annually, consistent with § 62.14655a, you must keep annual records that document that your emissions in the previous stack test(s) were less than 75 percent of the applicable emission limit and document that there was no change in source operations including fuel composition and operation of air pollution control equipment that would cause emissions of the relevant pollutant to increase within the past year.

(p) Records of the occurrence and duration of each malfunction of operation (*i.e.*, process equipment) or the air pollution control and monitoring equipment.

(q) Records of all required maintenance performed on the air pollution control and monitoring equipment.

(r) Records of actions taken during periods of malfunction to minimize emissions in accordance with § 60.11(d) of this chapter, including corrective actions to restore malfunctioning

process and air pollution control and monitoring equipment to its normal or usual manner of operation.

(s) For operating units that combust non-hazardous secondary materials that have been determined not to be solid waste pursuant to § 241.3(b)(1) of this chapter, you must keep a record which documents how the secondary material meets each of the legitimacy criteria under § 241.3(d)(1) of this chapter. If you combust a fuel that has been processed from a discarded non-hazardous secondary material pursuant to § 241.3(b)(4) of this chapter, you must keep records as to how the operations that produced the fuel satisfies the definition of processing in § 241.2 of this chapter and each of the legitimacy criteria in § 241.3(d)(1). If the fuel received a non-waste determination pursuant to the petition process submitted under § 241.3(c) of this chapter, you must keep a record that documents how the fuel satisfies the requirements of the petition process. For operating units that combust non-hazardous secondary materials as fuel per § 241.4 of this chapter, you must keep records documenting that the material is a listed non-waste under § 241.4(a) of this chapter.

(t) Records of the criteria used to establish that the unit qualifies as a small power production facility under section 3(17)(C) of the Federal Power Act (16 U.S.C. 796(17)(C)) and that the waste material the unit is proposed to burn is homogeneous.

(u) Records of the criteria used to establish that the unit qualifies as a cogeneration facility under section 3(18)(B) of the Federal Power Act (16 U.S.C. 796(18)(B)) and that the waste material the unit is proposed to burn is homogeneous.

§ 62.14680a Where and in what format must I keep my records?

All records must be available onsite in either paper copy or computer-readable format that can be printed upon request, unless an alternative format is approved by the Administrator.

§ 62.14685a What reports must I submit?

See table 3 to this subpart for a summary of the reporting requirements.

§ 62.14690a When must I submit my waste management plan?

You must submit a waste management plan no later than January 10, 2025, or the date you recommence burning solid waste, whichever is later.

§ 62.14695a What information must I submit following my initial performance test?

You must submit the information specified in paragraphs (a) through (c) of this section no later than 60 days following the initial performance test. All reports must be signed by the facilities manager:

- (a) The complete test report for the initial performance test results obtained under § 62.14625a, as applicable;
- (b) The values for the site-specific operating limits established in § 62.14605a or § 62.14610a; and
- (c) If you are using a fabric filter to comply with the emission limitations in this subpart, documentation that a bag leak detection system has been installed and is being operated, calibrated, and maintained as required by § 62.14665a(b).

§ 62.14700a When must I submit my annual report?

You must submit an annual report no later than 12 months following the submission of the information in § 62.14695a. You must submit subsequent reports no more than 12 months following the previous report. (If the unit is subject to permitting requirements under title V of the Clean Air Act, you may be required by the permit to submit these reports more frequently.)

§ 62.14705a What information must I include in my annual report?

The annual report required under § 62.14700a must include the items listed in paragraphs (a) through (p) of this section. If you have a deviation from the operating limits or the emission limitations in this subpart, you must also submit deviation reports as specified in §§ 62.14710a, 62.14715a, and 62.14720a.

- (a) Company name and address;
- (b) Statement by a responsible official, with that official's name, title, and signature, certifying the accuracy of the content of the report. If your report is submitted via the Compliance and Emissions Data Reporting Interface (CEDRI), the certifier's electronic signature during the submission process replaces this requirement;
- (c) Date of report and beginning and ending dates of the reporting period. You are no longer required to provide the date of the report when the report is submitted via CEDRI;
- (d) The values for the operating limits established pursuant to § 62.14605a or § 62.14610a;
- (e) If no deviation from any emission limitation or operating limit that applies to you has been reported, a statement

that there was no deviation from the emission limitations or operating limits during the reporting period;

- (f) The highest recorded 3-hour average and the lowest recorded 3-hour average (30-day average for energy recovery units), as applicable, for each operating parameter recorded for the calendar year being reported;
- (g) Information recorded under § 62.14675a(b)(6) and (c) through (e) for the calendar year being reported;
- (h) For each performance test conducted during the reporting period, if any performance test is conducted, the process unit(s) tested, the pollutant(s) tested and the date that such performance test was conducted. Submit, following the procedure specified in § 62.14730a(b)(1), the performance test report no later than the date that you submit the annual report;
- (i) If you met the requirements of § 62.14655a, and did not conduct a performance test during the reporting period, you must state that you met the requirements of § 62.14655a, and, therefore, you were not required to conduct a performance test during the reporting period;
- (j) The start date, start time, and duration (in hours) of periods when all qualified CISWI operators were unavailable for more than 8 hours, but less than 2 weeks;
- (k) If you had a malfunction during the reporting period, the compliance report must include the start date, start time, duration (in hours), and a brief description for each malfunction that occurred during the reporting period and that caused or may have caused any applicable emission limitation to be exceeded. The report must also include a description of actions taken by an owner or operator during a malfunction of an affected source to minimize emissions in accordance with § 60.11(d) of this chapter, including actions taken to correct a malfunction;
- (l) For each deviation from an emission or operating limitation that occurs for a CISWI for which you are not using a CMS to comply with the emission or operating limitations in this subpart, the annual report must contain the following information:
 - (1) The total operating time (in hours) of the CISWI at which the deviation occurred during the reporting period; and
 - (2) Information on the start date, start time, duration (in hours), and cause of deviations (including unknown cause, if applicable), as applicable, and the corrective action taken;
 - (m) If there were periods during which the continuous monitoring system, including the CEMS, was out of

control as specified in paragraph (o) of this section, the annual report must contain the following information for each deviation from an emission or operating limitation occurring for a CISWI for which you are using a continuous monitoring system to comply with the emission and operating limitations in this subpart:

- (1) The date and time that each malfunction started and stopped;
- (2) The start and end date and time and duration (in hours) that each CMS was inoperative, except for zero (low-level) and high-level checks;
- (3) The start and end date and time and duration (in hours) that each continuous monitoring system was out-of-control, and descriptions of corrective actions taken;
- (4) The date and time that each deviation started and stopped, and whether each deviation occurred during a period of malfunction or during another period;
- (5) A summary of the total duration (in hours) of the deviation during the reporting period, and the total duration as a percent of the total source operating time during that reporting period;
- (6) A breakdown of the total duration (in hours) of the deviations during the reporting period into those that are due to control equipment problems, process problems, other known causes, and other unknown causes;
- (7) A summary of the total duration (in hours) of continuous monitoring system downtime during the reporting period, and the total duration of continuous monitoring system downtime as a percent of the total operating time of the CISWI at which the continuous monitoring system downtime occurred during that reporting period;
- (8) An identification of each parameter and pollutant that was monitored at the CISWI;
- (9) A brief description of the CISWI;
- (10) A brief description of the continuous monitoring system;
- (11) The date of the latest continuous monitoring system certification or audit; and
- (12) A description of any changes in continuous monitoring system, processes, or controls since the last reporting period;
- (n) If there were periods during which the continuous monitoring system, including the CEMS, was not out of control as specified in paragraph (o) of this section, a statement that there were not periods during which the continuous monitoring system was out of control during the reporting period;

(o) A continuous monitoring system is out of control if any of the following occur:

(1) The zero (low-level), mid-level (if applicable), or high-level calibration drift exceeds two times the applicable calibration drift specification in the applicable performance specification or in the relevant standard;

(2) The continuous monitoring system fails a performance test audit (e.g., cylinder gas audit), relative accuracy audit, relative accuracy test audit, or linearity test audit; and

(3) The continuous opacity monitoring system calibration drift exceeds two times the limit in the applicable performance specification in the relevant standard; and

(p) For energy recovery units, include the annual heat input and average annual heat input rate of all fuels being burned in the unit to verify which subcategory of energy recovery unit applies.

§ 62.14710a What else must I report if I have a deviation from the operating limits or the emission limitations?

(a) You must submit a deviation report if any recorded 3-hour average (30-day average for energy recovery units or for PM CPMS) parameter level is above the maximum operating limit or below the minimum operating limit established under this subpart, if the bag leak detection system alarm sounds for more than 5 percent of the operating time for any 6-month reporting period, if a performance test was conducted that deviated from any emission limitation, or if a 30-day average measured using a CEMS deviated from any emission limitation.

(b) The deviation report must be submitted by August 1 of that year for data collected during the first half of the calendar year (January 1 to June 30), and by February 1 of the following year for data you collected during the second half of the calendar year (July 1 to December 31).

§ 62.14715a What must I include in the deviation report?

In each report required under § 62.14710a, for any pollutant or parameter that deviated from the emission limitations or operating limits specified in this subpart, include the four items described in paragraphs (a) through (d) of this section.

(a) The calendar dates and times your unit deviated from the emission limitations or operating limit requirements;

(b) The averaged and recorded data for the dates in paragraph (a) of this section;

(c) Duration and causes of the following;

(1) Each deviation from the emission limitations or operating limits and your corrective actions; and

(2) Bypass events and your corrective actions. Include the calendar date and start time of the bypass event; and

(d) A copy of the operating limit monitoring data during each deviation and, for any test report that documents the emission levels, the process unit(s) tested, the pollutant(s) tested and the date that the performance test was conducted. Submit, following the procedure specified in § 62.14730a(b)(1), the performance test report no later than the date that you submit the deviation report.

§ 62.14720a What else must I report if I have a deviation from the requirement to have a qualified operator accessible?

(a) If all qualified operators are not accessible for two weeks or more, you must take the two actions in paragraphs (a)(1) and (2) of this section.

(1) You must submit a notification of the deviation within 10 days that includes the three items in paragraphs (a)(1)(i) through (iii) of this section.

(i) A statement of what caused the deviation;

(ii) A description of what you are doing to ensure that a qualified operator is accessible; and

(iii) The date when you anticipate that a qualified operator will be available.

(2) Submit a status report to the Administrator every 4 weeks that includes the three items in paragraphs (a)(2)(i) through (iii) of this section.

(i) A description of what you are doing to ensure that a qualified operator is accessible;

(ii) The date when you anticipate that a qualified operator will be accessible; and

(iii) Request approval from the Administrator to continue operation of the CISWI.

(b) If your unit was shut down by the Administrator, under the provisions of § 62.14595a(b)(2), due to a failure to provide an accessible qualified operator, you must notify the Administrator that you are resuming operation once a qualified operator is accessible.

§ 62.14725a Are there any other notifications or reports that I must submit?

(a) Yes. You must submit notifications as provided by § 60.7 of this chapter.

(b) If you cease combusting solid waste but continue to operate, you must provide 30 days prior notice of the effective date of the waste-to-fuel switch, consistent with § 62.14640a(a). The notification must identify:

(1) The name of the owner or operator of the CISWI, the location of the source, the emissions unit(s) that will cease burning solid waste, and the date of the notice;

(2) The currently applicable subcategory under this subpart, and any subpart and subcategory under 40 CFR part 63 that will be applicable after you cease combusting solid waste;

(3) The fuel(s), non-waste material(s), and solid waste(s) the CISWI is currently combusting and has combusted over the past 6 months, and the fuel(s) or non-waste materials the unit will commence combusting;

(4) The date on which you became subject to the currently applicable emission limits; and

(5) The date upon which you will cease combusting solid waste, and the date (if different) that you intend for any new requirements to become applicable (i.e., the effective date of the waste-to-fuel switch), consistent with paragraphs (b)(2) and (3) of this section.

§ 62.14730a In what form can I submit my reports?

(a) Submit initial, annual, and deviation reports electronically or in paper format, postmarked on or before the submittal due dates. Beginning on January 10, 2025, or once the reporting form has been available in CEDRI for 1 year, whichever is later, you must submit subsequent reports on or before the submittal dates to the EPA via the CEDRI, which can be accessed through the EPA's Central Data Exchange (CDX) (<https://cdx.epa.gov>). Use the appropriate electronic report in CEDRI for this subpart or an alternate electronic file format consistent with the extensible markup language (XML) schema listed on the CEDRI website (<https://www.epa.gov/electronic-reporting-air-emissions/compliance-and-emissions-data-reporting-interface-cedri>). When the data forms become available in CEDRI, they will be listed on the CEDRI website. If the reporting form specific to this subpart is not available in CEDRI at the time that the report is due, submit the report to the Administrator at the appropriate address listed in § 60.4 of this chapter. Once the form has been available in CEDRI for 90 calendar days, you must begin submitting all subsequent reports via CEDRI. The reports must be submitted by the deadlines specified in this subpart, regardless of the method in which the report is submitted.

(b) Submit results of each performance test and CEMS performance evaluation required by this subpart as follows:

(1) Within 60 days after the date of completing each performance test (see § 60.8 of this chapter) required by this subpart, you must submit the results of the performance test following the procedure specified in either paragraph (b)(1)(i) or (ii) of this section:

(i) For data collected using test methods supported by the EPA's Electronic Reporting Tool (ERT) as listed on the EPA's ERT website (<https://www.epa.gov/electronic-reporting-air-emissions/electronic-reporting-tool-ert>) at the time of the test, you must submit the results of the performance test to the EPA via the CEDRI. CEDRI can be accessed through the EPA's CDX (<https://cdx.epa.gov>). Performance test data must be submitted in a file format generated through the use of the EPA's ERT or an alternate electronic file format consistent with the XML schema listed on the EPA's ERT website. If you claim that some of the performance test information being submitted is confidential business information (CBI), you must submit a complete file generated through the use of the EPA's ERT or an alternate electronic file consistent with the XML schema listed on the EPA's ERT website, including information claimed to be CBI, on a compact disc, flash drive, or other commonly used electronic storage media to the EPA. The electronic media must be clearly marked as CBI and mailed to U.S. EPA/OAQPS/CORE CBI Office, Attention: Group Leader, Measurement Policy Group, MD C404-02, 4930 Old Page Rd., Durham, NC 27703. The same ERT or alternate file with the CBI omitted must be submitted to the EPA via the EPA's CDX as described earlier in this paragraph (b)(1)(i); and

(ii) For data collected using test methods that are not supported by the EPA's ERT as listed on the EPA's ERT website at the time of the test, you must submit the results of the performance test to the Administrator at the appropriate address listed in § 60.4 of this chapter.

(2) Within 60 days after the date of completing each CEMS performance evaluation you must submit the results of the performance evaluation following the procedure specified in either paragraph (b)(2)(i) or (ii) of this section. In the situation where performance evaluations cover multiple days, the results may be submitted together up to 60 days after all performance evaluations are completed.

(i) For performance evaluations of continuous monitoring systems measuring RATA pollutants that are supported by the EPA's ERT as listed on the EPA's ERT website at the time of the

evaluation, you must submit the results of the performance evaluation to the EPA via the CEDRI. CEDRI can be accessed through the EPA's CDX. Performance evaluation data must be submitted in a file format generated through the use of the EPA's ERT or an alternate file format consistent with the XML schema listed on the EPA's ERT website. If you claim that some of the performance evaluation information being submitted is CBI, you must submit a complete file generated through the use of the EPA's ERT or an alternate electronic file consistent with the XML schema listed on the EPA's ERT website, including information claimed to be CBI, on a compact disc, flash drive, or other commonly used electronic storage media to the EPA. The electronic storage media must be clearly marked as CBI and mailed to U.S. EPA/OAQPS/CORE CBI Office, Attention: Group Leader, Measurement Policy Group, MD C404-02, 4930 Old Page Rd., Durham, NC 27703. The same ERT or alternate file with the CBI omitted must be submitted to the EPA via the EPA's CDX as described earlier in this paragraph (b)(2)(i); and

(ii) For any performance evaluations of continuous monitoring systems measuring RATA pollutants that are not supported by the EPA's ERT as listed on the EPA's ERT website at the time of the evaluation, you must submit the results of the performance evaluation to the Administrator at the appropriate address listed in § 60.4 of this chapter.

(c) If you are required to electronically submit a report through the CEDRI in the EPA's CDX, and due to a planned or actual outage of either the EPA's CEDRI or CDX systems within the period of time beginning 5 business days prior to the date that the submission is due, you will be or are precluded from accessing CEDRI or CDX and submitting a required report within the time prescribed, you may assert a claim of EPA system outage for failure to timely comply with the reporting requirement. You must submit notification to the Administrator in writing as soon as possible following the date you first knew, or through due diligence should have known, that the event may cause or caused a delay in reporting. You must provide to the Administrator a written description identifying the date, time, and length of the outage; a rationale for attributing the delay in reporting beyond the regulatory deadline to the EPA system outage; describe the measures taken or to be taken to minimize the delay in reporting; and identify a date by which you propose to report, or if you have already met the reporting requirement at the time of the

notification, the date you reported. In any circumstance, the report must be submitted electronically as soon as possible after the outage is resolved. The decision to accept the claim of EPA system outage and allow an extension to the reporting deadline is solely within the discretion of the Administrator.

(d) If you are required to electronically submit a report through CEDRI in the EPA's CDX and a force majeure event is about to occur, occurs, or has occurred or there are lingering effects from such an event within the period of time beginning 5 business days prior to the date the submission is due, the owner or operator may assert a claim of force majeure for failure to timely comply with the reporting requirement. For the purposes of this section, a force majeure event is defined as an event that will be or has been caused by circumstances beyond the control of the affected facility, its contractors, or any entity controlled by the affected facility that prevents you from complying with the requirement to submit a report electronically within the time period prescribed. Examples of such events are acts of nature (e.g., hurricanes, earthquakes, or floods), acts of war or terrorism, or equipment failure or safety hazard beyond the control of the affected facility (e.g., large scale power outage). If you intend to assert a claim of force majeure, you must submit notification to the Administrator in writing as soon as possible following the date you first knew, or through due diligence should have known, that the event may cause or caused a delay in reporting. You must provide to the Administrator a written description of the force majeure event and a rationale for attributing the delay in reporting beyond the regulatory deadline to the force majeure event; describe the measures taken or to be taken to minimize the delay in reporting; and identify a date by which you propose to report, or if you have already met the reporting requirement at the time of the notification, the date you reported. In any circumstance, the reporting must occur as soon as possible after the force majeure event occurs. The decision to accept the claim of force majeure and allow an extension to the reporting deadline is solely within the discretion of the Administrator.

§ 62.14735a Can reporting dates be changed?

If the Administrator agrees, you may change the semiannual or annual reporting dates. See § 60.19(c) of this chapter for procedures to seek approval to change your reporting date.

Air Curtain Incinerators (ACIs)**§ 62.14740a What is an air curtain incinerator?**

(a) An ACI operates by forcefully projecting a curtain of air across an open chamber or open pit in which combustion occurs. Incinerators of this type can be constructed above or below ground and with or without refractory walls and floor. Air curtain incinerators are not to be confused with conventional combustion devices with enclosed fireboxes and controlled air technology such as mass burn, modular, and fluidized bed combustors.

(b) Air curtain incinerators that burn only the materials listed in paragraphs (b)(1) through (3) of this section are only required to meet the requirements under § 62.14770a, this section, and §§ 62.14745a through 62.14765a:

- (1) One hundred (100) percent wood waste;
- (2) One hundred (100) percent clean lumber; and
- (3) One hundred (100) percent mixture of only wood waste, clean lumber, and/or yard waste.

§ 62.14745a What must I do if I close my air curtain incinerator and then restart it?

(a) If you close your incinerator but will reopen it prior to the final compliance date in this subpart, you must comply with the final standards in this subpart on January 10, 2025.

(b) If you close your incinerator but will restart it after January 10, 2025, you must complete emission control retrofits and meet the emission limitations under this subpart on the date your incinerator restarts operation.

§ 62.14750a What must I do if I plan to permanently close my air curtain incinerator and not restart it?

If you plan to permanently close your incinerator rather than comply with this subpart, submit a closure notification, including the date of closure, to the Administrator no later than six months prior to the date your operation will cease. The closure date cannot be later than January 10, 2025, for sources that will not operate on and after the compliance date under this subpart. In addition, while still in operation, your air curtain incinerator is subject to the same requirement to apply for and obtain an operating permit under title V of the Clean Air Act that applies to an air curtain incinerator that will not be permanently closing.

§ 62.14755a What are the emission limitations for air curtain incinerators?

After the date the initial test for opacity is required or completed (whichever is earlier), you must meet

the limitations in paragraphs (a) and (b) of this section.

(a) Maintain opacity to less than or equal to 10 percent opacity (as determined by the average of three 1-hour blocks consisting of ten 6-minute average opacity values), except as described in paragraph (b) of this section.

(b) Maintain opacity to less than or equal to 35 percent opacity (as determined by the average of three 1-hour blocks consisting of ten 6-minute average opacity values) during the startup period that is within the first 30 minutes of operation.

§ 62.14760a How must I monitor opacity for air curtain incinerators?

(a) Use Method 9 of 40 CFR part 60, appendix A–4, to determine compliance with the opacity limitation.

(b) Conduct an initial test for opacity as specified in § 60.8 of this chapter no later than 180 days after your final compliance date under this subpart.

(c) After the initial test for opacity, conduct annual tests no more than 12 calendar months following the date of your previous test.

§ 62.14765a What are the recordkeeping and reporting requirements for air curtain incinerators?

(a) Keep records of results of all initial and annual opacity tests onsite in either paper copy or electronic format, unless the Administrator approves another format, for at least 5 years.

(b) Make all records available for submittal to the Administrator or for an inspector's onsite review.

(c) Submit an initial report no later than 60 days following the initial opacity test that includes the information specified in paragraphs (c)(1) and (2) of this section.

(1) The types of materials you plan to combust in your ACI; and

(2) The results (as determined by the average of three 1-hour blocks consisting of ten 6-minute average opacity values) of the initial opacity tests.

(d) Submit annual opacity test results within 12 months following the previous report.

(e) Submit initial and annual opacity test reports as electronic or paper copy on or before the applicable submittal date and keep a copy onsite for a period of 5 years.

Title V Requirements**§ 62.14770a Am I required to apply for and obtain a title V operating permit for my unit?**

Yes. Each CISWI and ACI subject to standards under this subpart must

operate pursuant to a permit issued under section 129(e) and title V of the Clean Air Act.

Delegation of Authority**§ 62.14775a What authorities are withheld by the EPA Administrator?**

The following authorities are withheld by the EPA Administrator and not transferred to the state or tribe:

(a) Approval of alternatives to the emission limitations in tables 4 through 7 to this subpart and operating limits established under § 62.14605a and table 1 to this subpart.

(b) Approval of petitions submitted pursuant to the requirements of § 62.14610a establishing operating parameters when using controls other than a wet scrubber, fabric filter, activated carbon injection, selective noncatalytic reduction, or a dry scrubber to comply with the emission limitations in tables 4 through 7 to this subpart.

(c) Approval of major alternatives to test methods established under § 62.14615a and tables 4 through 7 to this subpart.

(d) Approval of major alternatives to monitoring requirements established under §§ 62.14665a and 62.14575a and table 1 to this subpart.

(e) Approval of major alternatives to recordkeeping and reporting requirements of this subpart.

(f) Approval of an alternative to any electronic reporting to the EPA required by this subpart.

(g) Approval of requests submitted pursuant to the requirements in § 62.14595a(b)(2).

(h) Approval of alternative opacity emission limits in § 62.14600a under § 60.11(e)(6) through (8) of this chapter.

(i) Performance test and data reduction waivers under § 62.14615a(j) and § 60.8(b)(4) and (5) of this chapter.

(j) Determination of whether a qualifying small power production facility or cogeneration facility under § 62.14530a(d) or (e) is combusting homogeneous waste.

Definitions**§ 62.14780a What definitions must I know?**

Terms used but not defined in this subpart are defined in the Clean Air Act, 40 CFR part 60, subparts A and B, and subpart A of this part.

30-day rolling average means the arithmetic mean of the previous 720 hours of valid operating data. Valid data excludes periods when this unit is not operating. The 720 hours should be consecutive, but not necessarily continuous if operations are intermittent.

Administrator means the Administrator of the U.S. Environmental Protection Agency or his/her authorized representative or Administrator of a State Air Pollution Control Agency.

Agricultural waste means vegetative agricultural materials such as nut and grain hulls and chaff (e.g., almond, walnut, peanut, rice, and wheat), bagasse, orchard prunings, corn stalks, coffee bean hulls and grounds, and other vegetative waste materials generated as a result of agricultural operations.

Air curtain incinerator (ACI) means an incinerator that operates by forcefully projecting a curtain of air across an open chamber or pit in which combustion occurs. Incinerators of this type can be constructed above or below ground and with or without refractory walls and floor. Air curtain incinerators are different from conventional combustion devices which typically have enclosed fireboxes and controlled air technology such as mass burn, modular, and fluidized bed combustors.

Annual heat input means the heat input for the 12 months preceding the compliance demonstration.

Auxiliary fuel means natural gas, liquefied petroleum gas, fuel oil, or diesel fuel.

Average annual heat input rate means annual heat input divided by the hours of operation for the 12 months preceding the compliance demonstration.

Bag leak detection system means an instrument that is capable of monitoring particulate matter loadings in the exhaust of a fabric filter (i.e., baghouse) in order to detect bag failures. A bag leak detection system includes, but is not limited to, an instrument that operates on triboelectric, light scattering, light transmittance, or other principle to monitor relative particulate matter loadings.

Burn-off oven means any rack reclamation unit, part reclamation unit, or drum reclamation unit. A burn-off oven is not an incinerator, waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart.

Bypass stack means a device used for discharging combustion gases to avoid severe damage to the air pollution control device or other equipment.

Calendar quarter means 3 consecutive months (non-overlapping) beginning on: January 1, April 1, July 1, or October 1.

Calendar year means 365 consecutive days starting on January 1 and ending on December 31.

CEMS data during startup and shutdown means the following:

(1) For incinerators and small, remote incinerators: CEMS data collected during the first hours of operation of a CISWI startup from a cold start until waste is fed into the unit and the hours of operation following the cessation of waste material being fed to the CISWI during a unit shutdown. For each startup event, the length of time that CEMS data may be claimed as being CEMS data during startup must be 48 operating hours or less. For each shutdown event, the length of time that CEMS data may be claimed as being CEMS data during shutdown must be 24 operating hours or less;

(2) For energy recovery units: CEMS data collected during the startup or shutdown periods of operation. Startup begins with either the first-ever firing of fuel in a boiler or process heater for the purpose of supplying useful thermal energy (such as steam or heat) for heating, cooling, or process purposes, or producing electricity, or the firing of fuel in a boiler or process heater for any purpose after a shutdown event. Startup ends four hours after when the boiler or process heater makes useful thermal energy (such as heat or steam) for heating, cooling, or process purposes, or generates electricity, whichever is earlier. Shutdown begins when the boiler or process heater no longer makes useful thermal energy (such as heat or steam) for heating, cooling, or process purposes and/or generates electricity or when no fuel is being fed to the boiler or process heater, whichever is earlier. Shutdown ends when the boiler or process heater no longer makes useful thermal energy (such as steam or heat) for heating, cooling, or process purposes and/or generates electricity, and no fuel is being combusted in the boiler or process heater; and

(3) For waste-burning kilns: CEMS data collected during the periods of kiln operation that do not include normal operations. *Startup* means the time from when a shutdown kiln first begins firing fuel until it begins producing clinker. Startup begins when a shutdown kiln turns on the induced draft fan and begins firing fuel in the main burner. Startup ends when feed is being continuously introduced into the kiln for at least 120 minutes or when the feed rate exceeds 60 percent of the kiln design limitation rate, whichever occurs first. *Shutdown* means the cessation of kiln operation. Shutdown begins when feed to the kiln is halted and ends when continuous kiln rotation ceases.

Chemical recovery unit means combustion units burning materials to recover chemical constituents or to produce chemical compounds where there is an existing commercial market

for such recovered chemical constituents or compounds. A chemical recovery unit is not an incinerator, a waste-burning kiln, an energy recovery unit, or a small, remote incinerator under this subpart. The following seven types of units are considered chemical recovery units:

(1) Units burning only pulping liquors (i.e., black liquor) that are reclaimed in a pulping liquor recovery process and reused in the pulping process;

(2) Units burning only spent sulfuric acid used to produce virgin sulfuric acid;

(3) Units burning only wood or coal feedstock for the production of charcoal;

(4) Units burning only manufacturing byproduct streams/residue containing catalyst metals that are reclaimed and reused as catalysts or used to produce commercial grade catalysts;

(5) Units burning only coke to produce purified carbon monoxide that is used as an intermediate in the production of other chemical compounds;

(6) Units burning only hydrocarbon liquids or solids to produce hydrogen, carbon monoxide, synthesis gas, or other gases for use in other manufacturing processes; and

(7) Units burning only photographic film to recover silver.

Chemotherapeutic waste means waste material resulting from the production or use of antineoplastic agents used for the purpose of stopping or reversing the growth of malignant cells.

Clean lumber means wood or wood products that have been cut or shaped and include wet, air-dried, and kiln-dried wood products. Clean lumber does not include wood products that have been painted, pigment-stained, or pressure-treated by compounds such as chromate copper arsenate, pentachlorophenol, and cresosote.

Commercial and industrial solid waste incineration unit (CISWI) means any distinct operating unit of any commercial or industrial facility that combusts, or has combusted in the preceding 6 months, any solid waste as that term is defined in 40 CFR part 241. If the operating unit burns materials other than traditional fuels as defined in § 241.2 of this chapter that have been discarded, and you do not keep and produce records as required by § 62.14675a(s), the operating unit is a CISWI. While not all CISWI will include all of the following components, a CISWI includes, but is not limited to, the solid waste feed system, grate system, flue gas system, waste heat recovery equipment, if any, and bottom ash system. The CISWI does not include air pollution control equipment or the

stack. The CISWI boundary starts at the solid waste hopper (if applicable) and extends through two areas: The combustion unit flue gas system, which ends immediately after the last combustion chamber or after the waste heat recovery equipment, if any; and the combustion unit bottom ash system, which ends at the truck loading station or similar equipment that transfers the ash to final disposal. The CISWI includes all ash handling systems connected to the bottom ash handling system.

Contained gaseous material means gases that are in a container when that container is combusted.

Continuous emission monitoring system (CEMS) means the total equipment that may be required to meet the data acquisition and availability requirements of this subpart, used to sample, condition (if applicable), analyze, and provide a record of emissions.

Continuous monitoring system (CMS) means the total equipment, required under the emission monitoring sections in applicable subparts, used to sample and condition (if applicable), to analyze, and to provide a permanent record of emissions or process parameters. A particulate matter continuous parameter monitoring system (PM CPMS) is a type of CMS.

Cyclonic burn barrel means a combustion device for waste materials that is attached to a 55 gallon, open-head drum. The device consists of a lid, which fits onto and encloses the drum, and a blower that forces combustion air into the drum in a cyclonic manner to enhance the mixing of waste material and air. A cyclonic burn barrel is not an incinerator, a waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart.

Deviation means any instance in which an affected source subject to this subpart, or an owner or operator of such a source:

(1) Fails to meet any requirement or obligation established by this subpart, including but not limited to any emission limitation, operating limit, or operator qualification and accessibility requirements; and

(2) Fails to meet any term or condition that is adopted to implement an applicable requirement in this subpart and that is included in the operating permit for any affected source required to obtain such a permit.

Dioxins/furans means tetra-through octa-chlorinated dibenzo-p-dioxins and dibenzofurans.

Discard means, for purposes of this subpart and 40 CFR part 60, subpart

DDDD, only, burned in an incineration unit without energy recovery.

Drum reclamation unit means a unit that burns residues out of drums (e.g., 55 gallon drums) so that the drums can be reused.

Dry scrubber means an add-on air pollution control system that injects dry alkaline sorbent (dry injection) or sprays an alkaline sorbent (spray dryer) to react with and neutralize acid gas in the exhaust stream forming a dry powder material. Sorbent injection systems in fluidized bed boilers and process heaters are included in this definition. A dry scrubber is a dry control system.

Energy recovery means the process of recovering thermal energy from combustion for useful purposes such as steam generation or process heating.

Energy recovery unit means a combustion unit combusting solid waste (as defined by the Administrator in 40 CFR part 241) for energy recovery. Energy recovery units include units that would be considered boilers and process heaters if they did not combust solid waste.

Energy recovery unit designed to burn biomass (biomass) means an energy recovery unit that burns solid waste, biomass, and non-coal solid materials but less than 10 percent coal, on a heat input basis on an annual average, either alone or in combination with liquid waste, liquid fuel or gaseous fuels.

Energy recovery unit designed to burn coal (coal) means an energy recovery unit that burns solid waste and at least 10 percent coal on a heat input basis on an annual average, either alone or in combination with liquid waste, liquid fuel or gaseous fuels.

Energy recovery unit designed to burn liquid waste materials and gas (liquid/gas) means an energy recovery unit that burns a liquid waste with liquid or gaseous fuels not combined with any solid fuel or waste materials.

Energy recovery unit designed to burn solid materials (solids) includes energy recovery units designed to burn coal and energy recovery units designed to burn biomass.

Fabric filter means an add-on air pollution control device used to capture particulate matter by filtering gas streams through filter media, also known as a baghouse.

Foundry sand thermal reclamation unit means a type of part reclamation unit that removes coatings that are on foundry sand. A foundry sand thermal reclamation unit is not an incinerator, a waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart.

Incinerator means any furnace used in the process of combusting solid waste

(as defined by the Administrator in 40 CFR part 241) for the purpose of reducing the volume of the waste by removing combustible matter.

Incinerator designs include single chamber and two-chamber.

In-line coal mill means those coal mills using kiln exhaust gases in their process. Coal mills with a heat source other than the kiln or coal mills using exhaust gases from the clinker cooler alone are not an in-line coal mill.

In-line kiln/raw mill means a system in a Portland Cement production process where a dry kiln system is integrated with the raw mill so that all or a portion of the kiln exhaust gases are used to perform the drying operation of the raw mill, with no auxiliary heat source used. In this system the kiln is capable of operating without the raw mill operating, but the raw mill cannot operate without the kiln gases, and consequently, the raw mill does not generate a separate exhaust gas stream.

Kiln means an oven or furnace, including any associated preheater or precalciner devices, in-line raw mills, in-line coal mills, or alkali bypasses used for processing a substance by burning, firing, or drying. Kilns include cement kilns that produce clinker by heating limestone and other materials for subsequent production of Portland Cement. Because the alkali bypass, in-line raw mill, and in-line coal mill are considered an integral part of the kiln, the kiln emissions limits also apply to the exhaust of the alkali bypass, in-line raw mill, and in-line coal mill.

Laboratory analysis unit means units that burn samples of materials for the purpose of chemical or physical analysis. A laboratory analysis unit is not an incinerator, waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart.

Load fraction means the actual heat input of an energy recovery unit divided by heat input during the performance test that established the minimum sorbent injection rate or minimum activated carbon injection rate, expressed as a fraction (e.g., for 50 percent load the load fraction is 0.5).

Low-level radioactive waste means waste material which contains radioactive nuclides emitting primarily beta or gamma radiation, or both, in concentrations or quantities that exceed applicable Federal or state standards for unrestricted release. Low-level radioactive waste is not high-level radioactive waste, spent nuclear fuel, or by-product material as defined by the Atomic Energy Act of 1954 (42 U.S.C. 2014(e)(2)).

Malfunction means any sudden, infrequent, and not reasonably

preventable failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner. Failures that are caused, in part, by poor maintenance or careless operation are not malfunctions.

Minimum voltage or amperage means 90 percent of the lowest test-run average voltage or amperage to the electrostatic precipitator measured during the most recent particulate matter or mercury performance test demonstrating compliance with the applicable emission limits.

Modification or modified CISWI means a CISWI you have changed later than August 7, 2013, and that meets one of two criteria:

(1) The cumulative cost of the changes over the life of the unit exceeds 50 percent of the original cost of building and installing the CISWI (not including the cost of land) updated to current costs (current dollars). To determine what systems are within the boundary of the CISWI used to calculate these costs, see the definition of CISWI; and

(2) Any physical change in the CISWI or change in the method of operating it that increases the amount of any air pollutant emitted for which section 129 or section 111 of the Clean Air Act has established standards.

Municipal solid waste or municipal-type solid waste means household, commercial/retail, or institutional waste. Household waste includes material discarded by residential dwellings, hotels, motels, and other similar permanent or temporary housing. Commercial/retail waste includes material discarded by stores, offices, restaurants, warehouses, nonmanufacturing activities at industrial facilities, and other similar establishments or facilities. Institutional waste includes materials discarded by schools, by hospitals (nonmedical), by nonmanufacturing activities at prisons and government facilities, and other similar establishments or facilities. Household, commercial/retail, and institutional waste does include yard waste and refuse-derived fuel. Household, commercial/retail, and institutional waste does not include used oil; sewage sludge; wood pallets; construction, renovation, and demolition wastes (which include railroad ties and telephone poles); clean wood; industrial process or manufacturing wastes; medical waste; or motor vehicles (including motor vehicle parts or vehicle fluff).

Opacity means the degree to which emissions reduce the transmission of light and obscure the view of an object in the background.

Operating day means a 24-hour period between 12 midnight and the following midnight during which any amount of solid waste is combusted at any time in the CISWI.

Oxygen analyzer system means all equipment required to determine the oxygen content of a gas stream and used to monitor oxygen in the boiler or process heater flue gas, boiler/process heater, firebox, or other appropriate location. This definition includes oxygen trim systems and certified oxygen CEMS. The source owner or operator is responsible to install, calibrate, maintain, and operate the oxygen analyzer system in accordance with the manufacturer's recommendations.

Oxygen trim system means a system of monitors that is used to maintain excess air at the desired level in a combustion device over its operating range. A typical system consists of a flue gas oxygen and/or carbon monoxide monitor that automatically provides a feedback signal to the combustion air controller or draft controller.

Part reclamation unit means a unit that burns coatings off parts (e.g., tools, equipment) so that the parts can be reconditioned and reused.

Particulate matter means total particulate matter emitted from CISWI as measured by Method 5 of 40 CFR part 60, appendix A-3, or Method 29 of 40 CFR part 60, appendix A-8.

Pathological waste means waste material consisting of only human or animal remains, anatomical parts, and/or tissue, the bags/containers used to collect and transport the waste material, and animal bedding (if applicable).

Performance evaluation means the conduct of relative accuracy testing, calibration error testing, and other measurements used in validating the continuous monitoring system data.

Performance test means the collection of data resulting from the execution of a test method (usually three emission test runs) used to demonstrate compliance with a relevant emission standard as specified in the performance test section of the relevant standard.

Process change means any of the following physical or operational changes:

(1) A physical change (maintenance activities excluded) to the CISWI which may increase the emission rate of any air pollutant to which a standard applies;

(2) An operational change to the CISWI where a new type of non-hazardous secondary material is being combusted;

(3) A physical change (maintenance activities excluded) to the air pollution

control devices used to comply with the emission limits for the CISWI (e.g., replacing an electrostatic precipitator with a fabric filter); and

(4) An operational change to the air pollution control devices used to comply with the emission limits for the affected CISWI (e.g., change in the sorbent injection rate used for activated carbon injection).

Rack reclamation unit means a unit that burns the coatings off racks used to hold small items for application of a coating. The unit burns the coating overspray off the rack so the rack can be reused.

Raw mill means a ball or tube mill, vertical roller mill, or other size reduction equipment, that is not part of an in-line kiln/raw mill, used to grind feed to the appropriate size. Moisture may be added or removed from the feed during the grinding operation. If the raw mill is used to remove moisture from feed materials, it is also, by definition, a raw material dryer. The raw mill also includes the air separator associated with the raw mill.

Reconstruction means rebuilding a CISWI and meeting two criteria:

(1) The reconstruction begins on or after August 7, 2013; and

(2) The cumulative cost of the construction over the life of the incineration unit exceeds 50 percent of the original cost of building and installing the CISWI (not including land) updated to current costs (current dollars). To determine what systems are within the boundary of the CISWI used to calculate these costs, see the definition of CISWI.

Refuse-derived fuel means a type of municipal solid waste produced by processing municipal solid waste through shredding and size classification. This includes all classes of refuse-derived fuel including two fuels:

(1) Low-density fluff refuse-derived fuel through densified refuse-derived fuel; and

(2) Pelletized refuse-derived fuel.

Responsible official means one of the following:

(1) For a corporation: A president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities applying for or subject to a permit and either:

(i) The facilities employ more than 250 persons or have gross annual sales or expenditures exceeding \$25 million (in second quarter 1980 dollars); or

(ii) The delegation of authority to such representatives is approved in advance by the permitting authority;

(2) For a partnership or sole proprietorship: A general partner or the proprietor, respectively;

(3) For a municipality, state, Federal, or other public agency: Either a principal executive officer or ranking elected official. For the purposes of this subpart, a principal executive officer of a Federal agency includes the chief executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., a Regional Administrator of EPA); or

(4) For affected facilities:

(i) The designated representative insofar as actions, standards, requirements, or prohibitions under title IV of the Clean Air Act or 40 CFR parts 72 through 78 are concerned; or

(ii) The designated representative for any other purposes under 40 CFR part 60.

Shutdown means, for incinerators and small, remote incinerators, the period of time after all waste has been combusted in the primary chamber.

Small, remote incinerator means an incinerator that combusts solid waste (as defined by the Administrator in 40 CFR part 241) and combusts 3 tons per day or less solid waste and is more than 25 miles driving distance to the nearest municipal solid waste landfill.

Soil treatment unit means a unit that thermally treats petroleum-contaminated soils for the sole purpose of site remediation. A soil treatment unit may be direct-fired or indirect fired. A soil treatment unit is not an incinerator, a waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart.

Solid waste means the term solid waste as defined in § 241.2 of this chapter.

Solid waste incineration unit means a distinct operating unit of any facility which combusts any solid waste (as defined by the Administrator in 40 CFR part 241) material from commercial or industrial establishments or the general public (including single and multiple residences, hotels, and motels). This definition does not include incinerators or other units required to have a permit under section 3005 of the Solid Waste Disposal Act. The term “solid waste incineration unit” does not include:

(1) Materials recovery facilities (including primary or secondary smelters) which combust waste for the primary purpose of recovering metals;

(2) Qualifying small power production facilities, as defined in section 3(17)(C) of the Federal Power Act (16 U.S.C. 769(17)(C)), or qualifying cogeneration facilities, as defined in section 3(18)(B) of the Federal Power Act (16 U.S.C. 796(18)(B)), which burn homogeneous waste (such as units which burn tires or used oil, but not including refuse-derived fuel) for the production of electric energy or in the case of qualifying cogeneration facilities which burn homogeneous waste for the production of electric energy and steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating or cooling purposes; or

(3) Air curtain incinerators provided that such incinerators only burn wood wastes, yard wastes, and clean lumber and that such air curtain incinerators comply with opacity limitations to be established by the Administrator by rule.

Space heater means a unit that meets the requirements of § 279.23 of this chapter. A space heater is not an incinerator, a waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart.

Standard conditions, when referring to units of measure, means a temperature of 68 °F (20 °C) and a pressure of 1 atmosphere (101.3 kilopascals).

Startup period means, for incinerators and small, remote incinerators, the period of time between the activation of the system and the first charge to the unit.

Useful Thermal Energy means energy (i.e., steam, hot water, or process heat) that meets the minimum operating temperature and/or pressure required by any energy use system that uses energy provided by the affected energy recovery unit.

Waste-burning kiln means a kiln that is heated, in whole or in part, by combusting solid waste (as defined by the Administrator in 40 CFR part 241). Secondary materials used in Portland cement kilns shall not be deemed to be combusted unless they are introduced into the flame zone in the hot end of the kiln or mixed with the precalciner fuel.

Wet scrubber means an add-on air pollution control device that utilizes an aqueous or alkaline scrubbing liquor to collect particulate matter (including non-vaporous metals and condensed organics) and/or to absorb and neutralize acid gases.

Wood waste means untreated wood and untreated wood products, including tree stumps (whole or chipped), trees, tree limbs (whole or chipped), bark, sawdust, chips, scraps, slabs, millings, and shavings. Wood waste does not include:

(1) Grass, grass clippings, bushes, shrubs, and clippings from bushes and shrubs from residential, commercial/retail, institutional, or industrial sources as part of maintaining yards or other private or public lands;

(2) Construction, renovation, or demolition wastes; or

(3) Clean lumber.

TABLE 1 TO SUBPART IIIA OF PART 62—OPERATING LIMITS FOR WET SCRUBBERS

For these operating parameters	You must establish these operating limits	And monitor using these minimum frequencies		
		Data measure- ment	Data recording	Averaging time
Charge rate	Maximum charge rate	Continuous	Every hour	1. Daily (batch units) 2. 3-hour rolling (continuous and intermittent units) ¹ . 3-hour rolling ¹ .
Pressure drop across the wet scrubber or amperage to wet scrubber.	Minimum pressure drop or amperage.	Continuous	Every 15 minutes	3-hour rolling ¹ .
Scrubber liquor flow rate	Minimum flow rate	Continuous	Every 15 minutes	3-hour rolling ¹ .
Scrubber liquor pH	Minimum pH	Continuous	Every 15 minutes	3-hour rolling ¹ .

¹ Calculated each hour as the average of the previous 3 operating hours.

TABLE 2 TO SUBPART IIIA OF PART 62—TOXIC EQUIVALENCY FACTORS

Dioxin/furan congener	Toxic equivalency factor
2,3,7,8-tetrachlorinated dibenzo-p-dioxin	1
1,2,3,7,8-pentachlorinated dibenzo-p-dioxin	0.5
1,2,3,4,7,8-hexachlorinated dibenzo-p-dioxin	0.1
1,2,3,7,8,9-hexachlorinated dibenzo-p-dioxin	0.1
1,2,3,6,7,8-hexachlorinated dibenzo-p-dioxin	0.1
1,2,3,4,6,7,8-heptachlorinated dibenzo-p-dioxin	0.01
octachlorinated dibenzo-p-dioxin	0.001
2,3,7,8-tetrachlorinated dibenzofuran	0.1
2,3,4,7,8-pentachlorinated dibenzofuran	0.5
1,2,3,7,8-pentachlorinated dibenzofuran	0.05
1,2,3,4,7,8-hexachlorinated dibenzofuran	0.1
1,2,3,6,7,8-hexachlorinated dibenzofuran	0.1
1,2,3,7,8,9-hexachlorinated dibenzofuran	0.1
2,3,4,6,7,8-hexachlorinated dibenzofuran	0.1
1,2,3,4,6,7,8-heptachlorinated dibenzofuran	0.01
1,2,3,4,7,8,9-heptachlorinated dibenzofuran	0.01
octachlorinated dibenzofuran	0.001

TABLE 3 TO SUBPART IIIA OF PART 62—SUMMARY OF REPORTING REQUIREMENTS ¹

Report	Due date	Contents	Reference
A. Waste Management Plan.	No later than January 10, 2025, or the date you recommence burning solid waste, whichever is later.	Waste management plan	§ 62.14690a.
B. Initial Test Report ..	No later than 60 days following the initial performance test.	1. Complete test report for the initial performance test 2. The values for the site-specific operating limits. 3. Installation of bag leak detection systems for fabric filters.	§ 62.14695a.
C. Annual report	No later than 12 months following the submission of the initial test report. Subsequent reports are to be submitted no more than 12 months following the previous report.	1. Name and address 2. Statement and signature by responsible official. 3. Date of report. 4. Values for the operating limits. 5. Highest recorded 3-hour average and the lowest 3-hour average, as applicable, (or 30-day average, if applicable) for each operating parameter recorded for the calendar year being reported. 6. If a performance test was conducted during the reporting period, the results of the test. 7. If a performance test was not conducted during the reporting period, a statement that the requirements of § 62.14655a(a) were met. 8. Documentation of periods when all qualified CISWI operators were unavailable for more than 8 hours but less than 2 weeks. 9. If you are conducting performance tests once every 3 years consistent with § 62.14655a(a), the date of the last 2 performance tests, a comparison of the emission level you achieved in the last 2 performance tests to the 75 percent emission limit threshold required in § 62.14655a(a) and a statement as to whether there have been any operational changes since the last performance test that could increase emissions. 10. Any malfunction, deviation, or continuous monitoring system out of control periods information as specified in § 62.14705a(k) through (o). 11. Fuel input information for energy recovery unit subcategory verification as specified in § 62.14705a(p).	§§ 62.14700a and 62.14705a. Subsequent reports are to be submitted no more than 12 months following the previous report.
D. Emission Limitation or Operating Limit Deviation Report.	By August 1 of that year for data collected during the first half of the calendar year. By February 1 of the following year for data collected during the second half of the calendar year.	1. Dates and times of deviations 2. Averaged and recorded data for these dates. 3. Duration and causes for each deviation and the corrective actions taken. 4. Copy of operating limit monitoring data and any test reports. 5. Dates, times, and causes for monitor downtime incidents.	§§ 62.14710a and 62.14715a.

TABLE 3 TO SUBPART IIIA OF PART 62—SUMMARY OF REPORTING REQUIREMENTS ¹—Continued

Report	Due date	Contents	Reference
E. Qualified Operator Deviation Notification.	Within 10 days of deviation.	1. Statement of cause of deviation 2. Description of efforts to have an accessible qualified operator. 3. The date a qualified operator will be accessible.	§ 62.14720a(a)(1)
F. Qualified Operator Deviation Status Report.	Every 4 weeks following deviation.	1. Description of efforts to have an accessible qualified operator 2. The date a qualified operator will be accessible. 3. Request for approval to continue operation.	§ 62.14720a(a)(2).
G. Qualified Operator Deviation Notification of Resumed Operation.	Prior to resuming operation.	Notification that you are resuming operation	§ 62.14720a(b).

¹ This table is only a summary, see the referenced sections of this part for the complete requirements.

TABLE 4 TO SUBPART IIIA OF PART 62—MODEL RULE—EMISSION LIMITATIONS THAT APPLY TO INCINERATORS ON AND AFTER JANUARY 10, 2025

For the air pollutant	You must meet this emission limitation ¹	Using this averaging time ²	And determining compliance using this method ²
Cadmium	0.0026 milligrams per dry standard cubic meter.	3-run average (collect a minimum volume of 2 dry standard cubic meters).	Performance test (Method 29 of appendix A–8 to 40 CFR part 60). Use inductively coupled plasma mass spectrometry (ICPMS) for the analytical finish.
Carbon monoxide	17 parts per million dry volume.	3-run average (1 hour minimum sample time per run).	Performance test (Method 10 of appendix A–4 to 40 CFR part 60).
Dioxins/furans (total mass basis).	4.6 nanograms per dry standard cubic meter.	3-run average (collect a minimum volume of 2 dry standard cubic meters).	Performance test (Method 23 of appendix A–7 to 40 CFR part 60).
Dioxins/furans (toxic equivalency basis).	0.13 nanograms per dry standard cubic meter.	3-run average (collect a minimum volume of 2 dry standard cubic meters).	Performance test (Method 23 of appendix A–7 to 40 CFR part 60).
Hydrogen chloride	29 parts per million dry volume.	3-run average (for Method 26 of appendix A–8 to 40 CFR part 60, collect a minimum volume of 60 liters per run; for Method 26A of appendix A–8 to 40 CFR part 60, collect a minimum volume of 1 dry standard cubic meter per run).	Performance test (Method 26 or 26A of appendix A–8 to 40 CFR part 60).
Lead	0.015 milligrams per dry standard cubic meter ² .	3-run average (collect a minimum volume of 2 dry standard cubic meters).	Performance test (Method 29 of appendix A–8 to 40 CFR part 60). Use ICPMS for the analytical finish.
Mercury	0.0048 milligrams per dry standard cubic meter.	3-run average (for Method 29 of appendix A–8 to 40 CFR part 60 an ASTM D6784–24, ³ collect a minimum volume of 2 dry standard cubic meters per run; for Method 30B of appendix A–8 to 40 CFR part 60, collect a minimum sample as specified in Method 30B).	Performance test (Method 29 or 30B of appendix A–8 to 40 CFR part 60) or ASTM D6784–24. ^{3,4}
Nitrogen oxides	53 parts per million dry volume.	3-run average (for Method 7E of appendix A–4 to 40 CFR part 60, 1 hour minimum sample time per run).	Performance test (Method 7 or 7E of appendix A–4 to 40 CFR part 60).
Particulate matter filterable.	34 milligrams per dry standard cubic meter.	3-run average (collect a minimum volume of 1 dry standard cubic meter).	Performance test (Method 5 of appendix A–3 to 40 CFR part 60 or Method 29 of appendix A–8 to 40 CFR part 60).
Sulfur dioxide	11 parts per million dry volume.	3-run average (1 hour minimum sample time per run).	Performance test (Method 6 or 6c of appendix A–4 to 40 CFR part 60) or ANSI/ASME PTC–19.10–1981. ^{3,5}
Fugitive ash	Visible emissions for no more than 5% of the hourly observation period.	Three 1-hour observation periods	Visible emission test (Method 22 of appendix A–7 to 40 CFR part 60).

¹ All emission limitations are measured at 7 percent oxygen, dry basis at standard conditions. For dioxins/furans, you must meet either the total mass basis limit or the toxic equivalency basis limit.

² In lieu of performance testing, you may use a CEMS or, for mercury, an integrated sorbent trap monitoring system, to demonstrate initial and continuing compliance with an emissions limit, as long as you comply with the CEMS or integrated sorbent trap monitoring system requirements applicable to the specific pollutant in §§ 62.14640a and 62.14665a. As prescribed in § 62.14640a(u), if you use a CEMS or integrated sorbent trap monitoring system to demonstrate compliance with an emissions limit, your averaging time is a 30-day rolling average of 1-hour arithmetic average emission concentrations.

³ The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy from the U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460, (202) 272–0167, <https://www.epa.gov>. You may inspect a copy at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: <https://www.archives.gov/federal-register/cfr/ibr-locations.html>.

⁴ ASTM D6784–24 Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury in Flue Gas Generated from Coal-Fired Stationary Sources (Ontario Hydro Method), [approved March 1, 2024]. ASTM International, 100 Barr Harbor Drive, Post Office Box C700, West Conshohocken, PA 19428–2959; (Phone: 1–877–909–2786; website: <https://www.astm.org/>).

⁵ ANSI/ASME PTC 19.10–1981, Flue and Exhaust Gas Analyses [Part 10, Instruments and Apparatus]. American Society of Mechanical Engineers (ASME), Two Park Avenue, New York, NY 10016–5990 (Phone: 1–800–843–2763; website: <https://www.asme.org/>).

TABLE 5 TO SUBPART IIIA OF PART 62—MODEL RULE—EMISSION LIMITATIONS THAT APPLY TO ENERGY RECOVERY UNITS AFTER JANUARY 10, 2025

For the air pollutant	You must meet this emission limitation ¹		Using this averaging time ²	And determining compliance using this method ²
	Liquid/gas	Solids		
Cadmium	0.023 milligrams per dry standard cubic meter.	Biomass—0.0014 milligrams per dry standard cubic meter. Coal—0.0017 milligrams per dry standard cubic meter.	3-run average (collect a minimum volume of 2 dry standard cubic meters).	Performance test (Method 29 of appendix A–8 to 40 CFR part 60). Use ICPMS for the analytical finish.
Carbon monoxide ..	35 parts per million dry volume.	Biomass—260 parts per million dry volume. Coal—95 parts per million dry volume.	3-run average (1 hour minimum sample time per run).	Performance test (Method 10 of appendix A–4 to 40 CFR part 60).
Dioxins/furans (total mass basis).	2.9 nanograms per dry standard cubic meter.	Biomass—0.52 nanograms per dry standard cubic meter. ² Coal—5.1 nanograms per dry standard cubic meter.	3-run average (collect a minimum volume of 4 dry standard cubic meter).	Performance test (Method 23 of appendix A–7 to 40 CFR part 60).
Dioxins/furans (toxic equivalency basis).	0.32 nanograms per dry standard cubic meter.	Biomass—0.12 nanograms per dry standard cubic meter. Coal—0.075 nanograms per dry standard cubic meter. ²	3-run average (collect a minimum volume of 4 dry standard cubic meters).	Performance test (Method 23 of appendix A–7 to 40 CFR part 60).
Hydrogen chloride ..	14 parts per million dry volume.	Biomass—0.20 parts per million dry volume. Coal—58 parts per million dry volume.	3-run average (for Method 26 of appendix A–8 to 40 CFR part 60, collect a minimum of 120 liters; for Method 26A of appendix A–8 to 40 CFR part 60, collect a minimum volume of 1 dry standard cubic meter).	Performance test (Method 26 or 26A of appendix A–8 to 40 CFR part 60).
Lead	0.096 milligrams per dry standard cubic meter.	Biomass—0.014 milligrams per dry standard cubic meter. ² Coal—0.057 milligrams per dry standard cubic meter.	3-run average (collect a minimum volume of 2 dry standard cubic meters).	Performance test (Method 29 of appendix A–8 to 40 CFR part 60). Use ICPMS for the analytical finish.
Mercury	0.0024 milligrams per dry standard cubic meter.	Biomass—0.0022 milligrams per dry standard cubic meter. Coal—0.013 milligrams per dry standard cubic meter.	3-run average (for Method 29 of appendix A–8 to 40 CFR part 60 and ASTM D6784–24, ³ collect a minimum volume of 2 dry standard cubic meters per run; for Method 30B of appendix A–8 to 40 CFR part 60, collect a minimum sample as specified in Method 30B).	Performance test (Method 29 or 30B of appendix A–8 to 40 CFR part 60) or ASTM D6784–24. ^{3,4}
Nitrogen oxides	76 parts per million dry volume.	Biomass—290 parts per million dry volume. Coal—460 parts per million dry volume.	3-run average (for Method 7E of appendix A–4 to 40 CFR part 60, 1 hour minimum sample time per run).	Performance test (Method 7 or 7E of appendix A–4 to 40 CFR part 60).
Particulate matter filterable.	110 milligrams per dry standard cubic meter.	Biomass—11 milligrams per dry standard cubic meter. Coal—130 milligrams per dry standard cubic meter.	3-run average (collect a minimum volume of 1 dry standard cubic meter).	Performance test (Method 5 of appendix A–3 to 40 CFR part 60 or Method 29 of appendix A–8 to 40 CFR part 60) if the unit has an annual average heat input rate less than or equal to 250 MMBtu/hr; or PM CPMS (as specified in § 62.14670(x)) if the unit has an annual average heat input rate greater than 250 MMBtu/hr.
Sulfur dioxide	720 parts per million dry volume.	Biomass—7.3 parts per million dry volume. Coal—850 parts per million dry volume.	3-run average (1 hour minimum sample time per run).	Performance test (Method 6 or 6c of appendix A–4 to 40 CFR part 60); or ANSI/ASME PTC–19.10–1981. ^{3,5}
Fugitive ash	Visible emissions for no more than 5 percent of the hourly observation period.	Visible emissions for no more than 5 percent of the hourly observation period.	Three 1-hour observation periods	Visible emission test (Method 22 of appendix A–7 to 40 CFR part 60).

¹ All emission limitations (except for opacity) are measured at 7 percent oxygen, dry basis at standard conditions. For dioxins/furans, you must meet either the total mass basis limit or the toxic equivalency basis limit.

² In lieu of performance testing, you may use a CEMS or, for mercury, an integrated sorbent trap monitoring system, to demonstrate initial and continuing compliance with an emissions limit, as long as you comply with the CEMS or integrated sorbent trap monitoring system requirements applicable to the specific pollutant in §§ 62.14640a and 62.14665a. As prescribed in § 62.14640a(u), if you use a CEMS or integrated sorbent trap monitoring system to demonstrate compliance with an emissions limit, your averaging time is a 30-day rolling average of 1-hour arithmetic average emission concentrations.

³ The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy from the U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460, (202) 272–0167, <https://www.epa.gov>. You may inspect a copy at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: <https://www.archives.gov/federal-register/cfr/ibr-locations.html>.

⁴ ASTM D6784–24 Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury in Flue Gas Generated from Coal-Fired Stationary Sources (Ontario Hydro Method), [approved March 1, 2024]. ASTM International, 100 Barr Harbor Drive, Post Office Box C700, West Conshohocken, PA 19428–2959; (Phone: 1–877–909–2786; website: <https://www.astm.org/>).

⁵ ANSI/ASME PTC 19.10–1981, Flue and Exhaust Gas Analyses [Part 10, Instruments and Apparatus]. American Society of Mechanical Engineers (ASME), Two Park Avenue, New York, NY 10016–5990 (Phone: 1–800–843–2763; website: <https://www.asme.org/>).

TABLE 6 TO SUBPART IIIA OF PART 62—MODEL RULE—EMISSION LIMITATIONS THAT APPLY TO WASTE-BURNING KILNS AFTER JANUARY 10, 2025

For the air pollutant	You must meet this emission limitation ¹	Using this averaging time ²	And determining compliance using this method ^{2,3}
Cadmium	0.0014 milligrams per dry standard cubic meter ² .	3-run average (collect a minimum volume of 2 dry standard cubic meters).	Performance test (Method 29 of appendix A–8 to 40 CFR part 60).
Carbon monoxide	110 (long kilns)/790 (preheater/precalciner) parts per million dry volume.	3-run average (1 hour minimum sample time per run).	Performance test (Method 10 of appendix A–4 to 40 CFR part 60).
Dioxins/furans (total mass basis).	1.3 nanograms per dry standard cubic meter.	3-run average (collect a minimum volume of 4 dry standard cubic meters).	Performance test (Method 23 of appendix A–7 to 40 CFR part 60).
Dioxins/furans (toxic equivalency basis).	0.075 nanograms per dry standard cubic meter ² .	3-run average (collect a minimum volume of 4 dry standard cubic meters).	Performance test (Method 23 of appendix A–7 to 40 CFR part 60).
Hydrogen chloride	3.0 parts per million dry volume ² .	3-run average (collect a minimum volume of 1 dry standard cubic meter) or 30-day rolling average if HCl CEMS is being used.	If a wet scrubber or dry scrubber is used, performance test (Method 321 of appendix A to 40 CFR part 63). If a wet scrubber or dry scrubber is not used, HCl CEMS as specified in § 62.14670(j).
Lead	0.014 milligrams per dry standard cubic meter ² .	3-run average (collect a minimum volume of 2 dry standard cubic meters).	Performance test (Method 29 of appendix A–8 to 40 CFR part 60).
Mercury	0.011 milligrams per dry standard cubic meter. Or 58 pounds/million tons of clinker.	30-day rolling average	Mercury CEMS or integrated sorbent trap monitoring system (performance specification 12A or 12B, respectively, of appendix B to 40 CFR part 60 and procedure 5 of appendix F to 40 CFR part 60), as specified in § 62.14670(j).
Nitrogen oxides	630 parts per million dry volume.	3-run average (for Method 7E of appendix A–4 to 40 CFR part 60, 1 hour minimum sample time per run).	Performance test (Method 7 or 7E of appendix A–4 to 40 CFR part 60).
Particulate matter filterable.	13.5 milligrams per dry standard cubic meter.	30-day rolling average	PM CPMS (as specified in § 62.14670(x)).
Sulfur dioxide	600 parts per million dry volume.	3-run average (for Method 6 of appendix A–4 to 40 CFR part 60, collect a minimum of 20 liters; for Method 6C of appendix A–4 to 40 CFR part 60, 1 hour minimum sample time per run).	Performance test (Method 6 or 6c of appendix A–4 to 40 CFR part 60) or ANSI/ASME PTC–19.10–1981. ⁴

¹ All emission limitations are measured at 7 percent oxygen (except for CEMS and integrated sorbent trap monitoring system data during start-up and shutdown), dry basis at standard conditions. For dioxins/furans, you must meet either the total mass basis limit or the toxic equivalency basis limit.

² In lieu of performance testing, you may use a CEMS or, for mercury, an integrated sorbent trap monitoring system, to demonstrate initial and continuing compliance with an emissions limit, as long as you comply with the CEMS or integrated sorbent trap monitoring system requirements applicable to the specific pollutant in §§ 62.14640a and 62.14665a. As prescribed in § 62.14640a(u), if you use a CEMS or integrated sorbent trap monitoring system to demonstrate compliance with an emissions limit, your averaging time is a 30-day rolling average of 1-hour arithmetic average emission concentrations.

³ Alkali bypass and in-line coal mill stacks are subject to performance testing only, as specified in § 62.14640a(y)(3). They are not subject to the CEMS, integrated sorbent trap monitoring system, or CPMS requirements that otherwise may apply to the main kiln exhaust.

⁴ ANSI/ASME PTC 19.10–1981, Flue and Exhaust Gas Analyses [Part 10, Instruments and Apparatus] is incorporated by reference into this section with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. This material is available for inspection at the U.S. Environmental Protection Agency (EPA) and at the National Archives and Records Administration (NARA). Contact the EPA at: 1200 Pennsylvania Avenue NW, Washington, DC 20460, (202) 272–0167, <https://www.epa.gov>. For information on the availability of this material at NARA, visit <https://www.archives.gov/federal-register/cfr/ibr-locations> or email fr.inspection@nara.gov. This material may be obtained from the American Society of Mechanical Engineers (ASME), Two Park Avenue, New York, NY 10016–5990; phone: 1–800–843–2763; website: <https://www.asme.org/>.

TABLE 7 TO SUBPART IIIA OF PART 62—MODEL RULE—EMISSION LIMITATIONS THAT APPLY TO SMALL, REMOTE INCINERATORS AFTER JANUARY 10, 2025

For the air pollutant	You must meet this emission limitation ¹	Using this averaging time ²	And determining compliance using this method ²
Cadmium	0.95 milligrams per dry standard cubic meter.	3-run average (collect a minimum volume of 1 dry standard cubic meters per run).	Performance test (Method 29 of appendix A–8 to 40 CFR part 60).
Carbon monoxide	64 parts per million dry volume.	3-run average (1 hour minimum sample time per run).	Performance test (Method 10 of appendix A–4 to 40 CFR part 60).

TABLE 7 TO SUBPART IIIA OF PART 62—MODEL RULE—EMISSION LIMITATIONS THAT APPLY TO SMALL, REMOTE INCINERATORS AFTER JANUARY 10, 2025—Continued

For the air pollutant	You must meet this emission limitation ¹	Using this averaging time ²	And determining compliance using this method ²
Dioxins/furans (total mass basis).	4,400 nanograms per dry standard cubic meter.	3-run average (collect a minimum volume of 1 dry standard cubic meters per run).	Performance test (Method 23 of appendix A–7 to 40 CFR part 60).
Dioxins/furans (toxic equivalency basis).	180 nanograms per dry standard cubic meter.	3-run average (collect a minimum volume of 1 dry standard cubic meters).	Performance test (Method 23 of appendix A–7 to 40 CFR part 60).
Fugitive ash	Visible emissions for no more than 5 percent of the hourly observation period.	Three 1-hour observation periods	Visible emissions test (Method 22 of appendix A–7 to 40 CFR part 60).
Hydrogen chloride	300 parts per million dry volume.	3-run average (for Method 26 of appendix A–8 to 40 CFR part 60, collect a minimum volume of 120 liters per run; for Method 26A of appendix A–8 to 40 CFR part 60, collect a minimum volume of 1 dry standard cubic meter per run).	Performance test (Method 26 or 26A of appendix A–8 to 40 CFR part 60).
Lead	2.1 milligrams per dry standard cubic meter.	3-run average (collect a minimum volume of 1 dry standard cubic meters).	Performance test (Method 29 of appendix A–8 to 40 CFR part 60). Use ICPMS for the analytical finish.
Mercury	0.0053 milligrams per dry standard cubic meter.	3-run average (for Method 29 of appendix A–8 to 40 CFR part 60 and ASTM D6784–24, ³ collect a minimum volume of 2 dry standard cubic meters per run; for Method 30B of appendix A–8 to 40 CFR part 60, collect a minimum sample as specified in Method 30B).	Performance test (Method 29 or 30B of appendix A–8 to 40 CFR part 60) or ASTM D6784–24. ^{3,4}
Nitrogen oxides	190 parts per million dry volume.	3-run average (for Method 7E of appendix A–4 to 40 CFR part 60, 1 hour minimum sample time per run).	Performance test (Method 7 or 7E of appendix A–4 to 40 CFR part 60).
Particulate matter (filterable).	270 milligrams per dry standard cubic meter.	3-run average (collect a minimum volume of 1 dry standard cubic meters).	Performance test (Method 5 of appendix A–3 to 40 CFR part 60 or Method 29 of appendix A–8 to 40 CFR part 60).
Sulfur dioxide	150 parts per million dry volume.	3-run average (for Method 6 of appendix A–4 to 40 CFR part 60, collect a minimum of 20 liters per run; for Method 6C of appendix A–4 to 40 CFR part 60, 1 hour minimum sample time per run).	Performance test (Method 6 or 6c of appendix A–4 to 40 CFR part 60); or ANSI/ASME PTC–19.10–1981. ^{3,5}

¹ All emission limitations (except for opacity) are measured at 7 percent oxygen, dry basis at standard conditions. For dioxins/furans, you must meet either the total mass basis limit or the toxic equivalency basis limit.

² In lieu of performance testing, you may use a CEMS or, for mercury, an integrated sorbent trap monitoring system, to demonstrate initial and continuing compliance with an emissions limit, as long as you comply with the CEMS or integrated sorbent trap monitoring system requirements applicable to the specific pollutant in §§ 62.14640a and 62.14665a. As prescribed in § 62.14640a(u), if you use a CEMS or integrated sorbent trap monitoring system to demonstrate compliance with an emissions limit, your averaging time is a 30-day rolling average of 1-hour arithmetic average emission concentrations.

³ The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy from the U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460, (202) 272–0167, <https://www.epa.gov>. You may inspect a copy at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: <https://www.archives.gov/federal-register/cfr/ibr-locations.html>.

⁴ ASTM D6784–24 Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury in Flue Gas Generated from Coal-Fired Stationary Sources (Ontario Hydro Method), [approved March 1, 2024]. ASTM International, 100 Barr Harbor Drive, Post Office Box C700, West Conshohocken, PA 19428–2959; (Phone: 1–877–909–2786; website: <https://www.astm.org/>).

⁵ ANSI/ASME PTC 19.10–1981, Flue and Exhaust Gas Analyses [Part 10, Instruments and Apparatus]. American Society of Mechanical Engineers (ASME), Two Park Avenue, New York, NY 10016–5990 (Phone: 1–800–843–2763; website: <https://www.asme.org/>).



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Part IV

Department of the Treasury

Internal Revenue Service

26 CFR Part 1

Taxable Income or Loss and Currency Gain or Loss With Respect to a
Qualified Business Unit; Final Rule

DEPARTMENT OF THE TREASURY**Internal Revenue Service****26 CFR Part 1**

[TD 10016]

RIN 1545–BO07

Taxable Income or Loss and Currency Gain or Loss With Respect to a Qualified Business Unit**AGENCY:** Internal Revenue Service (IRS), Treasury.**ACTION:** Final rule.

SUMMARY: This document contains final regulations relating to the determination of taxable income or loss and foreign currency gain or loss with respect to a qualified business unit. These final regulations include an election to treat all items of a qualified business unit as marked items (subject to a loss suspension rule), an election to recognize all foreign currency gain or loss with respect to a qualified business unit on an annual basis, and a new transition rule.

DATES: *Effective date:* The final regulations are effective December 10, 2024.

Applicability dates: For dates of applicability, see § 1.987–15.

FOR FURTHER INFORMATION CONTACT: Concerning the final regulations generally, Adam G. Province at (865) 329–4546; concerning the character and source of section 987 gain or loss, Larry Pounders at (202) 317–5465; concerning consolidated groups, Jeremy Aron-Dine at (202) 317–6847 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:**Authority**

This document contains additions and amendments to 26 CFR part 1 (Income Tax Regulations) addressing the application of section 987 of the Internal Revenue Code (Code) and related provisions (the “final regulations”). The additions and amendments are issued under sections 987, 989, and 1502, pursuant to the express delegations of authority provided under those sections. The express delegations relied upon are referenced in the Background section of this preamble and in the Summary of Comments and Explanation of Revisions describing the individual sections of the final regulations. The final regulations are also issued under the express delegation of authority under section 7805 of the Code.

Background

This document contains final regulations under section 987 of the Code and related provisions under sections 861, 985 through 989, and 1502 of the Code. Section 987 applies to any taxpayer that has a qualified business unit (“QBU”) with a functional currency other than the dollar. Section 987(1) and (2) provide rules for determining and translating taxable income or loss (“section 987 taxable income or loss”) with respect to the QBU. In addition, foreign currency gain or loss must be determined under section 987(3) (“section 987 gain or loss”), which requires proper adjustments (as prescribed by the Secretary) for transfers of property between QBUs of the taxpayer having different functional currencies.

Sections 987 and 989 provide several explicit grants of regulatory authority. Section 987(3) directs the Secretary to prescribe the proper adjustments needed to determine the taxable income of the owner of a section 987 QBU. Those adjustments include (but are not limited to) rules for sourcing section 987 gain or loss recognized under section 987(3)(B). Similarly, section 987(2) provides that the income of a QBU is translated at the “appropriate” exchange rate. Section 989(b)(4) provides that the appropriate exchange rate generally is the average rate for the taxable year, “except as provided in regulations.”

Section 989(c) directs the Secretary to “prescribe such regulations as may be necessary or appropriate to carry out the purposes of this subpart.”¹ The grant of authority in section 989(c) includes regulations limiting the recognition of foreign currency loss on certain remittances from QBUs, providing for the appropriate treatment of related party transactions (including transactions between QBUs of the same taxpayer), and setting forth procedures for determining the average exchange rate for any period. Section 989(c)(2), (5), and (6).

On December 8, 2016, the Department of the Treasury (“Treasury Department”) and the Internal Revenue Service (“IRS”) published Treasury Decision 9794, which contained final regulations under sections 861, 985, 987, 988, and 989 (the “2016 final regulations”), in the **Federal Register** (81 FR 88806). The same day, the Treasury Department and the IRS published Treasury Decision 9795, which contained temporary regulations under sections 987 and 988 (the “2016

temporary regulations”), in the **Federal Register** (81 FR 88854) and published a notice of proposed rulemaking (REG–128276–12, 81 FR 88882) (the “2016 proposed regulations”) in the **Federal Register** by cross-reference to the temporary regulations. On May 13, 2019, the Treasury Department and the IRS published Treasury Decision 9857, which contained final regulations under section 987 (the “2019 final regulations”), in the **Federal Register** (84 FR 20790).

On November 14, 2023, the Treasury Department and the IRS published proposed regulations (REG–132422–17) under sections 861, 985, 987, 988, 989, and 1502 of the Code (the “2023 proposed regulations”) in the **Federal Register** (88 FR 78134). The same day, the Treasury Department and the IRS also published a notice in the **Federal Register** (88 FR 77921) that reopened the comment period for the 2016 proposed regulations.

All written comments received in response to the 2016 proposed regulations and the 2023 proposed regulations are available at <https://www.regulations.gov> or upon request. A public hearing on the 2023 proposed regulations was not held because there were no requests to speak.

Concurrently with the publication of the final regulations, the Treasury Department and the IRS are publishing in the proposed rule section of this edition of the **Federal Register** (RIN 1545–BR37) a notice of proposed rulemaking providing additional proposed regulations under section 987 (REG–117213–24) (the “2024 proposed regulations”).

Summary of Comments and Explanation of Revisions**I. Overview**

The Treasury Department and the IRS received a number of written comments in response to the 2016 proposed regulations and the 2023 proposed regulations. The comments, and the revisions made in response to those comments, are summarized in this Summary of Comments and Explanation of Revisions.

The final regulations retain the basic approach and structure of the 2023 proposed regulations, with the revisions described in this Summary of Comments and Explanation of Revisions.

II. Comments and Changes to Proposed § 1.987–1: Scope, Definitions, and Special Rules

Proposed § 1.987–1 would provide rules regarding the scope of the

¹ The reference to “this subpart” refers to subpart J of part III of subchapter N of chapter 1 of the Code, which includes section 987.

regulations under section 987 (“section 987 regulations”), including which entities are subject to the regulations, rules relating to elections under section 987, and other rules.

A. Scope

Under proposed § 1.987–1(b)(1), the section 987 regulations would apply to all taxpayers, subject to a de minimis rule for pass-through entities with minimal U.S. ownership, but they would not apply to foreign individuals or foreign corporations that either are not controlled foreign corporations (“CFCs”) or are CFCs in which no United States shareholders (“U.S. shareholders”) own (within the meaning of section 958(a)) stock. In contrast to the 2016 final regulations, the 2023 proposed regulations would not provide an exception for banks, insurance companies, leasing companies, finance coordination centers, regulated investment companies, or real estate investment trusts (“specified entities”). The preamble to the 2023 proposed regulations explains that the current rate election and annual recognition election are expected to provide additional flexibility for specified entities to apply the section 987 regulations. 88 FR 78145. Taxpayers that make a current rate election would treat all assets and liabilities attributable to a section 987 QBU as marked items, and thus would not be required to track historic exchange rates. Taxpayers that make an annual recognition election would recognize all unrecognized section 987 gain or loss on an annual basis and would not be required to calculate the amount of a remittance with respect to a section 987 QBU under § 1.987–5. *See* parts II and IV of the Explanation of Provisions in the preamble to the 2023 proposed regulations. 88 FR 78138 through 78139, 78141 through 78143. In addition, including specified entities in the scope of the section 987 regulations is necessary to provide these entities with sufficient guidance under section 987 and to provide a consistent set of rules applicable to all taxpayers.

1. Specified Entities

Comments recommended that specified entities be excluded from the application of the section 987 regulations. The comments asserted that additional rules are needed to facilitate the application of the section 987 regulations to these entities. For example, according to the comments, it is unclear whether insurance reserves should be treated as marked items or historic items. A comment also noted that bank branches often engage in high volumes of intercompany transactions

that could be difficult to account for under the section 987 regulations.

The Treasury Department and the IRS have determined that the final regulations can be applied by specified entities in an administrable manner and that excluding specified entities from the scope of the section 987 regulations would not provide sufficient guidance to ensure that these entities are using an appropriate method to apply section 987. Moreover, section 987 and its legislative history give no indication that Congress intended for banks, insurance companies, and other specified entities to be treated differently from other taxpayers for this purpose. Accordingly, specified entities are subject to the final regulations. However, the final regulations contain modifications intended to facilitate application of the section 987 regulations to these entities. *See* parts II.B (rules relating to insurance companies), V.B (hedging transactions), and VI (modifications to annual remittance rules to reduce the burden of tracking disregarded transfers) of this Summary of Comments and Explanation of Revisions.

2. Partnerships and Certain Other Entities

One comment was received relating to the application of section 987 to partnerships, and the Treasury Department and the IRS continue to study this issue. The Treasury Department and the IRS have determined that, without additional guidance, the section 987 regulations in their entirety could not be applied to partnerships in an administrable way. Accordingly, the final regulations generally apply only with respect to corporations and individuals. However, as discussed in part VIII of this Summary of Comments and Explanation of Revisions, certain parts of the section 987 regulations (including the rules relating to suspension of section 987 loss and recognition of suspended section 987 loss) are applicable to partnerships and S corporations.

The section 987 regulations do not apply to trusts or estates (though trusts and estates can be subject to section 987) because additional guidance may be needed to apply section 987 to these entities. In particular, the Treasury Department and the IRS are studying whether specific rules are needed to address the apportionment of section 987 gain or loss between the estate or non-grantor trust and the beneficiaries or whether existing rules under section 643(a) (defining distributable net income of an estate or trust) sufficiently address this issue. In addition, specific

rules may be needed to address a beneficiary’s application of section 987 with respect to an estate or non-grantor trust that uses a different functional currency (which creates a separate layer of currency exposure). The Treasury Department and the IRS anticipate providing rules applicable to trusts and estates in future guidance.

3. Application to CFCs

The final regulations apply to individuals and corporations that are United States persons (“U.S. persons”) and to CFCs in which U.S. shareholders own stock (directly or indirectly within the meaning of section 958(a)). *See* § 1.987–1(b)(1). As explained in parts II.A.2 and VIII of this Summary of Comments and Explanation of Revisions, the Treasury Department and the IRS are continuing to study the appropriate rules for applying section 987 to partnerships.

A comment recommended that the scope of the section 987 regulations be limited to section 987 QBUs owned directly by U.S. persons or by partnerships with partners that are U.S. persons. According to the comment, this would reduce the compliance burden on taxpayers and prevent the selective recognition of section 987 losses. The comment further asserted that, based on the legislative history of section 987(3), the statute primarily was intended to address section 987 QBUs owned by U.S. persons.

The comment suggested that simplified mechanics under section 986(c) could be used to account for currency gain or loss arising between the time earnings are generated by a section 987 QBU and the time of distribution, but the comment did not explain how those mechanics would operate. Section 986(c) requires a U.S. shareholder to recognize foreign currency gain or loss with respect to distributions of previously taxed earnings and profits attributable to movements in exchange rates between the date of the income inclusion giving rise to the previously taxed earnings and profits and the distribution of the previously taxed earnings and profits.

The final regulations do not adopt the recommendations made by the comment. It is necessary to apply section 987(1) and (2) to foreign entities because many aspects of the income tax rules effectively require that the determination of a taxpayer’s items of income, gain, deduction, and loss be made in a single currency. In addition, it is not clear how a rule similar to section 986(c) could be applied to section 987 QBUs in lieu of section 987(3). Because a CFC’s earnings and

profits are determined in the CFC's functional currency under section 986(b), currency gain or loss on previously taxed earnings and profits arises under section 986(c) when a CFC's functional currency appreciates or depreciates against the U.S. dollar between the time the inclusion is computed and the time the CFC distributes the previously taxed earnings and profits. However, section 986(c) would not account for changes in value of a section 987 QBU's functional currency (measured against the functional currency of its CFC-owner or the U.S. shareholder) because earnings and profits are not tracked in the section 987 QBU's functional currency.

However, the Treasury Department and the IRS are studying whether there are instances in which it would be possible to simplify the application of section 987 by modifying the application of section 987(3) (and the related regulations, including §§ 1.987-4 through 1.987-6, 1.987-8, and 1.987-11 through 1.987-13) to certain entities. *See* part II.B of the Comments and Request for Public Hearing section in the preamble to the 2024 proposed regulations.

B. Special Rules for Insurance Companies

1. Insurance Reserves

A comment requested clarification as to whether insurance reserves are treated as marked items. The comment noted that the definition of a marked item under the proposed regulations is tied to the treatment of an asset or liability under section 988 and that the application of section 988 to insurance reserves is not clear. The Treasury Department and the IRS agree that treating insurance reserves as marked items would facilitate the application of section 987 to insurance companies and would be consistent with the treatment of liabilities outside the insurance context. Accordingly, § 1.987-1(d)(1)(iv) includes insurance reserves in the definition of marked items.

2. Assets That Support Variable Contracts

a. Background on Variable Contracts

In general, variable contracts are life insurance and annuity contracts under which the amount of the insurance company's obligation depends, at least in part, on the value of the assets held in a separate account that is segregated from the general asset accounts of the insurance company. Provided certain requirements are met, under section 817(c), an insurance company that issues variable contracts (as defined in

section 817(d)) must separately account for the various income, exclusion, deduction, asset, reserve, and other liability items properly attributable to such variable contracts.

As a general matter, section 807 provides that increases in the life insurance reserves of a life insurance company are deductible and decreases in the life insurance reserves are includible in income. However, section 817(a) provides that for purposes of determining the net decrease or increase in reserves under section 807(a) or (b), amounts subtracted from or added to separate account reserves by reason of the depreciation or appreciation of separate account assets (whether or not realized) are disregarded. Under section 817(a), deductions for items described in section 805(a)(1) and (6), which include claims and benefits accrued and losses incurred during the taxable year on insurance and annuity contracts, are similarly adjusted for the depreciation or appreciation of separate account assets. Additionally, section 817(b) provides that the basis of each separate account asset is decreased by the amount of depreciation, or increased by the amount of appreciation, of separate account assets (whether or not realized), to the extent separate account reserves are adjusted for such depreciation or appreciation under section 817(a). Generally, the result is a permanent elimination of any effects on company-level taxable income that would otherwise result from the change in the value of the separate account assets.

Sometimes, however, an insurance company may provide guarantees with respect to variable contracts with separate accounts that could require reserves to be held in a company's general account. Section 817(d)(3) recognizes this situation and states that "obligations under such guarantee which exceed obligations under the contract without regard to such guarantee shall be accounted for as part of the company's general account." Such guarantees might involve a limit on losses or guarantees of minimum crediting rates. These amounts are not liabilities of the separate account.

Similarly, CFCs generally must follow the Code and subchapter L rules in determining their insurance income, with minor modifications for determining: (i) whether a contract is a life insurance or annuity contract, and (ii) the amount of insurance reserves. For example, U.S. tax requirements in sections 72(s), 101(f), 817(h), and 7702 do not apply so long as no policyholder, annuitant, insured, or beneficiary under the contract is a United States person and the contract is regulated as a life

insurance or annuity contract in the issuer's home country. In addition, section 954(i) modifies the subchapter L computation of insurance reserves and its application to insurance contracts issued by CFCs. *See also* section 953(b)(3).

b. Treatment of Assets That Support Variable Contracts for Purposes of Section 987

A comment recommended that assets which support variable annuity and life insurance contracts be treated as marked items. The comment explained that these assets are required by law to be segregated from the general asset accounts of the insurance company in a separate account, and the related contracts reflect the investment return and market value of the separate account assets.

The comment asserted that both the separate account assets and the related insurance reserves should be treated as marked items in order to align the treatment of these assets and liabilities for purposes of section 987. Similarly, the comment recommended that these assets and liabilities should be treated as attributable to an eligible QBU if they are reflected on the books and records of the eligible QBU, even if they would otherwise be excluded under § 1.987-2(b)(2) (for example, if the separate account assets consist of stock or partnership interests).

The final regulations provide that separate account assets are treated as marked items. *See* § 1.987-1(d)(1)(v). In addition, the final regulations carve out separate account assets from the exclusions in § 1.987-2(b)(2), so that separate account assets reflected on the books and records of an eligible QBU generally will be attributable to the eligible QBU. *See* § 1.987-2(b)(2)(ii). These rules are expected to facilitate matching treatment of separate account assets and the related insurance contracts, consistent with the treatment of these items for statutory and financial accounting purposes and the nature of the issuer's economic obligations.

The final regulations define a separate account asset as an asset that is reflected on the books and records of an eligible QBU and is held in a separate account with respect to a separate account insurance contract. *See* § 1.987-1(h). A separate account insurance contract generally is defined as a contract that would be treated as an insurance contract for Federal income tax purposes for which the assets supporting the insurance reserves are required to be held in a separate account under the local insurance regulatory rules. In addition, the contract generally

must qualify as a variable contract under section 817(d). However, if the contract does not qualify as a variable contract under section 817(d) solely because it fails to meet one or more of the requirements in section 72(s), 101(f), 817(h), or 7702, the contract will be treated as a separate account insurance contract if it is regulated as a life insurance or annuity contract under foreign law, the contract reserves are computed or estimated on the basis of recognized mortality or morbidity tables and assumed rates of interest (treating the reflection of the investment return and the market value of assets in the separate account as an assumed rate of interest), and no policyholder, annuitant, insured, or beneficiary under the contract is a United States person. These requirements are consistent with the requirements for life insurance or annuity contracts issued by CFCs.

3. Assets of an Insurance Company That Produce Financial Services Income

A comment recommended that assets of an insurance company that produce financial services income (within the meaning of section 904(d)(2)(D)(ii)(II) and (III)) should be treated as marked items. The comment asserted that the assets insurance companies hold to support insurance obligations are closely matched to those obligations and that concerns related to the selective recognition of large noneconomic losses under section 987 are not present for insurance companies.

The final regulations do not treat all assets that produce financial services income as marked assets. As a result, those assets are classified as marked or historic under the general rules of § 1.987-1(d) or (e). The definition of a marked item under § 1.987-1(d)(1) is intended to identify those items of a section 987 QBU that are directly exposed to changes in the value of a section 987 QBU's functional currency. This definition is designed to ensure that, in the absence of a current rate election, section 987 gain or loss recognized by the owner of a section 987 QBU represents bona fide economic gain or loss. To the extent that a section 987 QBU of an insurance company holds assets that are not directly exposed to exchange rate fluctuations (for example, publicly traded stock), and a current rate election is not in effect, those assets are properly characterized as historic items even if they generate financial services income.

4. Deferred Acquisition Costs

A comment recommended that the unamortized portion of specified policy acquisition expenses (as defined in

section 848) should be treated as marked items. These specified policy acquisition expenses are generally a specified portion of general deductions and represent deferred acquisition costs. The comment noted that specified policy acquisition expenses are akin to prepaid expenses and the amount and timing of the related deductions are determined under insurance-specific tax rules.

The final regulations do not treat the unamortized portion of specified policy acquisition expenses as marked items. Although certain prepaid expenses are treated as marked items under § 1.987-1(d)(1)(ii), that rule applies only to prepaid expenses with an original term of one year or less. The preamble to the 2016 final regulations explains that, because these prepaid expenses have a short duration and often are small in amount, treating them as marked items promotes administrability without creating significant distortions. 81 FR 88810. By contrast, specified policy acquisition expenses under section 848 generally are amortized over a period of 15 years and can be substantial in magnitude. Thus, if specified policy acquisition expenses were treated as marked items, they could give rise to significant amounts of non-economic section 987 gain or loss.

C. Elections

The 2023 proposed regulations would provide that a current rate election or an annual recognition election may not be revoked without consent for any taxable year beginning within 60 months of the first day of the taxable year for which it was made. Proposed § 1.987-1(g)(3)(ii)(B). Once revoked, a new current rate election or annual recognition election may not be made without consent for any taxable year beginning within 60 months of the first day of the taxable year for which it was revoked. *Id.*

A comment recommended that, during the first five years in which the section 987 regulations are applicable, taxpayers should be allowed to make or revoke a current rate election without waiting 60 months or requesting consent. The comment noted that taxpayers may need more flexibility to reassess their elections during this initial period because they do not yet have sufficient information or experience regarding the impact of making (or not making) a current rate election.

The final regulations retain the 60-month limitation for taxpayers that make a current rate election or an annual recognition election and apply a similar limitation for purposes of the

section 988 mark-to-market election (see part IV.C.1 of this Summary of Comments and Explanation of Revisions). Permitting taxpayers to make or revoke elections on a more frequent basis could increase the potential for manipulation and abuse. However, taxpayers that wish to change their elections without waiting 60 months can do so by requesting the Commissioner's consent, and the Commissioner may consider the need for additional flexibility on a case-by-case basis.

D. No Change in Method of Accounting

Proposed § 1.987-1(g)(4) provides that elections under section 987 are not governed by the general rules concerning changes in methods of accounting. In addition, the final regulations clarify that an election under section 987 is not treated as a method of accounting for purposes of section 446 or 481. See § 1.987-1(g)(4). Similarly, the final regulations provide that application of the transition rules under § 1.987-10 is not treated as a change in method of accounting. See § 1.987-10(k)(4). No inference is intended as to whether a change in section 987 methodology is considered a change in method of accounting before the final regulations become applicable (or with respect to partnerships or other entities that are not generally subject to the section 987 regulations).

III. Comments and Changes to Proposed § 1.987-2: Attribution of Items of an Eligible QBU, the Definition of a Transfer, and Related Rules

Proposed § 1.987-2 provides rules for attributing items to eligible QBUs and rules relating to transfers of assets or liabilities to or from eligible QBUs.

A. Attribution of Items to an Eligible QBU

Under the proposed regulations, items are attributable to an eligible QBU to the extent they are reflected on the eligible QBU's separate set of books and records. Proposed § 1.987-2(b)(1). The final regulations clarify that an item that is not taken into account for financial accounting purposes is attributed to an eligible QBU to the extent it would have been reflected on the eligible QBU's books and records if it were taken into account for financial accounting purposes (for example, amortization attributable to an item of intangible property that is recognized and taken into account for tax purposes due to a section 338 election, but is not recognized or taken into account for financial reporting purposes). See § 1.987-2(b)(1). Similarly, in preparing

an adjusted balance sheet for a section 987 QBU, the owner must make adjustments to reflect items that were not reflected on the section 987 QBU's books and records for the taxable year but should be so reflected under United States tax accounting principles. *See* § 1.987–1(h). No inference should be drawn from this clarification with respect to other similar rules that attribute items based on books and records including under § 1.904–4(f) (foreign branch category income) or § 1.1503(d)–5(c) (income or dual consolidated loss of a separate unit).

B. Disregarded Transactions

Under proposed § 1.987–2(c)(2)(i), an asset is treated as transferred to a section 987 QBU from its owner if, as a result of a disregarded transaction, the asset is reflected on the books and records of (or attributable to) the section 987 QBU. Similarly, an asset is treated as transferred from a section 987 QBU to its owner if, as a result of a disregarded transaction, the asset ceases to be reflected on (or attributable to) the books and records of the section 987 QBU. However, disregarded transactions do not give rise to items of income, gain, deduction, or loss that are taken into account in determining section 987 taxable income or loss under § 1.987–3. Proposed § 1.987–2(c)(2)(iii).

A comment recommended that interbranch loans made by banks and other regulated financial institutions should not be treated as transfers for purposes of determining the amount of a remittance under § 1.987–5(c). The comment asserted that an interbranch loan is not a permanent transfer because the borrower has an obligation to repay the lender. Another comment requested that the final regulations conform the treatment of disregarded transactions for purposes of section 987 with the reattribution rules provided in § 1.904–4(f)(2)(vi). Under this approach, disregarded payments would result in the reattribution of items of gross income between a section 987 QBU and its owner and between separate 987 QBUs of the same owner, and they would not be treated as transfers giving rise to the recognition of section 987 gain or loss. The comment noted that, under proposed § 1.987–2(c)(2), a disregarded payment for services or a sale of inventory (including a payment from one section 987 QBU to a different section 987 QBU with the same functional currency) could give rise to a remittance even though there is no net economic transfer of value. Further, because disregarded transactions do not give rise to section 987 taxable income or loss under proposed § 1.987–

2(c)(2)(iii), the comment asserted that the amount of section 987 taxable income or loss may be different from the amount of income that is economically attributable to the section 987 QBU.

The final regulations retain the disregarded transaction rules of proposed § 1.987–2(c). *See* § 1.987–2(c). These rules are needed to properly account for the effect of a disregarded transaction on the balance sheet of a section 987 QBU for purposes of determining the owner's net unrecognized section 987 gain or loss under § 1.987–4, the amount of a remittance under § 1.987–5(c), and to properly determine the owner's basis in transferred assets under § 1.987–5(f).

In the case of a disregarded lending transaction in which a section 987 QBU lends money to its owner, although the owner remains obligated to repay the borrowed funds, the disregarded loan is not an asset that can be attributed to the QBU for tax purposes. Accordingly, for tax purposes, the QBU-lender's balance sheet is diminished by the amount of the loan in the same way as any other transfer from the QBU to its owner. To the extent the loan is funded and repaid within the same taxable year, the two transfers will offset in computing the remittance amount under § 1.987–5(c). However, when a disregarded loan spans multiple taxable years, the owner must account for the effect of the transaction on the net equity of the section 987 QBU (as regarded for tax purposes).

In addition, the final regulations do not provide for reattribution of gross income between a section 987 QBU and its owner or between section 987 QBUs of the same owner for purposes of section 987. When a section 987 QBU makes a disregarded payment to its owner, the payment properly triggers the recognition of section 987 gain or loss because the transferred asset has been withdrawn from the QBU and is no longer accounted for in the section 987 QBU's functional currency. Even if the transaction does not reduce the economic value of the section 987 QBU on a net basis (for example, because the disregarded payment is made in exchange for services of equal value), it nonetheless results in a net withdrawal of asset basis from the functional currency environment of the section 987 QBU and is therefore properly treated as a remittance for purposes of section 987. Moreover, a rule determining the amount of a remittance based on the value of property transferred from a section 987 QBU would be difficult to administer and prone to manipulation.

Similarly, because disregarded transactions do not give rise to taxable

income or loss under general tax principles, they are not taken into account in determining section 987 taxable income or loss. *See* § 1.987–2(c)(2)(iii). Instead, the regarded income of an owner that is properly reflected on the books and records of (or attributable to) a section 987 QBU under § 1.987–2(b) is determined in the functional currency of the section 987 QBU and translated into the owner's functional currency under the rules of § 1.987–3. Disregarded payments do not serve to reattribute gross income between a section 987 QBU and its owner for purposes of determining section 987 taxable income or loss. Such a reattribution rule would add complexity to the section 987 regulations (for example, when income is reattributed in a taxable year following the taxable year in which the disregarded payment is made), and it would not serve any necessary function.

However, the final regulations contain targeted modifications that are intended to reduce the compliance burden of accounting for certain transfers between a section 987 QBU and its owner. *See* part VI of this Summary of Comments and Explanation of Revisions (describing modifications to the annual remittance rules to reduce the burden of tracking and translating disregarded transfers). Additionally, if an owner elects to group section 987 QBUs with the same functional currency under § 1.987–1(b)(3)(ii), transactions between the section 987 QBUs will not be treated as transfers between the section 987 QBUs and their owner for purposes of section 987.

IV. Comments and Changes to Proposed § 1.987–3: Determination of Section 987 Taxable Income or Loss of an Owner of a Section 987 QBU

Proposed § 1.987–3 would provide rules for determining taxable income or loss of a section 987 QBU, including section 988 transactions of a section 987 QBU. Additional rules relating to section 988 transactions would be provided in § 1.987–3 of the 2016 proposed regulations, for which the comment period was reopened in 2023.

A. Treatment of Section 988 Transactions Under the 2016 Proposed Regulations

The 2016 proposed regulations provide that the determination of whether a transaction is a section 988 transaction is made by reference to the section 987 QBU's functional currency. Thus, a transaction otherwise within the scope of section 988 that is denominated in a functional currency other than the section 987 QBU's

functional currency generally would be treated as a section 988 transaction. *See* § 1.987–3(b)(4)(i) of the 2016 proposed regulations. However, section 988 transactions of a section 987 QBU denominated in, or determined by reference to, the owner's functional currency ("specified owner functional currency transactions") would not be treated as section 988 transactions of the section 987 QBU. *See* § 1.987–3(b)(4)(ii) of the 2016 proposed regulations.

The 2016 proposed regulations would further provide that section 988 gain or loss of a section 987 QBU generally is determined by reference to the owner's functional currency. *See* § 1.987–3(b)(4)(i) of the 2016 proposed regulations. However, section 988 gain or loss with respect to certain short-term section 988 transactions ("qualified short-term section 988 transactions") accounted for under a mark-to-market method of accounting would be determined in the functional currency of the section 987 QBU, and not the functional currency of its owner. *See* § 1.987–3(b)(4)(iii) of the 2016 proposed regulations. The 2016 proposed regulations would provide an election under which taxpayers can apply a mark-to-market method of accounting with respect to all qualified short-term section 988 transactions. *See* § 1.987–3(b)(4)(iii)(C) of the 2016 proposed regulations.

Under the 2016 final regulations (and the 2023 proposed regulations), a transaction denominated in a currency other than the section 987 QBU's functional currency is treated as a historic item. *See* § 1.987–1(d) and (e). However, the 2016 proposed regulations provide an exception under which a qualified short-term section 988 transaction for which section 988 gain or loss is determined by reference to the functional currency of the section 987 QBU is a marked item. *See* § 1.987–1(d)(3) of the 2016 proposed regulations.

The preamble to the 2023 proposed regulations requested comments as to whether section 988 gain or loss on nonfunctional currency transactions of a section 987 QBU (including specified owner functional currency transactions) should be determined in the functional currency of the section 987 QBU when a current rate election or annual recognition election is in effect. 88 FR 78154. The preamble expressed concern that, if such a rule were adopted, specified owner functional currency transactions would give rise to offsetting positions in the functional currency of the section 987 QBU; this could create opportunities for taxpayers to recognize losses while deferring the offsetting gains. *Id.* For example, if a section 987

QBU held assets denominated in its owner's functional currency, and the section 987 QBU's functional currency weakened against that of its owner, the section 987 QBU would have unrecognized section 988 gain and the owner would have an inverse amount of unrecognized section 987 loss. The owner could cause the QBU to make a remittance triggering the recognition of section 987 loss, while deferring the section 988 gain.

B. Comments on the 2023 Proposed Regulations Regarding Section 988 Transactions of Section 987 QBUs

Comments asserted that the section 988 rules of the 2016 proposed regulations would impose a substantial compliance burden on taxpayers. The comments noted that for financial accounting purposes, foreign currency gain or loss on nonfunctional currency transactions of a QBU is measured by reference to the functional currency of the QBU. In addition, taxpayers typically hedge their exposure to nonfunctional currency transactions of a QBU by reference to the QBU's functional currency. One comment noted that it is common for section 987 QBUs of insurance companies to hold assets denominated in U.S. dollars for commercial reasons and that treating these assets as historic items would increase the compliance burden on insurance companies.

Comments suggested that the rules of the 2016 proposed regulations be modified to provide that: (i) section 988 gain or loss on nonfunctional currency transactions of a section 987 QBU is determined by reference to the functional currency of the section 987 QBU, (ii) specified owner functional currency transactions are treated as section 988 transactions, and (iii) section 988 transactions of a section 987 QBU are treated as marked items. Alternatively, comments requested that (if the default rules of the 2016 proposed regulations are retained) taxpayers should be permitted to elect this modified treatment.

According to the comments, the recommended modifications would achieve greater consistency with financial accounting standards and would ease the compliance burden on taxpayers. One comment stated that such an approach would also be more consistent with the statutory requirement to determine a section 987 QBU's taxable income or loss in the QBU's functional currency under sections 985 and 987. Comments noted that the opportunity for selective recognition of losses is limited to the extent the taxpayer makes a current rate

election (because section 987 losses will be subject to suspension) or an annual recognition election (because section 987 gain or loss is recognized annually without regard to whether a remittance is made). One comment asserted that, even if neither of these elections is in effect, it is difficult to selectively recognize material section 987 losses attributable to section 988 transactions because the remittance proportion under § 1.987–5 is determined with respect to all the assets of the section 987 QBU.

Other comments recommended providing an election under which taxpayers could recognize section 988 gain or loss with respect to all section 988 transactions of a section 987 QBU on a mark-to-market basis (effectively expanding the special rule for qualified short-term section 988 transactions to cover all section 988 transactions of a QBU). For example, one comment requested mark-to-market timing for section 988 transactions of a section 987 QBU that is subject to an annual recognition election. According to this comment, because mark-to-market timing would apply to both section 988 and section 987 gains and losses on a current basis, the potential for abuse or selective loss recognition would be limited. Another comment requested that the definition of a qualified short-term section 988 transaction under proposed § 1.987–3(b)(4)(iii)(B) be expanded to include long-term transactions that have been properly identified as a hedge for U.S. tax purposes.

Finally, a comment recommended that, if the rules of the 2016 proposed regulations relating to section 988 transactions are retained in the final regulations, the applicability date of the final regulations should be deferred until taxable years beginning after December 31, 2026, so that taxpayers have adequate time to update their internal accounting systems.

C. Treatment of Section 988 Transactions Under the Final Regulations

1. Section 988 Mark-To-Market Election

The final regulations provide that a taxpayer may elect to recognize section 988 gain or loss with respect to section 988 transactions of a section 987 QBU under a mark-to-market method of accounting (a "section 988 mark-to-market election"). *See* § 1.987–3(b)(4)(ii). This election is expected to result in consistent treatment of section 988 transactions for tax and financial reporting purposes and to reduce the potential for selective recognition of

losses relating to these transactions, as indicated by the comments. The section 988 mark-to-market election is subject to the same timing and consistency requirements as a current rate election or an annual recognition election. *See* § 1.987–1(g).

The section 988 mark-to-market election does not apply to a section 988 transaction that is contributed to a section 987 QBU with a built-in loss if the section 988 transaction was not subject to a mark-to-market method of accounting in the hands of the transferor. *See* § 1.987–3(b)(4)(ii)(B). This rule is intended to prevent taxpayers from accelerating the recognition of section 988 loss by contributing a section 988 transaction with a built-in loss to a section 987 QBU that is subject to the section 988 mark-to-market election.

2. Treatment of Section 988 Transactions of a Section 987 QBU Under the Final Regulations

The final regulations provide new rules for applying section 988 with respect to nonfunctional currency transactions of a section 987 QBU. In response to the comments summarized in part IV.B of this Summary of Comments and Explanation of Revisions, the Treasury Department and the IRS have determined that a different framework is appropriate in order to reduce the compliance burden and complexity of the section 987 regulations.

Under the final regulations, whether an asset or liability of a section 987 QBU is a section 988 transaction is determined by reference to the functional currency of the section 987 QBU (instead of the owner's functional currency). *See* § 1.987–3(b)(4)(i). The final regulations further provide that section 988 gain or loss with respect to section 988 transactions of a section 987 QBU (including transactions denominated in the owner's functional currency) is determined in the functional currency of the section 987 QBU, and section 988 transactions are treated as marked items. *See* §§ 1.987–1(d)(1)(iii) and 1.987–3(b)(4)(i). The final regulations do not provide an exception for specified owner functional currency transactions; thus, such transactions are treated as section 988 transactions of the section 987 QBU.

However, the final regulations provide an anti-abuse rule to prevent taxpayers from entering into section 988 transactions through an eligible QBU for the purpose of generating offsetting amounts of gain and loss that can selectively be recognized or deferred. Under § 1.987–2(b)(3)(iv), section 988

transactions will not be treated as attributable to an eligible QBU if they are entered into (or reflected on the eligible QBU's books and records) with a principal purpose of generating offsetting amounts of section 988 gain and section 987 loss or offsetting amounts of section 988 loss and section 987 gain. Section 988 transactions also are subject to the general anti-avoidance rules of § 1.987–2(b)(3)(i) through (iii).

V. Comments and Changes to Proposed § 1.987–4: Determination of Net Unrecognized Section 987 Gain or Loss of a Section 987 QBU

Proposed § 1.987–4 provides rules for computing net unrecognized section 987 gain or loss with respect to a section 987 QBU. In particular, proposed § 1.987–4(d) provides a ten-step formula for computing unrecognized section 987 gain or loss for the current taxable year. The first step of this formula is to compute the change in owner functional currency net value (“OFCNV”) for the taxable year. Proposed § 1.987–4(d)(1). The other steps make adjustments for changes to OFCNV that are not attributable to changes in the exchange rate. Steps 2 through 5 relate to transfers of assets and liabilities between a section 987 QBU and its owner, and steps 6 through 9 relate to income or loss of the section 987 QBU. Proposed § 1.987–4(d)(2) through (9). Step 10 is a residual adjustment for any increase or decrease to the section 987 QBU's balance sheet that is not otherwise accounted for. Proposed § 1.987–4(d)(10). If a current rate election is in effect, taxpayers are required to apply only steps 1 through 5 and step 10.

Under proposed § 1.987–4(e), OFCNV is determined by preparing a tax basis balance sheet reflecting the section 987 QBU's assets and liabilities. The basis of each asset and the amount of each liability is then translated into the owner's functional currency at the appropriate exchange rate. Under the default rules, marked items are translated at the year-end spot rate, while historic items are translated at the applicable historic rate. However, taxpayers that make a current rate election under § 1.987–1(d)(2) translate all items on the year-end balance sheet at the year-end spot rate.

A. Mechanics for Calculating Unrecognized Section 987 Gain or Loss for the Current Taxable Year

1. Earnings and Capital Method

The preamble to the 2023 proposed regulations notes that, under a current rate election, the total amount of section 987 gain or loss recognized by an owner

with respect to a section 987 QBU would be similar to the amount computed under the earnings and capital method, which was described in proposed regulations published in the **Federal Register** in 1991 (56 FR 48457, September 25, 1991) (the “1991 proposed regulations”). 88 FR 78138 through 78139. Under the earnings and capital method, the owner of a section 987 QBU computes section 987 gain or loss by maintaining an equity pool in the QBU's functional currency and a basis pool in the owner's functional currency. The equity and basis pools are increased by income of the section 987 QBU and contributions from the owner, and they are decreased by losses of the section 987 QBU and distributions from the section 987 QBU to the owner. The preamble to the 1991 proposed regulations explains that the equity pool generally represents the amount of branch equity (adjusted basis of assets net of liabilities), and the basis pool represents the owner's basis in branch equity. 56 FR 48458.

Comments requested that the final regulations include an election to apply the earnings and capital method of the 1991 proposed regulations in lieu of the current rate election. These comments indicated that, even if a current rate election is in effect, proposed § 1.987–4 imposes a heightened compliance burden (as compared to the earnings and capital method) because it requires taxpayers to prepare tax basis balance sheets for each of their section 987 QBUs on an annual basis. In addition, the comments asserted that taxpayers are already familiar with the earnings and capital method and would be less likely to make errors in applying that method because taxpayers track book-to-tax adjustments in computing taxable income but do not make book-to-tax adjustments to their balance sheets. One comment recommended allowing taxpayers to use the earnings and capital method only if a current rate election and an annual recognition election are both in effect.

The final regulations do not permit taxpayers to use the earnings and capital method. As explained in the preamble to the 2023 proposed regulations, such an election would allow different taxpayers to apply section 987 using fundamentally different methodologies, which would increase the overall complexity of the section 987 regulations and make them more difficult to administer. 88 FR 78138. For example, it would be difficult for taxpayers to transition from one method to another in an administrable way. Moreover, under the earnings and capital method, the amount of section

987 gain or loss recognized is determined based on the percentage of a section 987 QBU's net equity remitted (rather than the percentage of gross assets remitted, as required under § 1.987-5), which can inappropriately accelerate the recognition of section 987 gain or loss. If a section 987 QBU has negative net equity, section 987 gain or loss cannot be recognized under the earnings and capital method until the section 987 QBU terminates, which is inconsistent with the statutory requirement to recognize currency gain or loss on transfers of property from the section 987 QBU.

However, the final regulations modify the existing framework of § 1.987-4 to allow taxpayers that make a current rate election to use certain elements of the earnings and capital method in lieu of preparing a tax basis balance sheet.² These modifications are expected to minimize the compliance burden of transitioning from the 1991 proposed regulations to the final regulations. Under the final regulations, if a current rate election is in effect, OFCNV is computed by determining the aggregate basis of the QBU's assets, net of the QBU's liabilities, in the functional currency of the section 987 QBU ("QBU net value") and translating the QBU net value into the owner's functional currency at the year-end spot rate. *See* § 1.987-4(e)(2)(i) and (ii). The final regulations provide that QBU net value can be computed without a tax basis balance sheet using the formula provided in § 1.987-4(e)(2)(iii).

The formula provided in § 1.987-4(e)(2)(iii) is modeled on the formula used to track the equity pool under the 1991 proposed regulations, with certain modifications. Under this formula, the QBU net value on the last day of the taxable year is equal to the QBU net value at the end of the preceding taxable year, adjusted by transfers of assets and liabilities between the section 987 QBU and its owner and by income or loss of the section 987 QBU (each determined in the section 987 QBU's functional currency). If a taxpayer determines QBU net value under § 1.987-4(e)(2)(iii), the taxpayer must retain the information used to determine QBU net value for each taxable year in lieu of retaining adjusted balance sheets. *See* § 1.987-9(b)(2).

2. Cumulative Translation Adjustment

Comments requested that taxpayers be permitted to use the cumulative

translation adjustment ("CTA") determined under U.S. generally accepted accounting principles ("U.S. GAAP") to compute their unrecognized section 987 gain or loss. Alternatively, some comments recommended that taxpayers should be allowed to use the CTA for this purpose only with respect to small QBUs and subject to certain tax adjustments. One comment suggested that section 987 gain or loss with respect to small QBUs should be recognized when the CTA is included in income from continuing operations under U.S. GAAP.

The final regulations do not permit taxpayers to use the CTA to determine their net unrecognized section 987 gain or loss. As explained in the preamble to the 2023 proposed regulations, section 987(3) requires currency gain or loss to be recognized at the time of a remittance, rather than when the CTA is included in income for U.S. GAAP purposes. 88 FR 78141. Moreover, the Treasury Department and the IRS have determined that significant differences may arise between the computation of the CTA for financial accounting purposes and the determination of unrecognized section 987 gain or loss under § 1.987-4(d). For example, the CTA is unlikely to reflect the correct amount of currency gain or loss for tax purposes because of book-to-tax differences in the basis of assets or because certain items are disregarded for tax purposes but regarded for financial accounting purposes. If the comment's recommended approach were adopted, complex rules would be needed to adjust the CTA amount in order to derive the correct amount to be recognized for tax purposes.

3. Simplified Accounting for Disregarded Transactions

A comment recommended that taxpayers that make a current rate election should be permitted to determine unrecognized section 987 gain or loss for the taxable year by applying only two steps: step 1 (determining the change in OFCNV) and step 10 (reducing the amount determined in step 1 by the change in QBU net value, translated into the owner's functional currency at the yearly average exchange rate). The recommended rule would have the effect of accounting for all transfers between the owner and the section 987 QBU (which would otherwise be accounted for under steps 2 through 5) as part of step 10; consequently, the net amount of all transfers would be translated at the yearly average exchange rate. The comment posited that this approach would simplify the

computations for taxpayers with a high volume of disregarded intercompany transactions.

The final regulations retain the requirement to apply steps 2 through 5 when a current rate election is in effect. Under these steps, transfers of marked assets and liabilities between a section 987 QBU and its owner generally are translated at the spot rate applicable on the date of transfer. Because the applicable spot rate may differ significantly from the yearly average exchange rate, it would not be appropriate to account for all transfers between a section 987 QBU and its owner by translating them at the yearly average exchange rate under step 10. The Treasury Department and the IRS continue to study possible simplifications of § 1.987-4 relating to disregarded transactions between a section 987 QBU and its owner, including whether, in certain circumstances, unrecognized section 987 gain or loss for a taxable year could be computed using only steps 1 and 10. *See* § 1.987-2(f) of the 2024 proposed regulations for proposed rules containing an election under which certain disregarded transactions between a section 987 QBU and its owner would not be taken into account in computing unrecognized section 987 gain or loss.

B. Hedging Transactions

1. Comment on Matching Source and Character of Section 988 Gain or Loss From a Hedging Transaction With the Source and Character of Section 987 Gain or Loss

A comment recommended adoption of a hedging rule under which a taxpayer that hedges exchange rate risk with respect to its net investment in a section 987 QBU could match the source and character of the section 988 gain or loss arising from the hedging transaction with that of the section 987 gain or loss attributable to the hedged section 987 QBU. Alternatively, the comment suggested that the hedging transaction could be integrated with the section 987 QBU, such that section 988 gain or loss with respect to the hedging transaction would directly offset the section 987 QBU's unrecognized section 987 gain or loss. The comment asserted that implementing either of these recommended rules would mitigate the potential for adverse consequences (or windfalls) under section 987 when the owner's foreign currency exposure is economically hedged. The comment noted that these rules would be particularly beneficial for taxpayers that make a current rate election and an

² Taxpayers would still need to track the gross assets of a section 987 QBU for other purposes, including the denominator of the remittance proportion under § 1.987-5.

annual recognition election (and thus recognize section 987 gain or loss whether or not there is a remittance).

2. Treatment of Section 987 Hedging Transactions Under the Final Regulations

The Treasury Department and the IRS agree with the comment that it would be appropriate to permit symmetrical treatment of currency gain or loss with respect to a net investment hedge and the hedged section 987 QBU.³ Accordingly, § 1.987–14 of the final regulations provides new rules that apply to certain identified hedging transactions entered into by the owner of a section 987 QBU (“section 987 hedging transactions”).

Under § 1.987–14(d), section 988 gain or loss that would otherwise be recognized on a section 987 hedging transaction (“hedging gain or loss”) is instead taken into account in adjusting the owner’s unrecognized section 987 gain or loss for the taxable year (as determined under § 1.987–4(d)). For example, if the owner has unrecognized section 987 gain for the taxable year under § 1.987–4(d), the owner’s hedging loss reduces the unrecognized section 987 gain. However, hedging loss cannot reduce unrecognized section 987 gain for the taxable year below zero, and hedging gain cannot reduce unrecognized section 987 loss for the taxable year below zero. This limitation ensures that hedging gain or loss in excess of the currency exposure generated by the section 987 QBU for the taxable year is not taken into account under section 987.

3. Requirements To Qualify as a Section 987 Hedging Transaction

A section 987 hedging transaction generally is defined as a financial instrument (a “hedge”) entered into by the owner of a section 987 QBU for the purpose of managing exchange rate risk with respect to the owner’s net investment in the section 987 QBU as part of the normal course of the owner’s trade or business. The hedge may be entered into with an unrelated counterparty or with a related person. For example, a CFC that owns a section 987 QBU may enter into a hedge with

its U.S. parent, which has entered into a similar, offsetting, transaction with a third party.

Several requirements must be met in order for a hedge to qualify as a section 987 hedging transaction. First, the hedge must be identified as a section 987 hedging transaction with respect to the hedged QBU on or before the day the owner enters into the hedge. *See* § 1.987–14(b)(2)(i) and (c). A hedge cannot be identified as a section 987 hedging transaction with respect to more than one section 987 QBU.

However, if a grouping election is in effect under § 1.987–1(b)(3)(ii), all section 987 QBUs that have the same functional currency will be treated as a single section 987 QBU. The final regulations also provide a special rule for cases in which a taxpayer fails to properly identify a hedge due to inadvertent error. *See* § 1.987–14(c)(2).

Second, a current rate election must be in effect for the taxable year. *See* § 1.987–14(b)(2)(ii). In the absence of a current rate election, gain or loss on a net investment hedge is unlikely to be comparable in amount to the owner’s unrecognized section 987 gain or loss, and thus the rules of § 1.987–14 would not serve their intended function.

Third, the owner (and any members of the same controlled group that are parties to the hedge) must account for section 988 gain or loss with respect to the hedge under a mark-to-market method of accounting (for example, under section 1256 or in reliance on proposed § 1.988–7). *See* § 1.987–14(b)(2)(iii). As a result of this requirement, foreign currency gain or loss on the hedge will be taken into account in the taxable year in which the related currency gain or loss is determined under § 1.987–4(d)).

Fourth, under U.S. GAAP, foreign currency gain or loss on the hedge must be properly accounted for as a cumulative foreign currency translation adjustment to shareholders’ equity. *See* § 1.987–14(b)(2)(iv). This requirement helps to ensure that the hedge is economically related to the owner’s net investment in the section 987 QBU.

Fifth, the hedge must be entered into by the owner of the section 987 QBU, and not by a section 987 QBU of the owner (that is, the hedge cannot itself be an asset attributable to a section 987 QBU). *See* § 1.987–14(b)(2)(v).

Finally, an anti-abuse rule provides that a hedge does not qualify as a section 987 hedging transaction if the hedge or a related transaction is entered into with a principal purpose of converting section 987 gain or loss into section 988 gain or loss. *See* § 1.987–14(b)(3). For example, a taxpayer that

owns a section 987 QBU might enter into a hedging transaction with a related party without hedging the related party’s resulting exchange rate risk (effectively shifting the exchange rate risk without reducing the group’s overall foreign currency exposure) for the purpose of taking the related foreign currency gain or loss into account under section 988 (rather than section 987). Under the anti-abuse rule, the net investment hedge would not be treated as a section 987 hedging transaction.

4. Consolidated Groups

With regard to consolidated groups (as defined in § 1.1502–1(h)), § 1.987–14(b)(2)(v) of the final regulations requires that the same corporation be the owner of the QBU and enter into the section 987 hedging transaction with respect to that QBU (similar requirements apply when a member of a consolidated group engages in a section 988(d) hedging transaction under § 1.988–5(a)(5)(v) or (b)(2)(i)(F)). The Treasury Department and the IRS continue to study whether it would be possible to treat consolidated group members as a single corporation for purposes of § 1.987–14 and the section 988(d) hedging transaction rules without inappropriately shifting income among members of the group. *See also* TD 8400, 57 FR 9172, 9176 (soliciting comments on whether to permit the rules of § 1.988–5 to be applied by treating consolidated group members as a single corporation).

VI. Comments and Changes to Proposed § 1.987–5: Recognition of Section 987 Gain or Loss

Proposed § 1.987–5 provides rules for determining the amount of section 987 gain or loss recognized by the owner of a section 987 QBU.

Under proposed § 1.987–5(a), when a section 987 QBU makes a remittance, the owner recognizes section 987 gain or loss. In general, the amount recognized equals the section 987 QBU’s net unrecognized section 987 gain or loss multiplied by the owner’s remittance proportion. The remittance proportion is determined in the owner’s functional currency; it is equal to the amount of the remittance for the taxable year, divided by the aggregate basis of the section 987 QBU’s gross assets reflected on its year-end balance sheet (without reduction for the remittance). Proposed § 1.987–5(b). For a taxable year, the amount of a remittance equals the excess of (i) the aggregate of all amounts transferred from the section 987 QBU to the owner during the taxable year; over (ii) the aggregate of all amounts transferred from the owner to the section 987 QBU

³ The Treasury Department and the IRS previously published proposed regulations in the *Federal Register* on December 19, 2017 (82 FR 60135), which contained proposed rules relating to the treatment of a net investment hedge for purposes of the business needs exception to the definition of foreign personal holding company income under section 954(c)(1)(D) and § 1.954–2(g)(2)(ii). Those proposed regulations would apply only for purposes of the business needs exception and do not address the potential for mismatches in other contexts.

during the taxable year (each determined in the owner's functional currency). Proposed § 1.987–5(c).

A comment noted that, for taxpayers with a high volume of disregarded intercompany transactions, it can be difficult to track the amount of each transfer between the section 987 QBU and its owner and to translate the transfer into the owner's functional currency at the appropriate exchange rate. The comment recommended that the amount of a remittance should be deemed to be equal to the change in the QBU's net value (if negative) for the taxable year.

Despite compliance and administrative burdens that may result in certain cases from tracking disregarded transfers for purposes of determining the amount of a remittance, it would not be appropriate to determine the remittance amount based solely on the negative change in net value of a section 987 QBU. Such an approach would not properly account for distributions out of a section 987 QBU's current year earnings. For example, if a section 987 QBU distributed an amount exactly equal to its current year earnings, there would be no change in the QBU's net value (and thus, no remittance) under the comment's recommended approach, even if the QBU made a substantial distribution. Section 987(3) and its legislative history indicate that Congress intended for gain or loss to be recognized on any remittance from a section 987 QBU, without regard to whether the remittance is sourced from current year earnings, prior year earnings, or capital contributions.

Nonetheless, the final regulations provide two modifications that are intended to reduce the burden of tracking disregarded transfers for purposes of § 1.987–5 while preserving consistency with the text and purpose of section 987. First, the final regulations provide an alternative formula for computing the annual remittance that is based on the comment's recommended approach (and does not require tracking of individual transfers) but contains an adjustment to account for remittances out of current-year income. Under this formula, the remittance amount is equal to the negative change in net value of the section 987 QBU (determined in the QBU's functional currency), adjusted for income and loss of the section 987 QBU. See § 1.987–5(c)(2). Mathematically, this formula will produce an amount that is equal to the aggregate net transfer from the section 987 QBU to its owner for the taxable year.

Second, § 1.987–5(b) and (c) provide that the numerator and denominator of

the remittance proportion (that is, the amount of the remittance and the section 987 QBU's gross assets) are determined in the section 987 QBU's functional currency, rather than the owner's functional currency. As a result, it is not necessary to separately translate each transfer for purposes of determining the annual remittance.

VII. Comments and Changes to Proposed § 1.987–6: Character and Source of Section 987 Gain or Loss

A. Determining the Character and Source of Section 987 Gain or Loss

1. In General

Under proposed § 1.987–6, section 987 gain or loss is assigned to the statutory and residual groupings in two steps: an initial assignment under proposed § 1.987–6(b)(2)(i), followed by a reassignment described in proposed § 1.987–6(b)(2)(ii). The initial assignment is made using the asset method under §§ 1.861–9(g) and 1.861–9T(g). It is made after the application of the income attribution rules of § 1.904–4(f)(2)(vi) or § 1.951A–2(c)(7), but before expenses are allocated and apportioned to gross income and before the application of provisions that require a net income computation. Section 987 gain or loss may be reassigned if required after the application of provisions that require a net income computation. For example, if an item of section 987 gain is initially assigned to tentative tested income, it will be reassigned to tested income or residual income depending on whether the taxpayer has made the GILTI high-tax exclusion election and, if so, whether the item (described in proposed § 1.987–6(b)(2)(iii)) is subject to a high rate of tax.

2. Asset Method

The asset method under §§ 1.861–9 and 1.861–9T is intended to serve as an administrable proxy for a section 987 QBU's historical earnings, in line with the statutory requirement of section 987(3)(B) (which provides that section 987 gain or loss is sourced by reference to the source of the income giving rise to post-1986 accumulated earnings). As explained in the preamble to the 2016 final regulations, it would be complex and burdensome to source and characterize section 987 gain or loss with direct reference to post-1986 accumulated earnings, and the gross assets of a section 987 QBU provide a reasonable proxy for historical earnings that is relatively easy to administer. 81 FR 88814.

A comment recommended that CFCs which apportion interest expense using

the modified gross income method be permitted to use the same method to determine the character and source of section 987 gain or loss (rather than using the asset method under §§ 1.861–9(g) and 1.861–9T(g)). According to the comment, the asset method may not accurately reflect the income earned by the CFC for the taxable year, and section 987 losses often could be allocated to a subpart F income group in excess of the income recognized in that group for the taxable year. The comment noted that the use of the modified gross income method would be more administrable and would more readily allow section 987 losses to be used against gross income recognized in the current year, since the source and character of the section 987 loss would be determined by reference to the section 987 QBU's gross income for the current year.

The final regulations do not permit CFCs to use the modified gross income method to source and characterize section 987 gain or loss because the source and character of a section 987 QBU's gross income may vary significantly from year to year, including by reason of extraordinary events or as a result of tax planning. Accordingly, the gross income earned in a single year is not a sufficiently reliable proxy for historical earnings for purposes of section 987(3)(B).

3. Timing of Source and Character Determination

The 2023 proposed regulations provide that the initial assignment of section 987 gain or loss would generally be made in the taxable year in which the section 987 gain or loss is treated as recognized, deferred, or suspended. Proposed § 1.987–6(b)(1).

Comments requested that the character and source of suspended section 987 loss and deferred section 987 gain or loss be determined in the year in which it is recognized, rather than in the year in which it becomes suspended or deferred. The comments noted that the proposed rules would require extensive tracking of the source and character of section 987 gain or loss in multiple categories over multiple years. Comments also posited that the potential for distortion due to changes in the basis of a QBU's assets or shifts in the character of its income would be present whether the section 987 gain or loss is characterized in the taxable year in which it becomes suspended or deferred or in the taxable year in which it is recognized.

The final regulations retain the rules of proposed § 1.987–6(b)(1)(ii) and (iii), under which suspended section 987 loss and deferred section 987 gain or loss are

characterized in the year of suspension and deferral, respectively, for several reasons.

First, making an initial assignment in the taxable year of deferral or suspension provides parity in the timing of the characterization of gains and losses (that is, both gains and losses are characterized in the year of a remittance or termination).

Second, this rule is expected to produce source and character determinations that more closely align with the historical income of the section 987 QBU during the period in which the relevant section 987 gain or loss arose. Making an initial assignment in the taxable year of deferral or suspension means that source and character are determined by reference to the assets of the section 987 QBU

contemporaneously with the remittance or termination, while the affected assets are still taken into account for purposes of applying the asset method under §§ 1.861–9 and 1.861–9T. By contrast, waiting until the year of recognition would require deferred section 987 gain or loss and (in some cases) suspended section 987 loss to be characterized after the section 987 QBU has been terminated and its assets have been transferred to a related party, which could result in substantial distortions.

Third, the timing rule of § 1.987–6(b)(1)(ii) is needed to facilitate the separate application of the loss-to-the-extent-of-gain rule under § 1.987–11(e) to section 987 gain or loss in each recognition grouping. As explained in part X.B.3 of this Summary of Comments and Explanation of Revisions, in order to prevent taxpayers from avoiding the loss limitation through the selective recognition of section 987 gains that are subject to a low rate of tax (or are not subject to U.S. tax), § 1.987–11(e) provides that suspended section 987 loss in a recognition grouping is not recognized until section 987 gain in the same recognition grouping is recognized. For this rule to achieve its policy objective, suspended section 987 loss must be sourced and characterized before determining whether it can be recognized under § 1.987–11(e). If suspended section 987 loss were not characterized until the year of recognition, there would be no administrable way to identify suspended section 987 loss in the relevant recognition grouping for purposes of § 1.987–11(e) because the source and character of the suspended section 987 loss would not yet have been determined.

Finally, in response to comments regarding compliance burden generally,

the final regulations include a number of new rules intended to simplify the tracking of suspended section 987 loss or deferred section 987 gain or loss. For instance, the new de minimis rule (described in part X.A.1 of this Summary of Comments and Explanation of Revisions) is expected to reduce the burden of tracking suspended section 987 loss because section 987 loss will be suspended only if it exceeds the de minimis threshold (the lesser of \$3 million or two percent of gross income). See § 1.987–11(c)(2). In addition, taxpayers that make the annual recognition election generally would not be subject to the deferral and loss suspension rules (and thus would not need to track deferred section 987 gain or loss or suspended section 987 loss). The lookback rule (described in part X.B.1 of this Summary of Comments and Explanation of Revisions) will permit suspended section 987 loss to be recognized in the year of a remittance to the extent of gain recognized during the lookback period, which will limit the amount of suspended section 987 loss carried forward to future years. Additionally, the new rules relating to the characterization of section 987 gain or loss for purposes of subpart F (described in part VII.B of this Summary of Comments and Explanation of Revisions) provide taxpayers more flexibility in characterizing their section 987 gain and loss relating to subpart F income groups, including an election that will limit the number of subpart F income groups for which tracking is required.

B. Characterization of Section 987 Gain or Loss for Purposes of Subpart F

1. In General

Under proposed § 1.987–6(b)(2)(i)(C), section 987 gain or loss assigned to a subpart F income group is treated as foreign currency gain or loss attributable to section 988 transactions not directly related to the business needs of the CFC for purposes of section 954(c)(1)(D).

Some comments recommended that, for subpart F purposes, section 987 gain or loss should instead be assigned to the same subpart F income groups as the income generated by the section 987 QBU's assets. The comments noted that the recommended rule would better align the characterization of section 987 gain or loss with the underlying assets and income of the section 987 QBU and would permit broader utilization of section 987 loss because the loss could be netted against income in the same subpart F income groups. One comment asserted that the recommended rule would be more consistent with section

987(3)(B), which requires section 987 gain or loss to be sourced by reference to the source of the income giving rise to post-1986 accumulated earnings.

Other comments stated that section 987 gain or loss should not be treated as foreign personal holding company income described in section 954(c)(1)(D) because section 954(c)(1)(D) refers to foreign currency gains or losses under section 988 and makes no reference to gain or loss recognized under section 987(3). One comment questioned whether section 987 gain or loss should be assigned to any subpart F income group because section 954 does not explicitly identify section 987 gain as a category of subpart F income.

Another comment requested that, if proposed § 1.987–6(b)(2)(i)(C) is retained for taxpayers applying the default rules, a different rule should be provided for taxpayers that make a current rate election (under which all assets and liabilities of a section 987 QBU give rise to currency gain or loss). A comment also recommended that, if proposed § 1.987–6(b)(2)(i)(C) is retained, the final regulations should clarify that, for taxpayers predominantly engaged in the active conduct of a banking, insurance, financing, or similar business, section 987 gain or loss that is assigned to a subpart F income group is treated as financial services income within the meaning of section 904(d)(2)(C).

Other comments requested that, if section 987 gain or loss is treated as gain or loss from section 988 transactions not directly related to the business needs of the CFC, taxpayers should be permitted to use the elections available under § 1.954–2(g)(3) (characterizing section 988 gain or loss that arises from a specific category of subpart F income as gain or loss in that category) and § 1.954–2(g)(4) (treating all section 988 gain or loss as foreign personal holding company income). One comment recommended that, for purposes of the election under § 1.954–2(g)(3), section 987 gain or loss should be allocated to categories of foreign base company income on a proportionate basis without requiring direct tracing of section 987 gain or loss to specific transactions or assets.

The final regulations retain the approach in the 2023 proposed regulations and treat section 987 gain or loss as subpart F income to the extent that the assets of the section 987 QBU generate subpart F income under the asset method of §§ 1.861–9(g) and 1.861–9T(g). See § 1.987–6(b)(2)(i)(A). However, the Treasury Department and the IRS agree with the comments that assigning section 987 gain or loss to the

same subpart F income groups as the income generated by the section 987 QBU's assets is most consistent with the principles of section 987(3)(B) and is therefore the most appropriate exercise of authority under sections 987(3) and 989(c). Accordingly, under the final regulations, the characterization of section 987 gain or loss is determined under the general rule of § 1.987–6 using the asset method of §§ 1.861–9(g) and 1.861–9T(g), including by assigning section 987 gain or loss to subpart F income groups. Thus, for example, if a QBU's assets generate foreign base company sales income, the section 987 gain or loss will be characterized as foreign base company sales income.

The Treasury Department and the IRS do not agree with the suggestion that section 987 gain or loss cannot give rise to subpart F income merely because section 954 does not explicitly identify section 987 gain as a separate category of subpart F income. Section 987(3) requires “proper adjustments (as prescribed by the Secretary)” to taxable income of the owner of a section 987 QBU. Further regulatory authority is provided in section 989(c). The adjustments required under section 987(3) include sourcing gain or loss recognized on a remittance by reference to the QBU's historical earnings under section 987(3)(B). This sourcing rule serves to characterize the adjustments to income under section 987(3) in the same way as the QBU's underlying income. Similarly, when a QBU's income is taken into account in determining the owner's subpart F income, proper adjustments must necessarily include adjustments to that type of income. Therefore, section 987 gain or loss must be characterized as foreign personal holding company income or other types of income described in section 952(a), in appropriate circumstances, to effectuate the intent of Congress reflected in the broader statutory scheme.

2. Election To Treat Certain Section 987 Gain or Loss as Foreign Currency Gain or Loss Attributable to Section 988 Transactions

In the case of section 987 gain or loss that would otherwise be characterized as passive foreign personal holding company income, the final regulations provide an election to treat the section 987 gain or loss as foreign currency gain or loss of the CFC-owner that is attributable to section 988 transactions not directly related to the business needs of the CFC (the “section 988 characterization election”). See § 1.987–6(b)(2)(i)(C)(1). This election is intended to benefit taxpayers because it would generally allow section 987 gains and

losses assigned to passive foreign personal holding company income groups, which would otherwise be treated as separate items (or as allocable to separate items) of passive foreign personal holding company income under the rules in § 1.954–1(c)(1)(iii)(B), to be treated as part of (or allocable to) a single item of income. This would generally facilitate some netting of the CFC-owner's section 987 gains and losses (because they would be assigned to the same item of income) and would also generally permit a CFC-owner to net its foreign currency gains and losses from section 988 transactions with the section 987 gain or loss from its QBUs (to the extent both comprise passive foreign personal holding company income). Similarly, the section 988 characterization election should, in many cases, reduce the number of recognition groupings under § 1.987–11(f), thereby simplifying the application of the loss-to-the-extent-of-gain rule and minimizing the tracking burden with respect to any suspended losses.

Section 987 gain or loss subject to the section 988 characterization election is not eligible for the business needs exception under § 1.954–2(g)(2) because this election applies only to section 987 gain or loss that would otherwise be characterized by reference to assets that give rise to passive foreign personal holding company income. The business needs exception is available only for foreign currency gain or loss arising from a transaction or property that does not give rise to subpart F income (which includes foreign personal holding company income). See § 1.954–1(g)(2)(ii)(B)(1)(ii).

Similarly, section 987 gain or loss subject to the section 988 characterization election is not eligible for the election in § 1.954–2(g)(3) (election to characterize foreign currency gain or loss that arises from a specific category of subpart F income as gain or loss in that category). The § 1.954–2(g)(3) election applies only to gain or loss that is related to income categories described in the foreign base company income groups of § 1.954–1(c)(1)(iii)(A)(1) or (2) or the other subpart F income categories described in section 952(a); it does not apply to gain or loss related to passive foreign personal holding company income.⁴ By contrast, the section 988

characterization election applies only to section 987 gain or loss that would otherwise be characterized by reference to assets that give rise to passive foreign personal holding company income. Thus, the two elections are mutually exclusive by their terms.

Finally, section 987 gain or loss subject to the section 988 characterization election is not eligible for the election in § 1.954–2(g)(4) (election to treat all foreign currency gains or losses as foreign personal holding company income). Extending the § 1.954–2(g)(4) election to section 987 gain or loss could permit inappropriate use of section 987 losses and would be inconsistent with the limited purpose of the section 988 characterization election. Therefore, if an election is in effect under § 1.954–2(g)(3) or (4), the foreign currency gain or loss to which the election applies is simply determined without regard to the section 987 gain or loss treated as foreign currency gain or loss attributable to a section 988 transaction by reason of the section 988 characterization election.

C. GILTI High-Tax Exclusion

Under the 2023 proposed regulations, for purposes of applying the high-tax exclusion in § 1.951A–2(c)(7) (the “GILTI HTE”), all section 987 gain and loss in a tentative tested income group that is recognized by a CFC in a taxable year is treated as a single tentative tested income item that is treated as recognized by a tested unit separate from the CFC's other tested units. Proposed § 1.987–6(b)(2)(iii). As a result, section 987 gain or loss is not taken into account in applying the GILTI HTE with respect to the CFC's other items of tentative tested income. Instead, the GILTI HTE is applied separately to section 987 gain and loss and, as a result, section 987 gain or loss generally will not be eligible for the GILTI HTE unless the CFC is subject to foreign tax on currency gain recognized with respect to its interest in the QBU under the applicable foreign tax rules. See proposed § 1.987–6(b)(3).

Some comments noted that these rules would preclude the application of the GILTI HTE with respect to section 987 gain of a CFC even if the CFC's section 987 QBUs are operating in jurisdictions subject to a high foreign tax rate. Another comment noted that the proposed rules would treat section 987 gain or loss differently from currency gain or loss recognized under section 988 (for example, section 988 gain or loss on a net investment hedge with respect to the section 987 QBU) and would make it difficult to project a

⁴ While § 1.954–1(c)(1)(iii)(A)(1) includes categories of foreign personal holding company income, it expressly excludes passive foreign personal holding company income, which is described in § 1.954–1(c)(1)(iii)(B). Therefore, the two elections apply to mutually exclusive income groups.

taxpayer's effective tax rate due to the unpredictability of exchange rate fluctuations. This comment recommended that proposed § 1.987–6(b)(2)(iii) be modified to provide that (i) section 987 gain and loss is taken into account in determining the effective tax rate under § 1.951A–2(c)(7)(vi) and (ii) section 987 gain or loss associated with highly taxed tested units is excluded from the computation of tested income.

The final regulations retain the rule that section 987 gain or loss is treated as a single tentative tested income item that is separate from the CFC's other tested units. *See* § 1.987–6(b)(2)(iii). Although section 987 gain or loss is characterized by reference to the historical earnings of the section 987 QBU, which may correspond to one or more tested units, it is not equivalent to current year income or loss attributable to a tested unit. Section 987 gain or loss is not properly attributable to the tested unit that corresponds to the section 987 QBU or to the CFC tested unit, because in most cases neither the tested unit's country of residence nor the CFC's country of residence will take the section 987 gain or loss into account in determining foreign gross income. Therefore, attributing section 987 gain or loss to either tested unit would tend to be distortive and generally would not further the goals of the high-tax exclusion.⁵

In addition, treating section 987 gain or loss as a single item of tentative tested income, as if it were attributable to a separate tested unit (distinct from the section 987 QBU), is consistent with the determination that a branch comprises a separate tested unit, even if it is not a tax resident of the foreign country in which it is located, if the income of the branch is subject to an exclusion, exemption, or other similar relief (such as a preferential rate) in the CFC's country of tax residence. *See* § 1.951A–2(c)(7)(iv)(A)(3). Section 987 gain or loss is currency gain or loss of

the owner of the QBU, and these gains and losses are generally not subjected to residency-based taxation in either the country of the QBU or the country in which the CFC is a resident. Therefore, the section 987 gains and losses of the CFC are functionally equivalent to gain or loss of a branch that is not a tax resident in any country and whose income is not subject to residency-based taxation in the CFC's country of tax residence.

Accordingly, it is appropriate to test the effective rate of foreign tax on section 987 gains and losses as a separate item of tentative tested income. The alternative approach recommended by a comment (which would incorporate section 987 gain or loss in the tested units that correspond to the section 987 QBU) would distort the effective tax rate computation with respect to a CFC's other income because section 987 gain or loss typically is not subject to foreign tax. These distortions could be favorable or unfavorable to taxpayers, depending on the circumstances. Moreover, the comment's recommended approach would complicate the ordering rules and mechanics needed to apply the loss-to-the-extent-of-gain rule of § 1.987–11(e) with respect to section 987 gain or loss assigned to a tested income group, which would increase the administrative and compliance burden of the section 987 regulations.

The approach set forth in the proposed regulations is also most consistent with the policy underlying the determination of an appropriate "item" of income for purposes of applying the high-tax exception under section 954(b)(4) as is reflected in the legislative history to that section, which directs the Treasury Department and the IRS to allow reasonable groupings of items of income that are substantially taxed at the same rate in a single country. *See* H.R. Rept. No. 99–426, at 400–01 (1985) ("Although this rule applies separately with respect to each 'item of income' received by a [CFC], the committee expects that the Secretary will provide rules permitting reasonable groupings of items of income that bear substantially equal effective rates of tax in a given country. For example, all interest income received by a [CFC] from sources within its country of incorporation may reasonably be treated as a single item of income for purposes of this rule, if such interest is subject to uniform taxing rules in that country."). The Treasury Department and the IRS have determined that section 987 gains and losses are likely to be taxed at a different rate of tax than other income generally subject to tax either in the

country of the tested unit or in the country of residence of the CFC and therefore should reasonably be grouped and tested as a separate "item" of income for this purpose.

As noted in a comment, for purposes of the GILTI HTE, the final regulations treat section 987 gain or loss differently from section 988 gain or loss on a net investment hedge. However, the new hedging rule in § 1.987–14 will enable taxpayers to account for the hedge as an adjustment to unrecognized section 987 gain or loss, as described in part V.B of this Summary of Comments and Explanation of Revisions.

VIII. Comments and Changes to Proposed §§ 1.987–7A, 1.987–7B, and 1.987–7C—Partnerships

A. Partnership Rules Under the 2023 Proposed Regulations

The 2023 proposed regulations (and the 2016 final regulations) generally would apply aggregate theory to partnerships wholly owned by related persons ("section 987 aggregate partnerships"). *See* proposed § 1.987–7B. Under proposed § 1.987–1(b)(5)(ii), each partner in a section 987 aggregate partnership would be treated as an indirect owner of the partnership's eligible QBUs (and a section 987 aggregate partnership is not itself a QBU under section 989(a)). Thus, exchange gain or loss under section 987 would be measured from the perspective of the partners (rather than the partnership). The aggregate approach would serve to prevent a group of related parties from holding an eligible QBU through a partnership (rather than owning it directly) in order to change the section 987 treatment of the eligible QBU without meaningfully altering the group's economic position.

The 2023 proposed regulations would provide a different set of rules for partnerships that are not wholly owned by related partners. *See* proposed § 1.987–7A. For these partnerships, the 2023 proposed regulations would apply a hybrid approach to entity theory, under which unrecognized section 987 gain or loss of the partnership's eligible QBUs for a taxable year is determined at the partnership level and then allocated to the partners for purposes of computing the pool of net unrecognized section 987 gain or loss. Any section 987 gain or loss would be recognized and taken into account at the partner level.

The preamble to the 2023 proposed regulations notes that the Treasury Department and the IRS considered whether it would be appropriate to apply a hybrid approach to all

⁵ While the legislative history relating to the GILTI high-tax exclusion indicates that high-taxed income does not present base erosion concerns, the policy rationale underlying that view does not extend to excluding low-taxed income from GILTI merely because it may be earned by an entity that also earns high-taxed income. *See* S. Comm. on the Budget, Reconciliation Recommendations Pursuant to H. Con. Res. 71, S. Print. No. 115–20, at 371 (2017) ("The Committee believes that certain items of income earned by CFCs should be excluded from the GILTI [regime], either because they should be exempt from U.S. tax—as they are generally not the type of income that is the source of the base erosion concerns—or are already taxed currently by the United States. Items of income excluded from GILTI because they are exempt from U.S. tax under the bill include foreign oil and gas extraction income (which is generally immobile) and income subject to high levels of foreign tax.").

partnerships, regardless of whether the partners are related. 88 FR 78147 through 78148. The preamble explains that such an approach might reduce the complexity and compliance burden of the section 987 regulations, but that it could permit taxpayers to manipulate the application of section 987 by holding a section 987 QBU through a partnership rather than holding it directly. *Id.* at 78148.

The 2023 proposed regulations would not provide rules relating to a partner's application of section 987 with respect to a partnership that uses a different functional currency (which creates a separate layer of currency exposure). However, the preamble to the 2023 proposed regulations discusses alternative methodologies under which the partners could determine and recognize section 987 gain or loss with respect to their partnership interests. 88 FR 78148 through 78149.

B. Partnership Rules in the Final Regulations

1. In General

The Treasury Department and the IRS continue to study the appropriate treatment of partnerships for purposes of section 987 and, accordingly, the final regulations do not provide detailed rules concerning the determination of section 987 taxable income or loss and section 987 gain or loss in the case of a partnership. The final regulations also reserve on the treatment of a partnership as a QBU under section 989(a) and § 1.989(a)-1(b)(2)(i). *See* § 1.989(a)-1(b)(2)(i)(C).

Only one comment regarding partnerships was received in response to the 2023 proposed regulations. The portions of the comment that relate to partnership rules that are not included in the final regulations have not been adopted because they are outside the scope of these regulations. The Treasury Department and the IRS expect to address these issues in future guidance.

Pending future guidance, taxpayers must apply sections 987 and 989(a) with respect to partnerships using a reasonable method consistent with the statute. For example, if a domestic corporation owns an interest in a foreign partnership (which would use the euro as its functional currency if it is treated as a QBU under section 989(a)), and the partnership owns an eligible QBU that uses the Swiss franc as its functional currency, the domestic corporation may apply section 987 to the eligible QBU under an aggregate approach. Alternatively, under an entity approach, the partnership could be treated as a section 987 QBU of the domestic

corporation, and the eligible QBU could be treated as a section 987 QBU of the partnership. The domestic corporation could also apply a hybrid approach under the principles of the 2023 proposed regulations. However, taxpayers will not be considered to have applied a reasonable method unless they apply the same method consistently from year to year with respect to a particular partnership or eligible QBU. Members of a controlled group that are partners in the same partnership must apply the same method with respect to a particular partnership or eligible QBU, but unrelated partners are not subject to a consistency requirement. *See* § 1.987-7(b).

2. Application of the Final Regulations to Partnerships

Although section 987 applies to partnerships, only certain parts of the final regulations apply to partnerships. *See* § 1.987-7(b) and (c). In particular, the rules relating to suspended section 987 loss in §§ 1.987-11 and 1.987-13 apply to partnerships, and the deferral rules of § 1.987-12 continue to apply to partnerships, with certain modifications. *See* § 1.987-7(c)(2)(i) and (d). These rules are needed to prevent the selective recognition of losses. In addition, the final regulations provide that an annual recognition election and a section 988 mark-to-market election can be made with respect to a partnership (whether an aggregate or entity approach is applied). *See* § 1.987-7(c)(2)(ii) and (iii). These elections are expected to reduce the compliance burden of applying section 987 in the partnership context.

Similarly, the rules for determining the source and character of section 987 gain or loss under § 1.987-6 apply to partnerships, in order to facilitate application of the loss-to-the-extent-of-gain rule. *See* § 1.987-7(c)(2)(i). A comment suggested that special rules should apply to determine the source and character of section 987 gain or loss recognized in connection with the sale or redemption of a partnership interest under the principles of § 1.864(c)(8)-1. The final regulations do not adopt this approach because it would be inconsistent with section 987(3)(B) (under which section 987 gain or loss is sourced by reference to historical earnings) and could allow taxpayers to manipulate the source and character of section 987 gain or loss.

Because the section 987 regulations generally do not apply to partnerships, the general rules of the section 987 regulations must be adapted as necessary to apply § 1.987-7 and the

other applicable provisions to partnerships. *See* § 1.987-7(c)(3). The rules must also be applied in this manner to an S corporation, which is treated the same way as a partnership for purposes of the section 987 regulations. *See* § 1.987-7(f).

3. Loss Suspension Rule

Under the final regulations, the general loss suspension rule in § 1.987-11(c)(1) does not apply to partnerships. *See* § 1.987-7(d)(1)(i). Instead, section 987 loss generally will be suspended in the taxable year in which it would otherwise be recognized under the method used by the taxpayer to apply section 987 with respect to the partnership. *See* § 1.987-7(d)(1)(ii). The loss suspension rule of § 1.987-7(d)(1)(ii) applies to an eligible QBU that is directly owned by a partnership, regardless of whether an aggregate approach, an entity approach, or a hybrid approach is applied. *See* § 1.987-7(d)(1)(ii)(A). However, if a partnership is itself treated as a section 987 QBU of its partners under an entity approach, the loss suspension rule applies only if at least 95% of the capital and profits interests in the partnership are owned by related persons. *See* § 1.987-7(d)(1)(ii)(B). This limitation is intended to reduce the complexity and compliance burden of the section 987 regulations for partnerships owned by unrelated persons.

The final regulations provide several other exceptions to the loss suspension rule of § 1.987-7(d)(1)(ii). First, section 987 loss with respect to an eligible QBU owned by a partnership is not suspended if section 987 is consistently applied using a method under which section 987 gain or loss does not arise with respect to historic items (for example, a method that follows the principles of §§ 1.987-3 through 1.987-5, under which historic items are assigned a historic rate, such that their balance sheet value does not change in response to changes in the value of the section 987 QBU's functional currency). *See* § 1.987-7(d)(2)(i). Second, section 987 loss is not suspended if an annual recognition election is in effect. *See* § 1.987-7(d)(2)(ii). Finally, section 987 loss is not suspended if the de minimis rule in § 1.987-11(c)(2) applies (that is, if the amount of section 987 loss subject to suspension does not exceed the lesser of \$3 million or two percent of gross income, as described in part X.A.1 of this Summary of Comments and Explanation of Revisions). *See* § 1.987-7(d)(2)(iii). These rules generally align with the scope of the loss suspension rule in § 1.987-11(c)(1).

4. Adjustments to the Basis of a Partner's Interest in the Partnership

The proposed regulations would provide that a partner's basis in a partnership is adjusted when the partner recognizes section 987 gain or loss, defers section 987 gain or loss, or suspends section 987 loss attributable to the partnership. Proposed § 1.987-7A(e). This rule is intended to avoid duplication of section 987 gain or loss (for example, when the partnership interest is sold). The final regulations retain this rule for taxpayers that apply section 987 using a method that results in recognition, deferral, or suspension of section 987 gain or loss at the partner level. Under § 1.987-7(e), the partner's basis in its partnership interest is adjusted under the principles of section 705 as though the section 987 gain or loss was part of the partner's distributive share of partnership items. *See* § 1.987-7(e).

A commenter requested clarification concerning the interaction of this basis adjustment rule with section 704(d). Section 704(d)(1) provides that a partner's distributive share of partnership loss (including capital loss) shall be allowed only to the extent of the basis of that partner's interest in the partnership at the end of the partnership year in which such loss occurred. Section 704(d)(2) provides for the carryover of the excess of any loss over such basis to the next taxable year. To the extent that basis is available in the next taxable year, the partner is able to take the loss into account. Relatedly, the partner will decrease the adjusted basis in its partnership interest to the extent that any loss carryover is taken into account within the taxable year. *See* section 705(a)(2).

The final regulations clarify that the principles of section 704(d) are applied as though items of section 987 loss, deferred section 987 loss, or suspended section 987 loss were part of the partner's distributive share of partnership items. *See* § 1.987-7(e). The basis adjustment rule in § 1.987-7(e) is intended to replicate the basis adjustments that would occur if the relevant section 987 gain or loss was taken into account as part of the partner's distributive share of partnership income or loss (including the effects of section 704(d)).

5. Other Special Rules for Partnerships

The final regulations contain several other rules that facilitate the application of section 987 to partnerships. If a partner in a partnership is treated as the owner of a section 987 QBU directly owned by the partnership (for example,

under an aggregate approach), § 1.987-7(c)(3)(ii) provides a special rule that is used to determine the members of the owner's controlled group for purposes of §§ 1.987-12 and 1.987-13. Under this rule, any member of the partnership's controlled group is treated as a member of the partner's controlled group so long as the partner continues to be a partner in the partnership. Thus, for example, if the partnership contributes the section 987 QBU's assets to a wholly owned subsidiary of the partnership, the subsidiary will be treated as a member of the partner's controlled group and the contribution may be treated as a deferral event for purposes of § 1.987-12.

When a partnership is itself treated as a QBU of a partner that is subject to section 987, and the partnership is not engaged in any trade or business (for example, a partnership that functions as a holding company), the rules of § 1.987-13(b) through (d) do not apply. Those rules are designed to attribute suspended section 987 loss to a successor suspended loss QBU if the assets of a section 987 QBU continue to be used in the same trade or business by a member of the controlled group, and they trigger the recognition of suspended section 987 loss if the section 987 QBU terminates without a successor. However, when a QBU that has suspended section 987 loss is not engaged in any trade or business, the rules of § 1.987-13(b) through (d) would not result in the appropriate recognition of suspended section 987 loss and could be prone to manipulation. Accordingly, the suspended section 987 loss can be recognized only under the loss-to-the-extent-of-gain rule of § 1.987-11(e).

The transition rules in § 1.987-10 do not apply to partnerships. Instead, the applicable rules of the section 987 regulations take effect on the transition date with respect to section 987 gain or loss determined and recognized under the taxpayer's existing method. In addition, taxpayers may not apply the fresh start transition method with respect to a partnership. As explained in the preamble to the 2023 proposed regulations, the fresh start transition method is no longer available because that method results in the elimination of pretransition gain or loss, and (if it were available) it could be opportunistically used by taxpayers to eliminate their pretransition gain. 88 FR 78150 and 78156.

The final regulations also clarify that the rule in § 1.988-1(a)(10)(i), which provides that transactions between a taxpayer and its QBU generally are not section 988 transactions, applies only to disregarded transactions. Thus, a nonfunctional currency transaction

between a partner and a partnership could be treated as a section 988 transaction even though the partnership is treated as a QBU subject to section 987.

IX. Comments and Changes to Proposed § 1.987-10: Transition Rules

Proposed § 1.987-10 would provide transition rules for the first year in which the section 987 regulations are applicable. In particular, proposed § 1.987-10(e) would provide rules for determining and recognizing pretransition gain or loss with respect to each of a taxpayer's QBUs.

A. Computation of Pretransition Gain or Loss

1. Taxpayers That Applied Section 987 Using an Eligible Pretransition Method

Under the 2023 proposed regulations, the computation of pretransition gain or loss would differ depending on how the taxpayer applied section 987 before the transition date. If the taxpayer applied section 987 to a section 987 QBU using an eligible pretransition method (as described in part IX.B of this Summary of Comments and Explanation of Revisions), the owner would use that method to compute pretransition gain or loss. Proposed § 1.987-10(e)(2). The owner's pretransition gain or loss would be equal to the amount of section 987 gain or loss that it would have recognized under the eligible pretransition method if the QBU terminated on the day before the transition date, with certain adjustments. Proposed § 1.987-10(e)(2)(i)(A).

Under proposed § 1.987-10(e)(2)(i)(B), the amount of pretransition gain or loss would be increased or reduced by the owner functional currency net value adjustment ("OFCNV adjustment"), which reflects any change to the basis of the section 987 QBU's assets (net of liabilities) that occurs as a result of the transition. For example, if a taxpayer applied an earnings only method under which currency gain or loss on the QBU's capital was not recognized at the time of a remittance but was separately tracked and accounted for in determining the basis of distributed assets, the currency gain or loss on capital would be accounted for as part of the OFCNV adjustment.

Two comments were received relating to the OFCNV adjustment. One comment requested that taxpayers be permitted to use the CTA prepared for financial accounting purposes rather than making the OFCNV adjustment. The comment asserted that taxpayers applying an earnings only method might

not have the information necessary to compute the OFCNV adjustment.

The final regulations do not permit taxpayers to use the CTA in lieu of making the OFCNV adjustment. As explained in part V.A.2 of this Summary of Comments and Explanation of Revisions, the CTA amount may be substantially different from the amount of section 987 gain or loss that is properly taken into account for tax purposes. Moreover, it should not be unduly burdensome for a taxpayer to compute the OFCNV adjustment because the relevant information is already needed to apply the taxpayer's existing pretransition method.

Another comment recommended that, in the case of taxpayers applying an earnings only method, currency gain or loss with respect to the QBU's capital should not be taken into account in determining pretransition gain or loss (which is ultimately recognized as section 987 gain or loss after the transition date). The comment noted that taxpayers may have adopted the earnings only method to reduce the size of their section 987 gain or loss pools and that the earnings only method serves to mitigate the potential for selective recognition of large section 987 losses. Therefore, the comment requested that the OFCNV adjustment instead be taken into account as an adjustment to asset basis.

The Treasury Department and the IRS agree that, for taxpayers applying an earnings only method, accounting for the OFCNV adjustment in determining the basis of a section 987 QBU's assets would produce a reasonable result that is consistent with these taxpayers' pretransition method. Accordingly, under the final regulations, if a taxpayer applied an earnings only method before the transition date and does not make a current rate election for the taxable year beginning on the transition date, the historic rate assigned to the section 987 QBU's historic assets (other than inventory) is equal to the exchange rate that would have been used to translate those assets if they had been distributed to the owner on the day before the transition date (the "pretransition translation rate"). See § 1.987–10(d)(3)(ii). As a result, no OFCNV adjustment is made with respect to those assets, but currency gain or loss related to those assets will be accounted for as the assets are sold or depreciated under § 1.987–3. For taxpayers that make a current rate election (and thus will not take historic rates into account under § 1.987–3), currency gain or loss on the QBU's capital must be accounted for in determining pretransition gain or

loss. See § 1.987–10(d)(3)(i) and (e)(2)(i)(B).

A comment raised a question as to whether the delegation of regulatory authority under section 987(3) is self-executing. The comment suggested that, if section 987(3) is not self-executing, then it might not be appropriate to attribute pretransition gain or loss to taxpayers that have not accounted for section 987 gain or loss before the transition date. The Treasury Department and the IRS have concluded that section 987(3) is self-executing because it provides a mandatory delegation under which the Secretary is directed to determine how (rather than whether) the owner of a section 987 QBU should make proper adjustments in computing its taxable income. See, e.g., *15 W 17th St. LLC v. Commissioner*, 147 T.C. 557 (2016) (articulating standard for determining whether a statute is self-executing in the absence of regulations); *Est. of Neumann v. Commissioner*, 106 T.C. 216 (1996) (holding delegation was self-executing because it related to how, rather than whether, the statute applied). Therefore, taxpayers currently are obligated to determine section 987 gain or loss in a reasonable manner and must account for pretransition gain or loss once the regulations become applicable.

2. Taxpayers That Did Not Apply Section 987 Using an Eligible Pretransition Method

Under proposed § 1.987–10(e)(3), taxpayers that did not apply an eligible pretransition method would be required to determine pretransition gain or loss by applying a simplified version of the computation described in § 1.987–4(d) to determine unrecognized section 987 gain or loss ("annual unrecognized section 987 gain or loss") for each taxable year since the section 987 QBU's inception. Proposed § 1.987–10(e)(3)(iii). Pretransition gain or loss would be reduced by any section 987 gain or loss recognized before the transition date. Proposed § 1.987–10(e)(3)(ii)(B).

Comments asserted that the method provided in proposed § 1.987–10(e)(3) could be burdensome to apply and difficult to administer. Some comments recommended that taxpayers should not be required to compute annual unrecognized section 987 gain or loss for each taxable year since the QBU's inception. Instead, the comments suggested that the final regulations provide a reasonable cutoff date before which pretransition gain or loss would not be computed. Another comment requested that taxpayers be permitted to determine pretransition gain or loss

using the earnings and capital method described in the 1991 proposed regulations, as this would avoid the need to prepare tax basis balance sheets. A further comment recommended adoption of a de minimis rule for taxpayers with minimal pretransition gain or loss.

The Treasury Department and the IRS agree that, when a QBU has been operating for a long period, computing annual unrecognized section 987 gain or loss for all taxable years since the QBU's inception could be burdensome. Accordingly, the final regulations provide a cutoff date of September 7, 2006, which is the date on which proposed section 987 regulations were published in the **Federal Register** (71 FR 52876) (the "2006 proposed regulations"). Under the final regulations, taxpayers that did not apply an eligible pretransition method must compute pretransition gain or loss only for taxable years beginning on or after September 7, 2006. The publication date of the 2006 proposed regulations is an appropriate cutoff date for this purpose because the 2006 proposed regulations contained transition rules that were conditioned on the application of section 987 using a reasonable method. See § 1.987–10(a)(2) of the 2006 proposed regulations.

The final regulations also provide a de minimis rule to reduce the compliance burden on small businesses that own section 987 QBUs.⁶ Under the de minimis rule, a qualifying taxpayer may elect to treat all QBUs that fall below the de minimis threshold as having no pretransition gain or loss. To qualify for the de minimis rule, the owner of a section 987 QBU must have gross receipts that fall below the threshold for the small business exception in section 163(j)(3) (that is, the owner must have gross receipts of \$25 million or less, indexed to inflation and averaged over the prior 3-year period). If this test is met, the de minimis rule applies to any section 987 QBU with gross assets of less than \$10 million (averaged over the same 3-year period and taking into account the assets of all section 987 QBUs in the same country that are owned by the same owner or a member of its controlled group).

The final regulations do not permit taxpayers to apply an earnings and capital method in lieu of computing annual unrecognized section 987 gain or loss under § 1.987–10(e)(3). However, as explained in part V.A.1 of this Summary

⁶ Although taxpayers that own section 987 QBUs generally are not small businesses, this rule is intended to limit the compliance burden for small businesses that may be affected.

of Comments and Explanation of Revisions, the rules for computing unrecognized section 987 gain or loss for a taxable year under § 1.987–4(d) have been modified so that they can be applied without the need for tax basis balance sheets. As a result, the method provided in § 1.987–10(e)(3) can similarly be applied without tax basis balance sheets (that is, by computing QBU net value using the formula provided in § 1.987–4(e)(2)(iii)).

B. Definition of an Eligible Pretransition Method

Under the 2023 proposed regulations, an eligible pretransition method would be defined to include a reasonable application of the earnings and capital method described in the 1991 proposed regulations, any other reasonable method that produces the same total amount of income as the earnings and capital method over the life of the owner, or an earnings only method that does not produce the same total amount of lifetime income as an earnings and capital method (subject to certain restrictions, including a consistency requirement). Proposed § 1.987–10(e)(4)(i) through (iii). The owner must have applied the eligible pretransition method with respect to each taxable year beginning before the transition date in which it was the owner of the section 987 QBU. Proposed § 1.987–10(e)(4). For this purpose, a method under which the owner of a section 987 QBU defers the recognition of section 987 gain or loss until the section 987 QBU is terminated, sold, or liquidated is not a reasonable method. Proposed § 1.987–10(e)(4)(iv).

Comments requested clarification concerning the definition of an eligible pretransition method. The comments noted that some taxpayers have applied the 1991 proposed regulations with modifications; for example, some taxpayers apply an annual netting convention to determine the amount of a remittance or treat a group of QBUs with the same functional currency as a single QBU. Other comments indicated that taxpayers may not account for frequently recurring intercompany transactions in computing their section 987 gain or loss.

One comment suggested that taxpayers should be treated as having applied an eligible pretransition method so long as they made a good faith effort to apply section 987 using a reasonable method. Another comment recommended that taxpayers that have consistently relied on their CTA account as an estimate of unrealized section 987 gain or loss should be considered to have applied an eligible pretransition method (and thus should be permitted

to use their CTA account to determine the amount of pretransition gain or loss).

Another comment suggested that a CFC that has consistently applied a reasonable method since the enactment of the Tax Cuts and Jobs Act (“TCJA”), Public Law 115–97, 131 Stat. 2054 (2017), should be treated as having applied an eligible pretransition method, even if the method was not applied in previous taxable years. In particular, the comment recommended that an owner that began applying an earnings only method described in proposed § 1.987–10(e)(4)(iii) after the TCJA was enacted should be deemed to meet the consistency requirement of proposed § 1.987–10(e)(4)(iii)(B).

In response to these comments, the final regulations clarify and expand the definition of an eligible pretransition method under § 1.987–10(e)(4). The definition is intended broadly to include any method that complies with the statutory requirements of section 987 in a reasonable manner.⁷

1. Errors Made in Applying a Pretransition Method and Certain Consistent Practices That Are Not Treated as Errors

The final regulations provide that a taxpayer is treated as applying an eligible pretransition method even if the taxpayer made an error in the application of its method or did not apply the method in all taxable years in which it was the owner of the section 987 QBU. § 1.987–10(e)(4)(iv). However, taxpayers are required to compute pretransition gain or loss under § 1.987–10(e)(2) as though the eligible pretransition method had been applied without error for all prior taxable years. Thus, for example, if a taxpayer made an error in applying its method for a prior year, the deemed termination amount under § 1.987–10(e)(2)(i)(A) is equal to the amount of section 987 gain or loss the taxpayer would have recognized on termination if it had not made the error and its section 987 QBU terminated on the day before the transition date.

If a taxpayer consistently used a reasonable convention to apply section 987 before the transition date, the taxpayer must use the same convention in determining pretransition gain or loss under § 1.987–10(e)(2). See § 1.987–10(e)(4)(v)(B)(1). Thus, unlike a taxpayer that made an error in applying its pretransition method, a taxpayer that

used a reasonable convention would not be required to recompute pretransition gain or loss without regard to the convention. Similarly, if a taxpayer had a consistent practice under which it did not account for frequently recurring disregarded transactions in determining the amount of section 987 gain or loss recognized upon a remittance, this practice is not treated as an error. See § 1.987–10(e)(4)(v)(B)(2). However, this rule does not apply unless the taxpayer reasonably accounted for the disregarded transactions in determining the amount of unrecognized section 987 gain or loss with respect to the section 987 QBU (for example, in the case of a taxpayer applying the 1991 proposed regulations, by adjusting the equity and basis pools to reflect the amount of each transfer).

2. Timing for Application of an Eligible Pretransition Method

The final regulations provide that a method of applying section 987 is not an eligible pretransition method unless it was applied on at least one tax return filed before November 9, 2023 (when the 2023 proposed regulations were filed with the **Federal Register**). See § 1.987–10(e)(4). Thus, a taxpayer that first adopted a reasonable method in the first taxable year after the TCJA was enacted would be treated as applying an eligible pretransition method, but a method adopted after November 9, 2023, would not qualify. Similarly, the final regulations modify the consistency requirement for the earnings only method under § 1.987–10(e)(4)(iii)(B) to require consistent application for all taxable years since the first taxable year in which the owner applied an eligible pretransition method. As a result, an owner that began applying the earnings only method after the TCJA was enacted (and did not previously apply a different eligible pretransition method) would meet this requirement.

3. Reliance on the CTA

Under the final regulations, a method that relies on the CTA determined for financial accounting purposes would not qualify as an eligible pretransition method; thus, taxpayers relying on CTA computations must determine pretransition gain or loss using the method provided in § 1.987–10(e)(3). As discussed in part V.A.2 of this Summary of Comments and Explanation of Revisions, because the amount of the CTA can be substantially different from the amount of section 987 gain or loss properly computed for tax purposes, reliance on the CTA could result in the recognition of significant amounts of artificial pretransition gain or loss.

⁷ In certain instances, a method that does not constitute a reasonable application of section 987 is treated as an eligible pretransition method in order to reduce the compliance burden of transitioning onto the section 987 regulations.

C. Recognition of Pretransition Gain or Loss

In general, under the proposed regulations, pretransition gain is treated as net unrecognized section 987 gain, while pretransition loss is treated as suspended section 987 loss. Proposed § 1.987–10(e)(5)(i)(A) and (B). This rule is intended to prevent taxpayers from selectively recognizing pretransition loss while deferring pretransition gain until the year of a remittance. Alternatively, taxpayers could elect to amortize pretransition gain or loss over a period of ten years beginning on the transition date. Proposed § 1.987–10(e)(5)(ii).

A comment recommended that pretransition loss should not be treated as suspended section 987 loss in the first taxable year in which the section 987 regulations apply. Instead, the comment recommended that pretransition loss should be treated as net unrecognized section 987 loss upon transition, which would later become suspended in the year of a remittance. The comment noted that this would create parity between pretransition loss and pretransition gain, which is treated as net unrecognized section 987 gain in the first taxable year in which the regulations apply.

Another comment recommended that, instead of determining pretransition gain or loss separately with respect to each QBU, the total amount of pretransition gain or loss in each category should be aggregated and netted among all QBUs of the same owner, with the net amounts reallocated to each QBU on a pro rata basis. In the case of a consolidated group or a group of related CFCs, the comment suggested further netting between all members of the consolidated group or group of related CFCs, respectively.

With respect to the amortization election under proposed § 1.987–10(e)(5)(ii), a comment suggested that taxpayers should be allowed to elect a shorter amortization period in which to recognize pretransition gain or loss (either four or five years), which would better align with certain taxpayers' internal forecasting and planning windows. A comment also requested clarification as to how the amortization election applies with respect to a terminating QBU (that is, a section 987 QBU that terminated after November 9, 2023, and before the taxable year in which the section 987 regulations are generally applicable).

The final regulations provide that, if a current rate election is in effect in the taxable year beginning on the transition date (and an annual recognition election

is not in effect), pretransition gain or loss is treated as net unrecognized section 987 gain or loss. Thus, pretransition losses are treated the same way as pretransition gains. However, if a current rate election is not in effect (or an annual recognition election is in effect) in the taxable year beginning on the transition date, pretransition loss is treated as suspended section 987 loss upon transition. This rule is necessary to prevent pretransition loss from being recognized without limitation.

The final regulations do not permit aggregation and netting of pretransition gain or loss within the same category. Absent an amortization election, the source and character of pretransition gains and losses generally will not be assigned in the taxable year beginning on the transition date, so it would not be possible to net gains and losses separately within each recognition grouping. In addition, aggregation and netting would make the transition rules more complicated and would increase the burden of administering these rules. Finally, taxpayers that make the amortization election can, as a practical matter, achieve the effect of netting pretransition gains and losses, because those gains and losses will be recognized over the same ten-year period.

The final regulations retain the ten-year amortization period under § 1.987–10(e)(5)(ii) and do not permit taxpayers to elect a shorter amortization period. The Treasury Department and the IRS have determined that a uniform amortization period should apply to all electing taxpayers to prevent the potential for whipsaw that could result from taxpayers with losses electing shorter amortization periods than taxpayers with gains. In addition, a ten-year period is appropriate given the expected magnitude of the pretransition gains and losses that are subject to amortization. However, taxpayers that do not make the amortization election will retain some control over when gains and losses are recognized (by choosing whether or not to make remittances). The final regulations also expand the acceleration rule of § 1.987–10(e)(5)(ii)(B) to cover transactions entered into with a principal purpose of avoiding the recognition of pretransition gain that is subject to the amortization election. See § 1.987–10(e)(5)(ii)(B)(1).

In addition, the final regulations clarify the application of the amortization election in the case of a terminating QBU. Under § 1.987–10(e)(5)(ii)(C), any deferred section 987 gain or suspended section 987 loss with respect to a terminating QBU that has not been recognized before the first

taxable year in which the section 987 regulations are generally applicable is subject to amortization beginning in that year. However, the final regulations do not modify the treatment of section 987 gain or loss that has already been recognized before the transition date; thus, such section 987 gain or loss is not subject to amortization.

X. Comments and Changes to Proposed § 1.987–11: Suspended Section 987 Loss Relating to Certain Elections; Loss-to-the-Extent-of-Gain Rule

Proposed § 1.987–11 provides rules that suspend the recognition of section 987 loss in connection with certain elections and rules under which suspended section 987 loss is recognized to the extent of recognized section 987 gain (the “loss-to-the-extent-of-gain rule”).

A. Loss Suspension Rule

1. In General

Under proposed § 1.987–11(c), in a taxable year in which a current rate election is in effect (and an annual recognition election is not in effect), any section 987 loss that would otherwise be recognized as a result of a remittance or termination would be treated as suspended section 987 loss.

A comment requested that the loss suspension rule of § 1.987–11(c) be eliminated because it prevents taxpayers from recognizing section 987 losses in connection with legitimate commercial transactions. The comment noted that the recognition of section 987 loss often is not the primary factor in determining whether a taxpayer causes its branch to make a remittance.

The final regulations retain the loss suspension rule in § 1.987–11(c). Congress specifically authorized loss limitation rules to address the potential for selective recognition of losses. See section 989(c)(2). These rules are integral to the current rate election; without a loss limitation the current rate election would create opportunities for abuse. Although remittances are often made for non-tax reasons, taxpayers can cause section 987 QBUs to make otherwise disregarded transfers for the purpose of recognizing large section 987 losses, and taxpayers have the ability to structure transactions in ways that defer the recognition of section 987 gain.

However, the final regulations limit the scope of the loss suspension rule to cover transactions that would otherwise result in the recognition of substantial section 987 losses. Under § 1.987–11(c)(2), if a current rate election is in effect, section 987 loss is not suspended unless the amount of section 987 loss

subject to suspension in the taxable year exceeds the lesser of \$3 million or two percent of the controlled group's gross income. This threshold is applied collectively to the section 987 loss of the owner and all members of the owner's controlled group. This rule is expected to reduce the compliance burden of tracking suspended section 987 losses, particularly for taxpayers with small section 987 QBUs.

2. Exception for QBUs With De Minimis Historic Assets

Comments requested an exception from the loss suspension rule for section 987 QBUs with minimal historic assets (such as financial institutions and insurance companies). Alternatively, a comment recommended that the loss suspension rule should apply solely to section 987 loss associated with historic items.

The final regulations do not provide an exception to the loss suspension rule for taxpayers with a de minimis amount of historic assets. Such an exception would be difficult to administer because it would require long-term tracking to ensure that the de minimis threshold was met in all prior taxable years over which the pool of net unrecognized section 987 gain or loss accrued. Further, for taxpayers with minimal historic assets, the compliance burden of applying the default rules of the final regulations (that is, the rules that apply in the absence of a current rate election) is expected to be more limited. A taxpayer that does not make a current rate election generally would not be subject to the loss suspension rule.

Similarly, under the final regulations, the loss suspension rule of § 1.987-11(c) is not limited to section 987 loss associated with historic items. Under § 1.987-4, the pool of net unrecognized section 987 gain or loss is determined with respect to a section 987 QBU as a whole. Separate computations of unrecognized section 987 loss associated with marked and historic items, respectively, would add significant complexity. Moreover, concerns related to selective recognition of section 987 loss can arise with respect to both marked and historic items.

B. Loss-to-the-Extent-of-Gain Rule

Under proposed § 1.987-11(e), an owner of a section 987 QBU recognizes suspended section 987 loss to the extent that it recognizes section 987 gain in the same recognition grouping (that is, section 987 gain that has the same source and character as the suspended section 987 loss) in the same taxable year. As explained in the preamble to

the 2023 proposed regulations, this rule is intended to prevent taxpayers from selectively recognizing section 987 losses when a current rate election is in effect. 88 FR 78139.

1. Lookback Rule

The 2023 proposed regulations do not include a lookback rule under which suspended section 987 loss can be recognized to the extent of section 987 gain recognized in previous taxable years. The preamble to the 2023 proposed regulations expressed concern that taxpayers might exploit a lookback rule by selectively triggering the recognition of section 987 gain in a taxable year in which the gain could be offset by losses or in which a taxpayer had excess foreign tax credits. 88 FR 78139.

Several comments recommended adoption of a lookback rule. Alternatively, a comment recommended modifying proposed § 1.987-11(e) to permit taxpayers to carry back section 987 losses to earlier years. Comments posited that, even if section 987 gain recognized in a previous year is offset by a loss carryforward or other tax attribute, the section 987 gain would still have a net impact on U.S. tax because the attribute would no longer be available to be utilized in subsequent years. However, the same comment expressed a minority view that a lookback rule would afford some potential for abuse, and suggested consideration of an anti-abuse rule targeting remittances that do not have economic effect. One comment recommended that the lookback period for section 987 gains should include years ending before the transition date, while another comment suggested that the lookback period should include only post-transition years.

The Treasury Department and the IRS agree that a lookback rule would allow for more evenhanded treatment of section 987 gains and losses when section 987 gain is recognized in an earlier taxable year and that a lookback rule could be tailored to prevent abuse. Accordingly, the final regulations provide that suspended section 987 loss is recognized to the extent of net section 987 gain recognized in the current year and the three preceding taxable years. See § 1.987-11(e)(3). Taxable years beginning before the transition date are not included in the lookback period, given the substantial flexibility taxpayers have had in determining the timing, amount, and character of section 987 gain or loss recognized before the applicability date of the final regulations.

Under an anti-abuse rule, section 987 gain is disregarded for purposes of the loss-to-the-extent-of-gain rule if it is recognized with a principal purpose of reducing U.S. Federal income tax liability, including over multiple taxable years. See § 1.987-11(e)(3)(v). For example, this rule would apply if an owner recognizes section 987 gain in a taxable year ("year 1") in which the section 987 gain is offset by a tax attribute that would not otherwise be used, the section 987 gain is recognized with a principal purpose of releasing suspended section 987 loss in a subsequent taxable year ("year 2"), and the net effect of recognizing both the section 987 gain and the suspended section 987 loss would reduce the combined U.S. Federal income tax liability for years 1 and 2. In determining whether such a principal purpose exists, one relevant factor is the extent to which a remittance does not result in a sustained economic contraction of the section 987 QBU (over a period of at least 12 months). Thus, for example, if a section 987 QBU makes a remittance giving rise to the recognition of section 987 gain, and the owner makes an offsetting contribution to the section 987 QBU within 12 months of the remittance, the section 987 gain may be disregarded for purposes of the loss-to-the-extent-of-gain rule.

The lookback period generally is limited to three years, because a longer lookback period would require additional tracking of section 987 gains recognized in prior taxable years and would increase the compliance and administrative burden of the section 987 regulations. In addition, this rule is consistent with other Code provisions that limit loss carryforward or carryback periods to a fixed number of years. See, e.g., section 1212(a)(1) (generally permitting capital losses to be carried forward for five years and carried back for three years). Moreover, it may be difficult to enforce the anti-abuse rule in § 1.987-11(e)(3)(v) with respect to transactions occurring more than three years before the taxable year in which suspended section 987 loss is recognized.

The final regulations provide a different lookback period for taxpayers that make both an annual recognition election and a current rate election. For these taxpayers, the lookback period includes all taxable years in which both elections are continuously in effect. See § 1.987-11(e)(3)(iv)(B). As a result, for purposes of applying the loss-to-the-extent-of-gain rule, the total amount of section 987 gain recognized under the annual recognition election for all

taxable years in which both elections are continuously in effect is offset by the total amount of section 987 loss recognized under the annual recognition election for all taxable years in which both elections are continuously in effect. As explained in the preamble to the proposed regulations, the Treasury Department and the IRS are concerned that, in the absence of such a rule, taxpayers would be able to recognize net losses on a cumulative basis for the taxable years to which the annual recognition election applies. 88 FR 78140. In addition, the tracking burden in this context should be more limited because losses generally are not suspended in taxable years in which an annual recognition election is in effect.

In general, following a transaction described in section 381(a), section 987 gain recognized by the transferor corporation in the three years preceding the transaction is taken into account for purposes of the lookback rule. *See* § 1.987–11(e)(5)(i). However, this rule does not apply in the case of an inbound reorganization or liquidation. *See* § 1.987–11(e)(5)(ii). Thus, section 987 gain recognized by the foreign transferor corporation (which may have been subject to a lower effective tax rate) cannot be used to release suspended section 987 loss of the domestic acquiring corporation.

2. Application of the Loss-to-the-Extent-of-Gain Rule at the Owner Level

Under proposed § 1.987–11(e), the loss-to-extent-of-gain rule is applied separately to each owner with respect to all of its section 987 QBUs. Comments asserted that the loss-to-the-extent-of-gain rule could produce harsh results when one CFC recognizes section 987 gain and a related CFC has suspended section 987 loss. One comment noted that concerns about selective recognition of section 987 loss should be mitigated to the extent that a different CFC in the same group recognizes section 987 gain.

Another comment recommended that, with respect to section 987 gain or loss that is characterized as tested income, the loss-to-the-extent-of-gain rule should be applied at the level of the U.S. shareholder with respect to all section 987 QBUs of CFCs owned by the U.S. shareholder, consistent with the general framework of section 951A. Under this approach, the excess of the U.S. shareholder's pro rata share of section 987 losses of any CFC attributable to a tested income group over its pro rata share of section 987 gains attributable to the same tested income group would be suspended (and available for recognition to the extent of

the U.S. shareholder's pro rata share of section 987 gains recognized in future years). Another comment recommended that the loss-to-the-extent-of-gain rule should be applied to a group of related CFCs by treating the group as a single owner. Under this approach, one CFC could recognize suspended section 987 loss to the extent that another CFC recognized section 987 gain.

The final regulations generally apply the loss-to-the-extent-of-gain rule separately to each owner, taking into account section 987 gain or loss with respect to all of the owner's section 987 QBUs. The final regulations do not apply the loss-to-the-extent-of-gain rule at the level of the U.S. shareholder. Because section 987 gain or loss is a CFC-level income item that is taken into account in computing each CFC's taxable income and earnings and profits, a U.S. shareholder level loss limitation rule could reach inappropriate results for minority shareholders and would be difficult to administer. For example, if a CFC is owned by multiple U.S. shareholders, application of the loss-to-the-extent-of-gain rule at the U.S. shareholder level would require multiple separate computations to determine the suspended section 987 loss recognized by a single CFC.

Similarly, the final regulations do not treat a group of related CFCs as a single owner for purposes of the loss-to-the-extent-of-gain rule. A CFC grouping rule would make the loss-to-the-extent-of-gain rule more complex and more difficult to administer. Moreover, under a CFC grouping rule, a CFC could recognize suspended section 987 loss as a result of a different CFC's recognition of section 987 gain in the same recognition grouping in a taxable year in which the loss cannot be utilized.

3. Expansion of the Loss-to-the-Extent-of-Gain Rule

A comment recommended expansion of the loss-to-the-extent-of-gain rule so that suspended section 987 loss could be recognized to the extent of any income recognized by the owner (including but not limited to section 987 gain) that has the same source and character as the suspended section 987 loss. Another comment recommended that suspended section 987 loss should be recognized to the extent of any section 987 gain recognized by the owner, even if the section 987 gain is in a different recognition grouping. The comment suggested that the requirement for section 987 gain to be in the same recognition grouping as suspended section 987 loss does not serve the policy goals of section 987, and that concerns relating to mismatches

between the source and character of section 987 gains and losses are adequately policed by other provisions of the Code.

The final regulations do not expand the scope of the loss-to-the-extent-of-gain rule to cover taxable income other than section 987 gain. Taxable income other than section 987 gain does not release suspended section 987 loss under the loss-to-the-extent-of-gain rule because this rule is intended to target selective recognition of section 987 loss and deferral of section 987 gain.

In addition, the final regulations retain the rule that section 987 gain can only release suspended section 987 loss in the same recognition grouping. This rule ensures that the loss-to-the-extent-of-gain rule effectively limits selective recognition of losses pursuant to the authority provided in section 989(c)(2). In particular, it prevents taxpayers from avoiding the loss limitation by recognizing gains that are subject to a low rate of tax (or are not subject to U.S. tax).

As explained in part VII.B of this Summary of Comments and Explanation of Revisions, the final regulations allow section 987 gain or loss to be assigned to multiple subpart F income groups. Therefore, each separate subpart F income group (as defined in § 1.960–1(d)(2)(ii)(B)) constitutes a separate recognition grouping. *See* § 1.987–11(f)(2)(ii). However, as explained in part VII.B.2 of this Summary of Comments and Explanation of Revisions, taxpayers can reduce the number of subpart F recognition groupings by making the section 988 characterization election provided in § 1.987–6(b)(2)(i)(C).

4. Application to Terminating QBUs

A comment requested clarification concerning the application of the loss-to-the-extent-of-gain rule in the case of a terminating QBU. The final regulations clarify that, when a terminating QBU has suspended section 987 loss in a taxable year before the final regulations are generally applicable, section 987 gain with respect to a taxpayer's other section 987 QBUs is assigned to a recognition grouping under the method applied by the taxpayer before the transition date. The owner recognizes suspended section 987 loss with respect to a terminating QBU only to the extent of its net section 987 gain in the same recognition grouping for the taxable year.

5. SRLY Rule Relating to Suspended Section 987 Losses

When a corporation that is the owner of a section 987 QBU joins a consolidated group, the corporation may have suspended section 987 losses that arose in earlier years. As explained in the preamble to the 2023 proposed regulations, the regulations issued under the authority of section 1502 generally limit a consolidated group's ability to use tax attributes generated in separate return years (as defined in § 1.1502-1(e)). 88 FR 78154. The Treasury Department and the IRS requested comments on how rules similar to the rules of § 1.1502-21(c) (limiting the use of net operating losses) should apply to suspended and deferred section 987 losses. *Id.* No comments were received in response to this request.

To prevent inappropriate trafficking of section 987 losses, § 1.987-11(e)(6)(ii) of the final regulations provides that the separate return limitation year (SRLY) limitation principles of § 1.1502-21(c) apply to suspended section 987 losses that arose in separate return years. The rule in § 1.987-11(e)(6)(ii) is based on the SRLY rules for capital loss carryovers in § 1.1502-22(c). To simplify the administration of this rule, when a corporation that is the owner of a section 987 QBU joins a consolidated group, the SRLY limitation is not applied separately to each recognition grouping determined under § 1.987-11(f), but rather to the corporation's section 987 losses overall.

Because deferred section 987 losses under § 1.987-12 are not subject to a loss-to-the-extent-of-gain rule, but rather are treated similarly under the section 987 regulations to other unrecognized section 987 losses, the SRLY limitation in § 1.987-11(e)(6)(ii) does not apply to such losses.

XI. Comments and Changes to Proposed § 1.987-13: Suspended Section 987 Loss Upon Terminations

Proposed § 1.987-13 would provide suspended loss rules that apply in connection with certain transactions in which a section 987 QBU or a successor suspended loss QBU terminates.

A. Successor Rules

Under the 2023 proposed regulations, if an owner has suspended section 987 loss with respect to a section 987 QBU that terminates, an eligible QBU that holds the assets of the section 987 QBU after the termination would be treated as a successor suspended loss QBU if it meets three requirements. Proposed § 1.987-13(b)(1)(i). First, a significant

portion of the assets of the terminating section 987 QBU must be reflected on the books and records of the eligible QBU. Second, the eligible QBU must carry on a trade or business of the section 987 QBU. Finally, the eligible QBU must be owned by the owner of the section 987 QBU or by a member of its controlled group (the owner of the successor is referred to as the "successor suspended loss QBU owner"). Following a termination, if the terminated section 987 QBU has a successor, suspended section 987 loss with respect to the section 987 QBU would be attributed to the successor. Similar successor rules would apply upon termination of a successor suspended loss QBU. Proposed § 1.987-13(c)(1)(i).

If a section 987 QBU or successor suspended loss QBU terminates without a successor, the owner would recognize its cumulative suspended section 987 loss with respect to the QBU. Proposed § 1.987-13(b)(2) and (c)(2). Similarly, the cumulative suspended section 987 loss with respect to a successor suspended loss QBU would be recognized if the original suspended loss QBU owner ceases to be a member of the same controlled group as the successor suspended loss QBU owner due to the transfer of an ownership interest in the successor suspended loss QBU owner. Proposed § 1.987-13(d).

A comment recommended that the definition of a successor suspended loss QBU should be aligned with the definition of a successor deferral QBU as provided in proposed § 1.987-12(g)(2), so that the same definition would apply for both purposes. The final regulations generally retain the definition of a successor suspended loss QBU provided in the proposed regulations because this definition is needed to ensure that suspended section 987 loss can be recognized (in excess of section 987 gain) only when the trade or business of a section 987 QBU ceases to be operated by a member of the same controlled group. The successor rule in § 1.987-12(g)(2) (which requires the successor to itself be a section 987 QBU) would not serve this function, because it would require suspended section 987 loss to be recognized when a section 987 QBU is transferred to a related owner that has the same functional currency as the section 987 QBU.

B. Elimination or Limited Recognition of Suspended Section 987 Loss Following Certain Transactions

Proposed § 1.987-13(e), (f), and (g) would provide rules that eliminate or limit the recognition of suspended section 987 loss following certain

transactions. First, under proposed § 1.987-13(e), if the original suspended loss QBU owner ceases to be a member of the same controlled group as the successor suspended loss QBU owner due to the transfer of an ownership interest in the original suspended loss QBU owner, the original suspended loss QBU owner's suspended section 987 loss would cease to be attributable to any section 987 QBU or successor suspended loss QBU. After the transaction, the owner's suspended section 987 loss can be recognized under § 1.987-11(e) to the extent that the owner recognizes section 987 gain; however, the suspended section 987 loss cannot be recognized under proposed § 1.987-13(b)(2), (c)(2), or (d). This rule would prevent taxpayers from transferring the stock of the original suspended loss QBU owner out of its controlled group for the purpose of selectively recognizing suspended section 987 loss, while retaining the assets and activities of the section 987 QBU in the hands of a different controlled group member.

Proposed § 1.987-13(f) would provide that, if an original suspended loss QBU owner ceases to exist as a result of a transaction in which there is no successor described in section 381(a) (for example, as a result of a section 331 liquidation), then any suspended section 987 loss that is not recognized after applying the loss-to-the-extent-of-gain rule cannot be recognized and is eliminated. This rule is intended to prevent taxpayers from entering into section 331 liquidations in order to trigger the recognition of suspended section 987 loss.

Similarly, under proposed § 1.987-13(g), if an owner of a section 987 QBU with suspended section 987 loss, or an original suspended loss QBU owner, ceases to exist in an inbound section 332 liquidation or in an inbound reorganization described in section 381(a)(2), then any suspended section 987 loss of the owner or original suspended loss QBU owner that is not recognized after application of the loss-to-the-extent-of-gain rule under proposed § 1.987-11(e) would be eliminated. This rule would prevent suspended section 987 loss that was generated offshore from being imported into the United States.

Several comments requested that the rules of proposed § 1.987-13(e) through (g) be replaced with anti-abuse rules tied to the purpose for which a taxpayer enters into the relevant transaction. One comment noted that if a CFC liquidates into its U.S. shareholder and a current rate election is not in effect, the transaction results in a termination of

the CFC's section 987 QBUs under § 1.987–8, and the CFC recognizes its net unrecognized section 987 gain or loss immediately before the liquidation. The comment proposed that suspended section 987 loss should similarly be recognized in connection with an inbound liquidation.

Other comments recommended that, following a section 331 liquidation or inbound transaction, suspended section 987 loss should be amortized over a ten-year period or added to the acquiring corporation's outside stock basis. One comment suggested that the suspended section 987 loss should be allocated pro rata among the U.S. shareholder's other foreign entities that own section 987 QBUs. Another comment requested that § 1.987–13(f) be modified to provide that suspended section 987 loss is recognized to the extent of the owner's overall gain (not limited to section 987 gain) recognized in connection with the section 331 liquidation. One comment suggested that, in connection with an inbound transaction, suspended section 987 loss could be recognized to the extent of the inbound section 987 gain.

The Treasury Department and the IRS have determined that, in order to facilitate the current rate election (which can have the effect of enlarging the pools of unrecognized section 987 gain or loss), effective loss limitation rules are needed to prevent the selective recognition of section 987 losses by, for example, entering into a section 331 liquidation, inbound liquidation or reorganization, or a transfer of the original suspended loss QBU owner. Further, an anti-avoidance rule tied to the taxpayer's subjective purpose for entering into a particular transaction would be difficult to administer and, consequently, would not be an adequate safeguard against abuse given the critical function served by the loss limitation rules. A subjective anti-abuse rule would also provide less certainty for taxpayers and the IRS. Therefore, the final regulations generally retain the rules of proposed § 1.987–13(e) through (g).

The final regulations do not permit suspended section 987 loss to be amortized by the acquiring corporation over a ten-year period following an inbound transaction or section 331 liquidation because this would nevertheless facilitate loss importation (in the case of an inbound transaction), even though the benefit would only be recognized over time, or would allow for losses to be carried over to the acquirer in a transaction not described in section 381(a) (in the case of a section 331 liquidation). Similarly, reallocating

losses to foreign entities other than the acquiring corporation would be inconsistent with the principles of section 381 and would be unduly complex. Adding suspended section 987 loss of a CFC to the outside basis of a domestic acquiring corporation's stock would have the same effect as loss importation (because the increased basis could reduce the taxable income of the domestic corporation's shareholders upon a sale of stock) and would also shift losses in a manner that is contrary to general tax principles.

The final regulations also do not permit suspended section 987 loss to be recognized to the extent of gain (other than section 987 gain) recognized in connection with a section 331 liquidation. As explained in part X.B.3 of this Summary of Comments and Explanation of Revisions, the loss-to-the-extent-of-gain rule generally does not allow suspended section 987 loss to be recognized in excess of section 987 gain. If a different rule were adopted for section 331 liquidations, taxpayers could enter into a section 331 liquidation in order to step up the basis of their assets, with any gain recognized with respect to those assets being offset by the recognition of suspended section 987 loss.

However, consistent with the 2023 proposed regulations, the final regulations permit suspended section 987 loss to be recognized to the extent of section 987 gain recognized in connection with a transaction described in § 1.987–13(f) or (g). Because those transactions generally would be treated as terminations under § 1.987–8, any net unrecognized section 987 gain of the owner will be recognized immediately before the transaction and will be taken into account under the loss-to-the-extent-of-gain rule.

C. Clarification of § 1.987–13

A comment requested clarification as to the mechanics for recognizing suspended section 987 loss following a transaction described in § 1.987–13(e), in which an original suspended loss QBU owner is transferred outside the controlled group. The comment also suggested clarifying the interaction between the successor rules of § 1.987–13(b) and (c) and the inbound transaction rule in proposed § 1.987–13(g).

The final regulations clarify that, following a transaction described in § 1.987–13(e) (in which the original suspended loss QBU owner is transferred outside the controlled group), the original owner recognizes suspended section 987 loss to the extent that it recognizes section 987 gain in the

same recognition grouping. Further, in the case of a transaction described in § 1.987–13(e) (transfer of original suspended loss QBU owner), § 1.987–13(f) (section 331 liquidation), or § 1.987–13(g) (inbound transaction), suspended section 987 loss is not recognized or attributed to a successor suspended loss QBU under § 1.987–13(b) or (c). The final regulations also clarify that the rules of § 1.987–13(f) apply to a transaction (such as a section 331 liquidation) in which the owner of a section 987 QBU ceases to exist without having a successor (that is, this rule applies even if the section 987 QBU with respect to which the suspended section 987 loss arose had not previously been terminated, such that the owner was not an original suspended loss QBU owner).

XII. Comments and Changes to Proposed § 1.987–14: Applicability Date

Proposed § 1.987–14 would provide rules relating to the applicability date of the section 987 regulations.

In general, the 2023 proposed regulations are proposed to apply to taxable years beginning after December 31, 2024. Proposed § 1.987–14(a)(1). In the case of a terminating QBU (that is, a section 987 QBU that terminates after November 9, 2023, but before the section 987 regulations are generally applicable), the 2023 proposed regulations, as finalized, generally would apply immediately before the termination.

A comment requested that the general applicability date be delayed until taxable years beginning after December 31, 2025, to allow additional time for taxpayers to build systems and processes to comply with the final regulations. Another comment requested a deferred applicability date no earlier than the taxable year beginning on or after one year after the first day of the first taxable year following the date on which the final regulations are published.

One comment requested that the special rule for terminating QBUs be eliminated. The comment asserted that the existing deferral rules under § 1.987–12 are sufficient to prevent abuse.

Under § 1.987–15, the final regulations generally apply to taxable years beginning after December 31, 2024, consistent with the 2023 proposed regulations. See § 1.987–15(a)(1). See also §§ 1.861–9(g)(2)(v), 1.985–5(g), 1.988–1(i), 1.988–4(b)(2)(ii), 1.989(a)-1(b)(4) and (d)(4), and 1.1502–13(l)(10). The 2016 final regulations originally were applicable to taxable years beginning on or after one year after the

first day of the first taxable year following December 7, 2016 (thus, they would have been applicable in 2018 for calendar year taxpayers). Although the applicability date of those regulations was subsequently deferred, taxpayers have been on notice for many years concerning the general framework of the section 987 regulations. Final regulations are necessary to provide guidance to taxpayers regarding the proper determination of section 987 taxable income or loss and section 987 gain or loss and to provide a consistent set of rules applicable to all taxpayers. Accordingly, further deferral would not serve the interest of sound tax administration. The applicability date under § 1.987–15(a)(1) is consistent with the rule under section 7805(b) of the Code regarding retroactivity of regulations or rulings.

In addition, the final regulations retain the special applicability date providing that the section 987 regulations apply to terminating QBUs immediately before the termination. *See* § 1.987–15(a)(2). This rule is needed to prevent taxpayers from terminating a section 987 QBU before the section 987 regulations generally become applicable in order to avoid the rules of the section 987 regulations, including the loss suspension rules in §§ 1.987–10, 1.987–11, and 1.987–13.

XIII. Comments and Changes to Proposed § 1.1502–13: Intercompany Transactions

The 2023 proposed regulations would provide a new rule applicable to certain intercompany transactions (as defined in § 1.1502–13(b)(1)(i)) involving section 987 QBUs. *See* proposed § 1.1502–13(j)(9).

In general, § 1.1502–13 provides rules to clearly reflect the taxable income and tax liability of a consolidated group as a whole by preventing intercompany transactions from creating, accelerating, avoiding, or deferring consolidated taxable income or consolidated tax liability. *See* § 1.1502–13(a). Under § 1.1502–13, the selling member (S) and the buying member (B) are treated as separate entities for some purposes but as divisions of a single corporation for other purposes. The matching rule in § 1.1502–13(c) is one of the principal rules in § 1.1502–13 that produces the effect of transactions between divisions of a single corporation (single entity treatment). *See* § 1.1502–13(a)(6)(i).

To address potential mismatches that make it difficult to apply the rules of § 1.1502–13 to section 987 QBUs, the 2023 proposed regulations would apply a reattribution rule that treats all intercompany transactions involving a

section 987 QBU as attributable to a member's home office rather than to any section 987 QBU. As a result, an intercompany transaction between one member of a consolidated group and a section 987 QBU of another member of the same group is treated as a combination of (i) an intercompany transaction between the consolidated group members (that is, S and B), and (ii) transfers between the section 987 QBU and its owner as necessary to account for the effect of the transaction on the assets and liabilities of the section 987 QBU. This approach would ensure that consolidated taxable income includes the same amount of section 987 gain or loss as would be recognized if the members were divisions of a single corporation.

One comment requested that the proposed rule be removed, on the grounds that it would change the amount of currency gain or loss recognized by S and B with respect to intercompany transactions. For example, assume that S has a section 987 QBU with the euro as its functional currency, and the QBU makes a euro-denominated loan to B. The comment noted that, under the proposed rule, B's foreign currency exposure and S's foreign currency exposure offset for Federal income tax purposes (that is, if B recognizes any section 988 gain or loss on the interest payments, S will recognize an offsetting amount of section 988 loss or gain). The comment indicated that, for financial accounting purposes, B's foreign currency exposure would result in net income (it would not be offset by S's foreign currency exposure). According to the comment, B would typically enter into a separate hedging transaction (for example, a foreign currency forward contract) to hedge this exposure. However, under the proposed rule, because the section 988 gain or loss of B and S with respect to the loan will offset for tax purposes, the hedging transaction itself will generate net section 988 gain or loss. Therefore, the comment asserted that the proposed rule may have the practical effect of giving rise to income or loss for tax purposes for consolidated groups with respect to hedging transactions.

In other words, under the view expressed in the comment, if the taxpayer enters into a hedging transaction for U.S. GAAP purposes, B would have section 988 gain or loss on the loan absent the proposed rule, and such gain or loss would be offset by loss or gain on the hedging transaction; in contrast, under the proposed rule, B's section 988 gain or loss on the loan would be offset by S's section 988 loss

or gain, and loss or gain on the hedging transaction would not be offset.

The comment appears to reflect the view that, in the absence of the reattribution rule in proposed § 1.1502–13(j)(9), the matching rule of § 1.1502–13(c) does not apply to transactions involving section 987 QBUs, and as a result the tax treatment of S and B is determined independently. Therefore, the comment appears to assume that the Federal income tax treatment and the accounting treatment of transactions involving section 987 QBUs would be identical without the proposed rule.

The Treasury Department and the IRS disagree with the comment. The intercompany transaction rules in § 1.1502–13 apply to all intercompany transactions, including those that involve section 987 QBUs, and taxpayers must apply those rules to achieve single entity treatment. The reattribution rule of proposed § 1.1502–13(j)(9) merely reflects the application of the intercompany transaction rules to section 987 QBUs in a simpler and more administrable manner for taxpayers and the IRS. Therefore, removing the reattribution rule would not address the concerns expressed in the comment. Additionally, the approach discussed in the comment would be fundamentally inconsistent with the purposes of section 1502 and § 1.1502–13: it would not clearly reflect the income tax liability of the consolidated group, because it would allow intercompany transactions to accelerate or defer currency gains and losses. The proposed reattribution rule is therefore finalized without change.

Comments also requested clarification regarding Example 8 in proposed § 1.1502–13(j)(10)(viii). In response, the final regulations include additional facts in Example 8 as well as two alternative fact patterns involving (i) a member's disposition of an intercompany loan before its satisfaction, and (ii) a member ceasing to be a member of the consolidated group while an intercompany loan remains outstanding. The final regulations also include formatting changes to the examples under § 1.1502–13(j) that were proposed in REG–134420–10 (88 FR 52057).

XIV. Other Comments and Revisions

A comment recommended that the Treasury Department and the IRS consider the impact of section 987 gain or loss on the corporate alternative minimum tax ("CAMT") regime. The comment did not recommend specific rules to be implemented for this purpose. The final regulations do not address the application of the CAMT regime. Accordingly, this comment was

not adopted because it is outside the scope of the final regulations.

Similarly, comments requested that information relating to section 987 should continue to be reported on Form 8858, Schedule C–1, with modifications for taxpayers that do not make a current rate election. The development or modification of forms related to section 987 is outside the scope of the final regulations. Therefore, this comment was not adopted.

A comment was received in response to the 2016 proposed regulations during the initial comment period for those proposed regulations. The comment requested that the 2016 final regulations and the 2016 temporary regulations be repropounded with a deferred applicability date, which is consistent with the approach taken by the 2023 proposed regulations and these final regulations.

In addition to the provisions described in parts I through XIII of this Summary of Comments and Explanation of Revisions, the final regulations include other wording changes, additions, deletions, and organizational changes to the 2023 proposed regulations for purposes of clarification. For example, the rules in § 1.987–3(c)(3) relating to the adjustments required under the simplified inventory method have been clarified, and an example has been added to illustrate those rules. Similarly, the rules of § 1.985–5 have been modified to update cross-references to the section 987 regulations and to clarify the example in § 1.985–5(f).

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) (PRA) requires that a Federal agency obtain the approval of the Office of Management and Budget (OMB) before collecting information from the public, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it

displays a valid control number assigned by the OMB.

The collections of information in the final regulations with respect to section 987 are in §§ 1.987–1(g), 1.987–9, 1.987–10(k), and 1.987–14(c). The likely respondents are individuals who file a Form 1040 and businesses that file a Form 1065 or Form 1120. The final regulations do not apply to trusts and estates. See part II.A.2 of the Summary of Comments and Explanation of Revisions.

The collection of information provided by § 1.987–1(g) is required only when a taxpayer makes or revokes certain elections for purposes of calculating its section 987 taxable income or loss and section 987 gain or loss with respect to a section 987 QBU. In the first year in which the section 987 regulations apply to the taxpayer, or the taxpayer or a member of its consolidated group or section 987 electing group is the owner of a section 987 QBU, the taxpayer may make any section 987 election. Thereafter, the taxpayer may make or revoke a current rate election, annual recognition election, or section 988 mark-to-market election only every five years and may make or revoke other elections only with the consent of the Commissioner, which may be granted with a private letter ruling. When a taxpayer makes or revokes an election, the collection of information is mandatory. The collection of information required by § 1.987–1(g) will be used by the IRS for tax compliance purposes.

Section 1.987–9 is intended to specify how a taxpayer satisfies its recordkeeping obligations under section 6001 with respect to section 987. The recordkeeping requirements under § 1.987–9 are considered general tax records under § 1.6001–1(e). For PRA purposes, general tax records are already approved by OMB under 1545–0074 for individuals and under 1545–0123 for business entities. The IRS intends that the information collection requirements pursuant to § 1.987–9 will be satisfied by the taxpayer maintaining permanent books and records that are adequate to verify its section 987 gain or loss and section 987 taxable income or loss with respect to its section 987 QBU.

Specifically, with respect to each section 987 QBU, successor deferral QBU, and successor suspended loss QBU for a taxable year, as applicable, § 1.987–9 requires taxpayers to maintain books and records related to the amount of the items of income, gain, deduction, or loss attributed to the section 987 QBU in the functional currency of the section 987 QBU and its owner; the adjusted balance sheet of the section 987 QBU in

the functional currency of the section 987 QBU and its owner (or the information used to determine QBU net value under § 1.987–4(e)(2)(iii), as explained in part V.A.1 of the Summary of Comments and Explanation of Revisions); the exchange rates used to translate items of income, gain, deduction, or loss of the section 987 QBU into the owner's functional currency and, if a spot rate convention is used, the manner in which the convention is determined; the exchange rates used to translate the assets and liabilities of the section 987 QBU into the owner's functional currency and, if a spot rate convention is used, the manner in which the convention is determined; the amount of assets and liabilities transferred by the section 987 QBU to the owner determined in the functional currency of the owner and the section 987 QBU; the amount of the unrecognized section 987 gain or loss for the taxable year; the amount of the net accumulated unrecognized section 987 gain or loss for the taxable year; the amount of the remittance and the remittance proportion for the taxable year; the computations required under §§ 1.861–9(g) and 1.861–9T(g) for purposes of sourcing and characterizing section 987 gain or loss, deferred section 987 gain or loss, or suspended section 987 loss under § 1.987–6; the cumulative suspended section 987 loss in each recognition grouping; the outstanding deferred section 987 gain or loss in each recognition grouping; the transition information required to be determined under § 1.987–10(k); and the identification required under § 1.987–14(c) with respect to a section 987 hedging transaction. These records are required for the IRS to validate that section 987 gain or loss and section 987 taxable income or loss have been properly determined.

The Treasury Department and the IRS are adding a recordkeeping requirement under § 1.987–14(c) based on a public comment on the substantive rules of the 2023 proposed regulations which requested implementation of a section 987 hedging election. See part V.B.1 of the Summary of Comments and Explanation of Revisions. Under § 1.987–14(c), the final regulations require an identification statement to be kept in the taxpayers' books and records with respect to a section 987 hedging transaction described in § 1.987–14(b)(1).

The collection of information in § 1.987–10(k) is mandatory. Specifically, § 1.987–10(k) would require a taxpayer to file a “Section 987 Transition Information” statement with its return for the taxable year beginning on the

transition date (as defined in § 1.987–10(c)). The statement would contain information that is necessary for a taxpayer to transition to the final section 987 regulations. Specifically, the statement requires a taxpayer to provide information that is relevant to determining the taxpayer’s pretransition gain or loss with respect to its section 987 QBUs. The collection of information required by § 1.987–10(k) will be used by the IRS for tax compliance purposes.

The Treasury Department and the IRS intend that the information described in § 1.987–1(g) will be collected by attaching a statement to a taxpayer’s return (such as the appropriate Form 1040, Form 1120, Form 1065, or other appropriate form). With respect to § 1.987–10(k), the IRS also intends that the collection of information will be conducted by attaching a “Section 987 Transition Information” statement to a return. For purposes of the PRA, the reporting burden associated with those collections of information with respect to §§ 1.987–1(g) and 1.987–10(k) will be reflected in the PRA submissions associated with those forms. The OMB Control Numbers for the forms will be approved under 1545–0074 for individuals and under 1545–0123 for business entities.

To the extent that a taxpayer makes or revokes an election by obtaining a private letter ruling, the reporting burden associated with those collections of information will be reflected in the PRA submissions associated with revenue procedures governing private letter rulings. The OMB Control Number for the collection of information for those revenue procedures is control number 1545–1522. The final regulations would only require taxpayers to follow the procedures under Revenue Procedure 2024–1, IRB 2024–1 (or future revenue procedure governing private letter rulings) and would not change the collection requirements of the Revenue Procedure.

The attachment to a return used for making elections with respect to these final regulations will be used by those taxpayers making or revoking an election for the taxable year. The “Section 987 Transition Information” statement attached to a return will be used by all taxpayers, but generally only with respect to the taxable year in which the taxpayer transitions to these final regulations. In certain cases, if the taxpayer owns a QBU that terminates after November 9, 2023, and before the taxable year in which the taxpayer transitions to the final regulations, the “Section 987 Transition Information” statement must be filed for that taxable year too, but the statement would only

contain information with respect to the terminating QBU. The burden will be accounted for in 1545–0074 for individuals and in 1545–0123 for businesses.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

III. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that this rulemaking will not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the Regulatory Flexibility Act. The final regulations affect taxpayers with foreign branch operations and taxpayers that own an interest in a foreign partnership (or a partnership with a foreign branch).

The number of small entities potentially affected by the final regulations is unknown; however, it is unlikely to be a substantial number because taxpayers with wholly owned foreign operations are typically larger businesses. The Treasury Department and the IRS estimate that the total number of corporations (other than S corporations) with a foreign branch subject to section 987 is approximately 2,000. This estimate is based on the number of corporations (other than S corporations) that filed a Form 8858 in 2022 that showed that the filer: (1) owned at least one disregarded entity or branch with a functional currency different from the functional currency of the owner, and (2) indicated that the disregarded entity or branch was a section 989 QBU. As shown in the following table, only a small percentage of those filers are small entities.

Total receipts/positive income (2022)	Percentage of filers
Under \$5 Million	7
\$5 Million to \$10 Million	2
\$10 Million to \$25 Million	4
Over \$25 Million	87

The number of affected corporations (other than S corporations) with total receipts of less than \$25 million represents 0.02% of all corporations (other than S corporations) with total receipts of less than \$25 million.

The Treasury Department and the IRS estimate that the total number of partnerships and S corporations with a foreign branch subject to section 987 is approximately 800. Approximately 50

percent of those filers have gross receipts of less than \$25 million, but the data does not indicate whether these partnerships are part of larger enterprises. The number of affected partnerships and S corporations with total receipts of less than \$25 million represents 0.004% of all partnerships and S corporations with total receipts of less than \$25 million. Small entities may also own partnership interests.

The primary rules that apply to partnerships (that is, the deferral rules in § 1.987–12 and the suspended loss rules in §§ 1.987–11 and 1.987–13) apply only in the case of a remittance or termination that would result in the recognition of a significant amount of section 987 gain or loss. Small entities typically will not recognize section 987 gain or loss in excess of the applicable thresholds.

These final regulations generally modify the rules that would otherwise apply under the 2016 final regulations by providing taxpayers with additional elections that reduce the compliance burden of applying section 987. Small entities generally would not be affected by these rules unless they choose to make one of the new elections in order to reduce their compliance burden. In addition, the final regulations contain several rules intended to limit their impact on small taxpayers. For example, the final regulations provide a de minimis rule under which section 987 loss is not suspended unless the amount of the loss exceeds the lesser of \$3 million or two percent of gross income, as described in part X.A.1 of the Summary of Comments and Explanation of Revisions. In addition, for purposes of the transition rules, the final regulations provide an election under which small businesses can treat small QBUs as having no pretransition gain or loss. See part IX.A.2 of the Summary of Comments and Explanation of Revisions.

A portion of the economic impact of the final regulations may derive from the collection of information requirements imposed under §§ 1.987–1(g), 1.987–10(k), and 1.987–14(c). The Treasury Department and the IRS have determined that the average burden is 1.95 hours per response. The IRS’s Research, Applied Analytics, and Statistics division estimates that the appropriate wage rate for this set of taxpayers is \$99.87 per hour. Thus, the annual burden per taxpayer from each collection of information requirement is \$194.75. The requirements of § 1.987–1(g) apply only if a taxpayer chooses to make or revoke an election (and only in the year of the election or revocation), the requirements of § 1.987–10(k) apply

only in the first taxable year in which the final regulations apply, and the requirements of § 1.987–14(c) apply only if a taxpayer identifies a hedge as a section 987 hedging transaction (which is unlikely to be relevant for small entities).

Another portion of the economic impact of the final regulations may derive from the recordkeeping requirements of § 1.987–9, which identify the records needed to satisfy the taxpayer's obligations under section 6001. The requirements of § 1.987–9 generally will be less burdensome for small entities than the requirements of the 2016 final regulations due to the modifications described in part V.A.1 of the Summary of Comments and Explanation of Revisions (which permit QBU net value to be computed without preparing a tax basis balance sheet).

IV. Section 7805(f)

Pursuant to section 7805(f) of the Code, the proposed regulations preceding these final regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business and no comments were received.

V. 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 final 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.

VI. Executive Order 13132: Federalism

Executive Order 13132 (entitled “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 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.

Statement of Availability of IRS Documents

IRS Revenue Procedures, Revenue Rulings, Notices, and 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 <https://www.irs.gov>.

Drafting Information

The principal authors of these final regulations are Adam G. Province and Raphael J. Cohen of the Office of Associate Chief Counsel (International); and Matthew N. Palucki and Jeremy Aron-Dine of the Office of Associate Chief Counsel (Corporate). 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, the Treasury Department and the IRS amend 26 CFR part 1 as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by:

- a. Removing the entry for §§ 1.861–9 and 1.861–9T and §§ 1.861–8T through 1.861–14T;
 - b. Adding entries for §§ 1.861–8T, 1.861–9, 1.861–9T through 1.861–14T in numerical order;
 - c. Removing the entry for §§ 1.985–0 through 1.985–5;
 - d. Adding entries for §§ 1.985–0 through 1.985–5 in numerical order;
 - e. Removing the entry for §§ 1.987–1 through 1.987–5;
 - f. Adding entries for §§ 1.987–1 through 1.987–11 in numerical order;
 - g. Revising the entry for § 1.987–12;
 - h. Adding entries for §§ 1.987–13 through 1.987–15 in numerical order;
 - i. Removing the entry for §§ 1.988–0 through 1.988–5;
 - j. Adding entries for §§ 1.988–0 through 1.988–5 and 1.989(a)–1 in numerical order; and
 - k. Revising the entry for § 1.1502–13.
- The additions and revisions read as follows:

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

* * * * *

Section 1.861–8T also issued under 26 U.S.C. 863(a), 864(e), 865(i), and 7701(f).
Section 1.861–9 also issued under 26 U.S.C. 861, 863(a), 864(e), 864(e)(7), 865(i), 987, and 989(c), and 7701(f).

Section 1.861–9T also issued under 26 U.S.C. 861, 863(a), 864(e), 864(e)(7), 865(i), and 7701(f).

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Section 1.861–10T also issued under 26 U.S.C. 863(a), 864(e), 865(i), and 7701(f).

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Section 1.861–11T also issued under 26 U.S.C. 863(a), 864(e), 865(i), and 7701(f).

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Section 1.861–12T also issued under 26 U.S.C. 863(a), 864(e), 865(i), and 7701(f).

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Section 1.861–13T also issued under 26 U.S.C. 863(a), 864(e), 865(i), and 7701(f).

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Section 1.861–14T also issued under 26 U.S.C. 863(a), 864(e), 865(i), and 7701(f).

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Section 1.985–0 also issued under 26 U.S.C. 985.

Section 1.985–1 also issued under 26 U.S.C. 985.

Section 1.985–2 also issued under 26 U.S.C. 985.

Section 1.985–3 also issued under 26 U.S.C. 985.

Section 1.985–4 also issued under 26 U.S.C. 985.

Section 1.985–5 also issued under 26 U.S.C. 985, 987, and 989.

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Section 1.987–1 also issued under 26 U.S.C. 987, 989, and 1502.

Section 1.987–2 also issued under 26 U.S.C. 987, 989, and 1502.

Section 1.987–3 also issued under 26 U.S.C. 987 and 989.

Section 1.987–4 also issued under 26 U.S.C. 987 and 989.

Section 1.987–5 also issued under 26 U.S.C. 987 and 989.

Section 1.987–6 also issued under 26 U.S.C. 904, 987, and 989.

Section 1.987–7 also issued under 26 U.S.C. 987 and 989.

Section 1.987–8 also issued under 26 U.S.C. 987 and 989.

Section 1.987–9 also issued under 26 U.S.C. 987, 989, and 6001.

Section 1.987–10 also issued under 26 U.S.C. 987, 989, and 6001.

Section 1.987–11 also issued under 26 U.S.C. 987, 989, and 1502.

Section 1.987–12 also issued under 26 U.S.C. 987 and 989.

Section 1.987–13 also issued under 26 U.S.C. 987 and 989.

Section 1.987–14 also issued under 26 U.S.C. 987 and 989.

Section 1.987–15 also issued under 26 U.S.C. 987 and 989.

Section 1.988–0 also issued under 26 U.S.C. 988.

Section 1.988–1 also issued under 26 U.S.C. 988 and 989.

Section 1.988–2 also issued under 26 U.S.C. 988.

Section 1.988–3 also issued under 26 U.S.C. 988.

Section 1.988–4 also issued under 26 U.S.C. 988 and 989.

Section 1.988–5 also issued under 26 U.S.C. 988.

Section 1.989(a)–1 also issued under 26 U.S.C. 989.

Section 1.1502–13 also issued under 26 U.S.C. 250(c), 987, 989, and 1502.

■ **Par. 2.** Section 1.861–9 is amended by:

■ a. Revising paragraphs (g)(2)(ii)(A) introductory text, (g)(2)(ii)(A)(1), and (g)(2)(ii)(B); and

■ b. Adding paragraph (g)(2)(v).

The revisions and addition read as follows:

§ 1.861–9 Allocation and apportionment of interest expense and rules for asset-based apportionment.

* * * * *

(g) * * *
(2) * * *
(ii) * * *

(A) *Tax book value method.* In the case of taxpayers using the tax book value method of apportionment, the following rules apply to determine the value of the assets of a qualified business unit (QBU) (as defined in section 989(a)) of a domestic corporation with a functional currency other than the dollar.

(1) *Section 987 QBU.* In the case of a section 987 QBU (as defined in § 1.987–1(b)(3)), the tax book value is determined by applying the rules of paragraph (g)(2)(i) of this section and § 1.861–9T(g)(3) to the beginning-of-year and end-of-year owner functional currency amount of assets. The beginning-of-year owner functional currency amount of assets is determined by reference to the owner functional currency amount of assets computed under § 1.987–4(d)(1)(i)(B) and (e) on the last day of the preceding taxable year. The end-of-year owner functional currency amount of assets is determined by reference to the owner functional currency amount of assets computed under § 1.987–4(d)(1)(i)(A) and (e) on the last day of the current taxable year. The beginning-of-year and end-of-year owner functional currency amount of assets, as so determined within each grouping, are then averaged as provided in paragraph (g)(2)(i) of this section.

* * * * *

(B) *Fair market value method.* In the case of taxpayers using the fair market value method of apportionment, the beginning-of-year and end-of-year fair market values of branch assets within each grouping are computed in dollars and averaged as provided in this paragraph (g)(2) and § 1.861–9T(g)(2).

* * * * *

(v) *Applicability date.* Generally, paragraph (g)(2)(ii)(A)(1) of this section applies to taxable years beginning after December 31, 2024. However, if pursuant to § 1.987–15(b), a taxpayer chooses to apply §§ 1.987–1 through 1.987–15 to a taxable year before the first taxable year described in § 1.987–15(a)(1), then paragraph (g)(2)(ii)(A)(1) of this section applies to that taxable year and subsequent years.

* * * * *

§ 1.861–9T [Amended]

■ **Par. 3.** Section 1.861–9T is amended by removing and reserving paragraph (g)(2)(ii) and removing paragraph (g)(2)(vi).

■ **Par. 4.** Section 1.904–4 is amended by revising paragraph (c)(5)(iii)(B) to read as follows:

§ 1.904–4 Separate application of section 904 with respect to certain categories of income.

* * * * *

(c) * * *
(5) * * *
(iii) * * *

(B) *Section 987.* For special rules relating to the allocation and apportionment of foreign income taxes to section 987 items, see § 1.987–6(b)(3).

* * * * *

■ **Par. 5.** Add an undesignated center heading before § 1.985–0 to read as follows:

* * * * *

Foreign Currency Transactions

* * * * *

§ 1.985–1 [Amended]

■ **Par. 6.** Section 1.985–1 is amended by:

■ a. In paragraph (f) designating *Examples 1 through 12* as paragraphs (f)(1) through (12), respectively; and

■ b. Removing and reserving newly redesignated paragraphs (f)(9) through (11).

■ **Par. 7.** Section 1.985–5 is amended by:

■ a. In paragraph (a) removing the language “§ 1.987–1(b)(2)” and adding the language “§ 1.987–1(b)(3)” in its place;

■ b. In paragraph (d)(1)(i) removing the language “1.987–11” and adding the language “1.987–15” in its place;

■ c. Revising the last sentence of paragraph (d)(2);

■ d. Removing the second sentence of paragraph (e)(1);

■ e. Revising and republishing paragraphs (e)(4) and (f); and

■ f. Revising paragraph (g).

The revisions read as follows:

§ 1.985–5 Adjustments required upon change in functional currency.

* * * * *

(d) * * *

(2) * * * *See* §§ 1.987–5, 1.987–8, 1.987–12, and 1.987–13 for the effect of a termination of a section 987 QBU that is subject to §§ 1.987–1 through 1.987–15.

(e) * * *

(4) *Adjustments to a section 987 QBU's balance sheet and unrecognized section 987 gain or loss when an owner changes functional currency—*(i) *Owner changing to a functional currency other than the section 987 QBU's functional currency.* If an owner of a section 987 QBU, subject to §§ 1.987–1 through 1.987–15 pursuant to § 1.987–1(b)(1), changes to a functional currency other than the functional currency of the section 987 QBU, the adjustments described in paragraphs (e)(4)(i)(A) through (C) of this section are taken into account for purposes of section 987.

(A) *Determining new historic rates.* The historic rate (as defined in § 1.987–1(c)(3)) for the year of change and subsequent taxable years with respect to a historic item (as defined in § 1.987–1(e)) reflected on the balance sheet of the section 987 QBU immediately before the year of change is equal to the historic rate before the year of change (that is, a rate that translates the section 987 QBU's functional currency into the owner's old functional currency) divided by the spot rate for translating an amount denominated in the owner's new functional currency into the owner's old functional currency on the last day of the last taxable year ending before the year of change. For example, if a taxpayer that owns a section 987 QBU with a British pound functional currency changes from a U.S. dollar functional currency to a euro functional currency, and the historic rate for translating a specific item of the section 987 QBU from GBP to USD is 1.50 and the spot rate for translating EUR to USD on the last day of the last taxable year before the change is 1.10, then the new historic rate for translating this historic item from GBP to EUR is 1.36 (1.50/1.10).

(B) *Determining the owner functional currency net value of the section 987 QBU on the last day of the last taxable year ending before the year of change under § 1.987–4(d)(1)(i)(B).* For purposes of determining the change in the owner functional currency net value of the section 987 QBU on the last day of the last taxable year preceding the year of change under § 1.987–4(d)(1)(i)(B) and (e), the section 987 QBU's marked items are translated into the owner's new functional currency at the spot rate on

the last day of the last taxable year ending before the year of change.

(C) *Translation of unrecognized section 987 gain or loss.* Any net accumulated unrecognized section 987 gain or loss determined under § 1.987–4(c), cumulative suspended section 987 loss determined under § 1.987–11(b), or deferred section 987 gain or loss determined under § 1.987–12 is translated from the owner's old functional currency into the owner's new functional currency using the spot rate for translating an amount denominated in the owner's old functional currency into the owner's new functional currency on the last day of the last taxable year ending before the year of change.

(ii) *Taxpayer with the same functional currency as its QBU changing to a*

different functional currency. If a taxpayer with the same functional currency as its QBU changes to a new functional currency and as a result the taxpayer becomes an owner of a section 987 QBU (see § 1.987–1), the taxpayer and the section 987 QBU become subject to section 987 for the year of change and subsequent taxable years.

(iii) *Owner changing to the same functional currency as the section 987 QBU.* If an owner changes its functional currency to the functional currency of its section 987 QBU, the section 987 QBU is treated as if it terminated on the last day of the last taxable year ending before the year of change. See §§ 1.987–5, 1.987–8, 1.987–12, and 1.987–13 for the consequences of a termination of a

section 987 QBU that is subject to §§ 1.987–1 through 1.987–15.

(f) *Example.* The provisions of this section are illustrated by the following example:

(1) *Facts.* FC, a foreign corporation, is wholly owned by DC, a domestic corporation. The Commissioner granted permission to change FC's functional currency from the British pound to the euro beginning January 1, year 2. The EUR/GBP exchange rate on December 31, year 1, is €1:£0.50.

(2) *Analysis—(i) Determining new functional currency basis of property and liabilities.* The following table shows how FC must convert the items on its balance sheet from the British pound to the euro on December 31, year 1.

TABLE 1 TO PARAGRAPH (f)(2)(i) CONVERSION OF FC'S BALANCE SHEET ITEMS

	GBP	EUR
Assets:		
Cash on hand	£40,000	€80,000
Accounts Receivable	10,000	20,000
Inventory	100,000	200,000
100,000 Euro Bond (100,000 historical basis)	50,000	100,000
Fixed assets:		
Property	200,000	400,000
Plant	500,000	1,000,000
Accumulated Depreciation	(200,000)	(400,000)
Equipment	1,000,000	2,000,000
Accumulated Depreciation	(400,000)	(800,000)
Total Assets	1,300,000	2,600,000
Liabilities and Equity:		
Accounts Payable	50,000	100,000
Long-term Liabilities	400,000	800,000
Paid-in-Capital	800,000	1,600,000
Retained Earnings	50,000	100,000
Total Liabilities and Equity	1,300,000	2,600,000

(ii) *Exchange gain or loss on section 988 transactions.* Under paragraph (b) of this section, FC will recognize a £50,000 loss (£50,000 current value minus £100,000 historical basis) on the Euro Bond resulting from the change in functional currency because, after the change, the Euro Bond will no longer be an asset denominated in a non-functional currency. The amount of FC's retained earnings on its December 31, year 1, balance sheet reflects the £50,000 loss on the Euro Bond.

(g) *Applicability date.* Generally, this section applies to taxable years beginning after December 31, 2024. However, if pursuant to § 1.987–15(b), a taxpayer chooses to apply §§ 1.987–1 through 1.987–15 to a taxable year before the first taxable year described in § 1.987–15(a)(1), then this section applies to that taxable year and subsequent years.

■ **Par. 8.** Revise §§ 1.987–0 through 1.987–12 and add §§ 1.987.13 through 1.987–15 to read as follows:

Foreign Currency Transactions

* * * * *

Sec.

1.987–0 Table of contents.

1.987–1 Scope, definitions and special rules.

1.987–2 Attribution of items to eligible QBUs; definition of a transfer and related rules.

1.987–3 Determination of section 987 taxable income or loss of an owner of a section 987 QBU.

1.987–4 Determination of net unrecognized section 987 gain or loss of a section 987 QBU.

1.987–5 Recognition of section 987 gain or loss.

1.987–6 Character and source of section 987 gain or loss.

1.987–7 Application of the section 987 regulations to partnerships and S corporations.

1.987–8 Termination of a section 987 QBU.

1.987–9 Recordkeeping requirements.

1.987–10 Transition rules.

1.987–11 Suspended section 987 loss relating to certain elections; loss-to-the-extent-of-gain rule.

1.987–12 Deferral of section 987 gain or loss.

1.987–13 Suspended section 987 loss upon terminations.

1.987–14 Section 987 hedging transactions.

1.987–15 Applicability date.

* * * * *

§ 1.987–0 Table of contents.

This section lists the headings for §§ 1.987–1 through 1.987–15.

§ 1.987–1 *Scope, definitions and special rules.*

(a) In general.

(b) Scope of section 987 and certain rules relating to QBUs.

- (1) Persons subject to section 987.
 - (i) In general.
 - (ii) Inapplicability to certain entities.
- (2) Application of the section 987 regulations to earnings and profits.
 - (i) In general.
 - (ii) Timing.
 - (3) Definition of a section 987 QBU.
 - (i) In general.
 - (ii) Section 987 QBU grouping election.
 - (4) Definition of an eligible QBU.
 - (i) In general.
 - (ii) Qualified business unit.
 - (5) Definition of an owner.
 - (i) Direct ownership.
 - (ii) [Reserved]
 - (6) [Reserved]
 - (7) Examples illustrating paragraph (b) of this section.
 - (i) Example 1: Owner owns an eligible QBU and a DE holding company.
 - (ii) Example 2: Owner owns eligible QBUs through DEs.
 - (iii) Example 3: Section 987 grouping election.
 - (c) Exchange rates.
 - (1) Spot rate.
 - (i) In general.
 - (ii) Election to use a spot rate convention.
 - (2) Yearly average exchange rate.
 - (3) Historic rate.
 - (i) In general.
 - (ii) Date placed in service for depreciable or amortizable property.
 - (iii) Changed functional currency.
 - (d) Marked item.
 - (1) In general.
 - (2) Current rate election.
 - (e) Historic item.
 - (f) Example: Identification of marked and historic items.
 - (1) Facts.
 - (2) Analysis.
 - (g) Elections.
 - (1) Persons making the election.
 - (i) United States persons.
 - (ii) CFCs.
 - (iii) Consolidated groups.
 - (iv) Partnerships.
 - (2) Consistency rules.
 - (i) Consolidated groups.
 - (ii) CFCs and foreign partnerships.
 - (iii) Section 381(a) transactions.
 - (3) Manner of making or revoking elections.
 - (i) Statement must be attached to a return.
 - (ii) Election requirements.
 - (iii) Elections made under the 2016 and 2019 section 987 regulations.
 - (4) No change in method of accounting.
 - (5) Principles of § 1.964–1(c)(3) applicable to section 987 elections.
 - (h) Definitions.

§ 1.987–2 Attribution of items to eligible QBUs; definition of a transfer and related rules.

 - (a) In general.
 - (b) Attribution of items to an eligible QBU.
 - (1) General rules.
 - (2) Exceptions for non-portfolio stock, interests in partnerships, and certain acquisition indebtedness.
 - (i) In general.
 - (ii) Separate account assets.

(3) Adjustments to items reflected on the books and records.

- (i) General rule.
 - (ii) Factors indicating no tax avoidance.
 - (iii) Factors indicating tax avoidance.
 - (iv) Section 988 transactions.
- (c) Transfers to and from section 987 QBUs.
 - (1) In general.
 - (2) Disregarded transactions.
 - (i) General rule.
 - (ii) Definition of a disregarded transaction.
 - (iii) Items derived from disregarded transactions ignored.
 - (3) through (6) [Reserved]
 - (7) Application of general tax law principles.
 - (8) Interaction with § 1.988–1(a)(10).
 - (9) Certain disregarded transactions not treated as transfers.
 - (i) Combinations of section 987 QBUs.
 - (ii) Change in functional currency from a combination.
 - (iii) Separation of section 987 QBUs.
 - (iv) Special rules for successor suspended loss QBUs.
 - (10) Examples.
 - (i) Example 1: Loan to a section 987 QBU.
 - (ii) Example 2: Transfer between section 987 QBUs.
 - (iii) Example 3: Sale of property between two section 987 QBUs.
 - (iv) through (ix) [Reserved]
 - (x) Example 10: Contribution of a section 987 QBU's assets to a corporation.
 - (xi) Example 11: Circular transfers.
 - (xii) Example 12: Transfers without substance.
 - (xiii) Example 13: Offsetting positions in section 987 QBUs.
 - (xiv) Example 14: Offsetting positions with respect to a section 987 QBU and a section 988 transaction.
 - (xv) Example 15: Offsetting positions with respect to a section 987 QBU and a section 988 transaction.
 - (xvi) Example 16: Borrowing by section 987 QBU followed by immediate distribution to owner.
 - (xvii) Example 17: Payment of interest by section 987 QBU on obligation of owner.
 - (xviii) Example 18: Sale of the interests in a DE.
 - (d) Translation of items transferred to a section 987 QBU.
 - (1) Marked items.
 - (2) Historic items.
 - (e) Cross-reference.

§ 1.987–3 Determination of section 987 taxable income or loss of an owner of a section 987 QBU.

 - (a) In general.
 - (b) Determination of each item of income, gain, deduction, or loss in the section 987 QBU's functional currency.
 - (1) In general.
 - (2) Translation of items of income, gain, deduction, or loss that are denominated in a nonfunctional currency.
 - (3) [Reserved]
 - (4) Section 988 transactions.
 - (i) In general.
 - (ii) Section 988 mark-to-market election.
 - (c) Translation of items of income, gain, deduction, or loss of a section 987 QBU into the owner's functional currency.

(1) In general.

- (2) Exceptions.
 - (i) Recovery of basis with respect to historic assets.
 - (ii) through (iii) [Reserved]
 - (iv) Cost of goods sold computation.
 - (v) Translation of income to account for certain foreign income tax claimed as a credit.
 - (3) Adjustments to COGS required under the simplified inventory method.
 - (i) In general.
 - (ii) Adjustment for cost recovery deductions included in inventoriable costs.
 - (iii) Adjustment for beginning inventory for non-LIFO inventory.
 - (iv) Adjustment for year of LIFO liquidation.
 - (d) [Reserved]
 - (e) Examples.
 - (1) Example 1: Item of income denominated in nonfunctional currency.
 - (2) Example 2: Asset sold for nonfunctional currency.
 - (3) Example 3: Historic inventory method.
 - (i) Facts.
 - (ii) Analysis.
 - (4) Example 4: Simplified inventory method.
 - (i) Facts.
 - (ii) Analysis.
 - (5) Example 5: Depreciation expense that is not an inventoriable cost.
 - (6) Example 6: Translation of depreciation expense that is an inventoriable cost (historic inventory method).
 - (7) Example 7: Sale of land.
 - (8) Example 8: Current rate election.
 - (9) through (12) [Reserved]
 - (13) Example 13: Section 988 transaction.
 - (i) Facts.
 - (ii) Analysis.
 - (14) Example 14: Payment of foreign income tax.
 - (i) Facts.
 - (ii) Analysis.

§ 1.987–4 Determination of net unrecognized section 987 gain or loss of a section 987 QBU.

 - (a) In general.
 - (b) Calculation of net unrecognized section 987 gain or loss.
 - (c) Net accumulated unrecognized section 987 gain or loss for all prior taxable years.
 - (1) In general.
 - (2) Additional adjustments for certain taxable years beginning on or before December 31, 2024.
 - (d) Calculation of unrecognized section 987 gain or loss for a taxable year.
 - (1) Step 1: Determine the change in the owner functional currency net value of the section 987 QBU for the taxable year.
 - (i) In general.
 - (ii) Year section 987 QBU is terminated.
 - (iii) First taxable year of a section 987 QBU.
 - (iv) First year in which an election is in effect or ceases to be in effect.
 - (2) Step 2: Increase the amount determined in step 1 by the amount of assets transferred from the section 987 QBU to the owner.
 - (i) In general.
 - (ii) Assets transferred from the section 987 QBU to the owner during the taxable year.
 - (3) Step 3: Decrease the amount determined in steps 1 and 2 by the amount

of assets transferred from the owner to the section 987 QBU.

(i) In general.

(ii) Assets transferred from the owner to the section 987 QBU during the taxable year.

(4) Step 4: Decrease the amount determined in steps 1 through 3 by the amount of liabilities transferred from the section 987 QBU to the owner.

(i) In general.

(ii) Liabilities transferred from the owner to the section 987 QBU during the taxable year.

(5) Step 5: Increase the amount determined in steps 1 through 4 by the amount of liabilities transferred from the owner to the section 987 QBU.

(6) Step 6: Decrease or increase the amount determined in steps 1 through 5 by the section 987 taxable income or loss, respectively, of the section 987 QBU for the taxable year.

(7) Step 7: Increase the amount determined in steps 1 through 6 by certain expenses or losses that are not deductible in computing the section 987 taxable income or loss of the section 987 QBU for the taxable year.

(8) Step 8: Decrease the amount determined in steps 1 through 7 by the amount of certain income or gain that is not included in taxable income in computing the section 987 taxable income or loss of the section 987 QBU for the taxable year.

(9) Step 9: Increase or decrease the amount determined in steps 1 through 8 by any income or gain, or any deduction or loss, respectively, that does not impact the adjusted balance sheet.

(10) Step 10: Decrease or increase the amount determined in steps 1 through 9 by any increase or decrease, respectively, to the section 987 QBU's net assets that is not previously taken into account under steps 2 through 9.

(i) In general.

(ii) Determining the residual increase or decrease to net assets.

(iii) Modifications for taxable years to which a current rate election or an annual recognition election applies.

(e) Determination of the owner functional currency net value of a section 987 QBU.

(1) In general.

(i) Marked item.

(ii) Historic item.

(2) Current rate election.

(i) In general.

(ii) QBU net value.

(iii) Alternative calculation of QBU net value.

(f) Combinations and separations.

(1) Combinations.

(2) Separations.

(3) Examples.

(i) Example 1: Combination of two section 987 QBUs that have the same owner.

(ii) Example 2: Separation of two section 987 QBUs that have the same owner.

(g) Examples.

(1) Example 1: Determination of net unrecognized section 987 gain or loss.

(i) Facts.

(ii) Analysis.

(2) Example 2: Determination of net unrecognized section 987 gain or loss if a current rate election in effect.

(i) Facts.

(ii) Analysis.

(iii) Alternative computation of QBU net value.

(3) Example 3: Determination of net unrecognized section 987 gain or loss when a current rate election is revoked.

(i) Facts.

(ii) Analysis.

§ 1.987–5 Recognition of section 987 gain or loss.

(a) Recognition of section 987 gain or loss by the owner of a section 987 QBU.

(b) Remittance proportion.

(1) In general.

(2) Annual recognition election.

(c) Remittance.

(1) Definition.

(2) Alternative calculation.

(i) Step 1: Determine the change in QBU net value.

(ii) Step 2: Adjust the amount determined in step 1 for income or loss of the section 987 QBU.

(iii) Step 3: Multiply the amount determined in step 2 by negative one.

(3) Day when a remittance is determined.

(4) Termination.

(d) Aggregate of all amounts transferred from the section 987 QBU to the owner for the taxable year.

(e) Aggregate of all amounts transferred from the owner to the section 987 QBU for the taxable year.

(f) Determination of owner's adjusted basis in transferred assets and amount of transferred liabilities.

(1) In general.

(2) Marked items.

(3) Historic items.

(g) Example—Calculation of section 987 gain or loss recognized.

(1) Facts.

(i) In general.

(ii) Year 1 balance sheet.

(iii) Transfers and income in year 2.

(iv) Year 2 balance sheet.

(2) Analysis.

(i) Computation of amount of remittance.

(ii) Alternative computation of remittance amount.

(iii) Computation of section 987 QBU gross assets plus remittance.

(iv) Computation of remittance proportion.

(v) Computation of section 987 gain or loss.

(3) Annual recognition election.

§ 1.987–6 Character and source of section 987 gain or loss.

(a) Ordinary income or loss.

(b) Character and source of section 987 gain or loss.

(1) Timing of source and character determination.

(2) Method for determining the character and source section 987 gain or loss.

(i) Initial assignment

(ii) Reassignment of section 987 gain or loss.

(iii) Special rule for the application of the GILTI high-tax exclusion to section 987 gain or loss.

(3) Allocation and apportionment of foreign income tax to section 987 items under section 861.

(i) The foreign gross income is an item of foreign currency gain or loss.

(ii) The same event or events give rise to both the foreign gross income and the section 987 gain or loss.

(c) Examples.

(1) Example 1: Initial assignment and reassignment of section 987 gain or loss.

(i) Facts.

(ii) Analysis.

(2) Example 2: Effect of GILTI high-tax exclusion.

(i) Facts.

(ii) Analysis.

(3) Example 3: Section 987 gain or loss treated as attributable to section 988 transactions.

(i) Facts.

(ii) Analysis.

(4) Example 4: Section 987 gain or loss assigned to passive foreign personal holding company income.

(i) Facts.

(ii) Analysis.

§ 1.987–7 Application of the section 987 regulations to partnerships and S corporations.

(a) Overview.

(b) Section 987 regulations generally do not apply to partnerships.

(c) Provisions of the section 987 regulations that apply to partnerships.

(1) In general.

(i) Eligible QBU.

(ii) Partnership.

(2) Applicable provisions.

(i) In general.

(ii) Annual recognition election.

(iii) Section 988 mark-to-market election.

(3) Modifications to applicable provisions.

(i) In general.

(ii) Controlled group.

(4) Terminating QBUs.

(d) Suspended section 987 loss.

(1) In general.

(i) Rules of § 1.987–11(c) and (d)(2) do not apply.

(ii) Suspension of section 987 loss.

(2) Exceptions.

(i) Method under which historic items do not give rise to section 987 gain or loss.

(ii) Annual recognition election.

(iii) De minimis rule.

(3) Recognition of suspended section 987 loss.

(i) In general.

(ii) Partnership that is not engaged in a trade or business.

(iii) Application of the loss-to-the-extent-of-gain rule.

(e) Adjustments to the basis of a partner's interest in the partnership.

(f) S corporations treated as partnerships.

(g) Examples.

(1) Example 1: Aggregate approach to section 987.

(i) Facts.

(ii) Analysis.

(2) Example 2: Entity approach to section 987.

(i) Facts.

(ii) Analysis.

§ 1.987–8 Termination of a section 987 QBU.

(a) Scope.

(b) In general.

(1) Trade or business ceases.

(2) Substantially all assets transferred.
 (3) Owner no longer a CFC.
 (4) Owner ceases to exist.
 (5) Section 987 QBU ceases to be an eligible QBU with a functional currency different from its owner.

(6) Change in form of ownership.
 (c) Transactions described in section 381(a).

(1) Liquidations.
 (2) Reorganizations.
 (d) [Reserved]
 (e) Effect of terminations.
 (f) Examples.

(1) Example 1: Cessation of operations.
 (i) Facts.
 (ii) Analysis.
 (2) Example 2: Transfer of a section 987 QBU to a member of a consolidated group.

(i) Facts.
 (ii) Analysis.
 (3) Example 3: Cessation of controlled foreign corporation status.

(i) Facts.
 (ii) Analysis.
 (4) Example 4: Section 332 liquidation.
 (i) Facts.

(ii) Analysis.
 (5) [Reserved]
 (6) Example 6: Deemed transfers to a CFC upon a check-the-box election.

(i) Facts.
 (ii) Analysis.
 (7) Example 7: Sale of a section 987 QBU to a member of a consolidated group.
 (i) Facts.
 (ii) Analysis.

§ 1.987–9 Recordkeeping requirements.

(a) In general.
 (b) Supplemental information.
 (c) Retention of records.
 (d) Information on a dedicated section 987 form.

§ 1.987–10 Transition rules.

(a) Overview.
 (1) In general.
 (2) Terms defined under prior § 1.987–12.
 (b) Scope.
 (1) Owner of a section 987 QBU.
 (2) Deferral QBU owner and owner of outbound loss QBU.
 (c) Transition date.
 (1) In general.
 (2) Terminating QBU.
 (i) In general.
 (ii) Ordering rule.
 (d) Application of the section 987 regulations after the transition date.

(1) Owner functional currency net value on the last day of the preceding taxable year.
 (2) Determination of historic rate.
 (3) Transition exchange rate.
 (i) In general.
 (ii) Earnings only method.
 (e) Pretransition gain or loss.
 (1) In general.
 (2) Amount of pretransition gain or loss for an owner that applied an eligible pretransition method.

(i) Owner of a section 987 QBU
 (ii) Deferral QBU owner.
 (iii) Owner of an outbound loss QBU.
 (3) Amount of pretransition gain or loss for an owner that did not apply an eligible pretransition method.

(i) In general.
 (ii) Computation of pretransition gain or loss.
 (iii) Annual unrecognized section 987 gain or loss.

(iv) Deferral QBU owner.
 (v) Owner of an outbound loss QBU.
 (4) Eligible pretransition method.
 (i) Earnings and capital method.
 (ii) Other reasonable methods.
 (iii) Other earnings only methods.
 (iv) Error in the application of a section 987 method.

(v) Certain consistent practices not treated as errors.
 (vi) Deferral of section 987 gain or loss until termination is not reasonable.
 (vii) Anti-abuse rule.

(5) Recognition of pretransition gain or loss.
 (i) In general.
 (ii) Election to recognize pretransition section 987 gain or loss ratably over the transition period.

(6) Predecessor of an owner.
 (i) In general.
 (ii) Predecessor.
 (7) Small business election.

(i) Scope.
 (ii) Owner threshold.
 (iii) QBU threshold.
 (iv) Small business election.
 (f) QBUs to which the fresh start transition method was applied.

(1) In general.
 (2) Application of the section 987 regulations after the transition date.
 (i) Owner functional currency net value on the last day of the preceding taxable year.
 (ii) Determination of historic rate.
 (iii) Unrecognized section 987 gain or loss.
 (3) Taxpayers that are required to transition using the fresh start transition method.
 (g) [Reserved]
 (h) Determination of source and character.

(1) In general.
 (2) Deferral QBU or outbound loss QBU.
 (i) [Reserved]
 (j) Adjustments to avoid double counting or omissions.

(k) Reporting.
 (1) In general.
 (2) QBUs for which reporting is required.
 (i) In general.
 (ii) QBUs to which the fresh start transition method was applied.

(3) Attachments not required where information is reported on a form.
 (4) No change in method of accounting.
 (l) Examples.

(1) Example 1: Earnings and capital method.
 (i) Facts.
 (ii) Analysis.
 (2) Example 2: Earnings only method described in paragraph (e)(4)(ii) of this section.

(i) Facts.
 (ii) Analysis.
 (3) Example 3: Earnings only method described in paragraph (e)(4)(iii) of this section.

(i) Facts.
 (ii) Analysis.
 (4) Example 4: Owner did not apply section 987(3).

(i) Facts.
 (ii) Analysis.
 (5) Example 5: Error in application of method.

(i) Facts.
 (ii) Analysis.
 (6) Example 6: Consistent practice not treated as an error.
 (i) Facts.
 (ii) Analysis.

§ 1.987–11 Suspended section 987 loss relating to certain elections; loss to the extent of gain rule.

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§ 1.987–15 Applicability date.

(a) Applicability date of section 987 regulations.
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§ 1.987–1 Scope, definitions, and special rules.

(a) *In general.* Sections 1.987–1 through 1.987–15 (the *section 987 regulations*) provide rules for determining the taxable income or loss and earnings and profits of a taxpayer with respect to a qualified business unit (QBU) that is subject to section 987. Further, the section 987 regulations provide rules for determining the timing, amount, character, and source of section 987 gain or loss recognized with respect to a section 987 QBU. This section addresses the scope of the section 987 regulations and provides certain definitions, special rules, and procedures for making elections. Section 1.987–2 provides rules for attributing assets and liabilities and items of income, gain, deduction, and loss to an eligible QBU. It also provides rules regarding the translation of items transferred to a section 987 QBU. Section 1.987–3 provides rules for determining and translating the taxable income or loss of a taxpayer with respect to a section 987 QBU. Section 1.987–4 provides rules for determining net unrecognized section 987 gain or loss. Section 1.987–5 provides rules regarding the recognition of section 987 gain or loss. It also provides rules regarding the translation of items

transferred from a section 987 QBU to its owner. Section 1.987–6 provides rules regarding the character and source of section 987 gain or loss. Section 1.987–7 provides rules relating to the application of the section 987 regulations with respect to a partnership or S corporation. Section 1.987–8 provides rules regarding the termination of a section 987 QBU. Section 1.987–9 provides rules regarding the recordkeeping required under section 987. Section 1.987–10 provides transition rules. Section 1.987–11 provides rules relating to suspended losses in connection with certain elections and the loss-to-the-extent-of-gain rule. Section 1.987–12 provides rules regarding when section 987 gain or loss is deferred, as well as when such deferred amounts are recognized. Section 1.987–13 provides rules relating to suspended section 987 loss of an owner with respect to a section 987 QBU that terminates. Section 1.987–14 provides rules relating to section 987 hedging transactions. Section 1.987–15 provides the applicability date of the section 987 regulations.

(b) *Scope of section 987 and certain rules relating to QBUs*—(1) *Persons subject to section 987*—(i) *In general*. Except as provided in paragraphs (b)(1)(ii) and (b)(6) of this section, any individual or corporation is subject to the section 987 regulations. See § 1.987–7 for rules relating to the application of the section 987 regulations in the case of a partnership or S corporation.

(ii) *Inapplicability to certain entities*. Section 987(3) and the section 987 regulations do not apply to individuals who are not United States persons and foreign corporations that either are not controlled foreign corporations or that are controlled foreign corporations in which no United States shareholders own (within the meaning of section 958(a)) stock.

(2) *Application of the section 987 regulations to earnings and profits*—(i) *In general*. The rules and principles of the section 987 regulations also apply to the determination of earnings and profits, and any elections that apply pursuant to the section 987 regulations also apply for purposes of determining earnings and profits.

(ii) *Timing*. Earnings and profits are increased when section 987 gain is recognized and decreased when section 987 loss is recognized. As a result, converting net unrecognized section 987 gain or loss to deferred section 987 gain or loss or suspended section 987 loss does not affect earnings and profits because the amounts have not yet been recognized.

(3) *Definition of a section 987 QBU*—(i) *In general*. For purposes of section 987, a *section 987 QBU* is an eligible QBU that has a functional currency different from its owner. A section 987 QBU will continue to be treated as a section 987 QBU of the owner until a sale or other termination of the section 987 QBU as described in § 1.987–8(b) and (c). See § 1.985–1 for rules determining the functional currency of an eligible QBU.

(ii) *Section 987 QBU grouping election*—(A) *In general*. Solely for purposes of section 987, an owner may elect to treat all section 987 QBUs with the same functional currency as a single section 987 QBU except to the extent provided in paragraph (b)(2)(ii)(B) of this section. However, a QBU described in § 1.987–7(c)(1) may not be treated as part of the same QBU as a section 987 QBU that is not described in § 1.987–7(c)(1).

(B) [Reserved]

(4) *Definition of an eligible QBU*—(i) *In general*. For purposes of section 987, an *eligible QBU* means a qualified business unit that is not subject to the United States dollar approximate separate transactions method rules of § 1.985–3.

(ii) *Qualified business unit*. For purposes of this paragraph (b)(4), a qualified business unit is defined in § 1.989(a)–1(b), except that a corporation, partnership, trust, estate, or disregarded entity is not itself a qualified business unit, but the activities of such entity may be a qualified business unit if they meet the requirements of § 1.989(a)–1(b)(1) and (b)(2)(ii). For example, if a corporation is solely engaged in activities that constitute a trade or business, and the corporation maintains only one set of books and records, the activities (but not the corporation) are a qualified business unit.

(5) *Definition of an owner*. For purposes of section 987, an *owner* is any person having direct ownership in an eligible QBU (including ownership through DEs). The term *owner* does not include an eligible QBU. For example, a section 987 QBU (QBU1) is not an owner of another section 987 QBU (QBU2) even if QBU1 wholly owns the DE that owns QBU2. A person that is not subject to the section 987 regulations under paragraph (b)(1)(ii) of this section can meet the definition of an owner under this paragraph (b)(5) for purposes of applying the section 987 regulations to other persons.

(i) *Direct ownership*. A person is a direct owner of an eligible QBU if the person is the owner for Federal income

tax purposes of the assets and liabilities of the eligible QBU.

(ii) [Reserved]

(6) [Reserved]

(7) *Examples illustrating paragraph (b) of this section*. The following examples illustrate the principles of this paragraph (b). The following facts are assumed for purposes of the examples. U.S. Corp is a domestic corporation, has the U.S. dollar as its functional currency, and uses the calendar year as its taxable year. Except as otherwise provided: Business A and Business B are eligible QBUs and have the euro and the Japanese yen, respectively, as their functional currencies; and DE1 and DE2 are DEs, have no assets or liabilities, and conduct no activities.

(i) *Example 1: Owner owns an eligible QBU and a DE holding company*—(A) *Facts*. U.S. Corp owns Business A and all of the interests in DE1. DE1 maintains a separate set of books and records that are kept in British pounds. DE1 owns pounds and all of the stock of a foreign corporation, FC. DE1 is liable to a lender on a pound-denominated obligation that was incurred to acquire the stock of FC. The FC stock, the pounds, and the liability incurred to acquire the FC stock are recorded on DE1's separate books and records. DE1 has no other assets or liabilities and conducts no activities (other than holding the FC stock and pounds and servicing its liability).

(B) *Analysis*—(1) Pursuant to paragraph (b)(5) of this section, U.S. Corp is the owner of Business A because it has direct ownership of Business A, an eligible QBU. Because Business A is an eligible QBU with a functional currency that is different from the functional currency of its owner, U.S. Corp, Business A is a section 987 QBU under paragraph (b)(3)(i) of this section. As a result, U.S. Corp and its section 987 QBU, Business A, are subject to section 987.

(2) Holding the stock of FC and pounds and servicing a liability does not constitute a trade or business within the meaning of § 1.989(a)–1(c). Because the activities of DE1 do not constitute a trade or business within the meaning of § 1.989(a)–1(c), such activities are not an eligible QBU. In addition, pursuant to paragraph (b)(4)(ii) of this section, DE1 itself is not an eligible QBU. As a result, neither DE1 nor its activities qualify as a section 987 QBU of U.S. Corp. Therefore, neither the activities of DE1 nor DE1 itself is subject to section 987. For the foreign currency treatment of payments on DE1's pound-denominated liability, see § 1.988–2(b).

(ii) *Example 2: Owner owns eligible QBUs through DEs*—(A) *Facts*. U.S.

Corp owns all of the interests in DE1. DE1 owns Business A and all of the interests in DE2. The only activities of DE1 are Business A activities and holding the interests in DE2. DE2 owns Business B and Business C. For purposes of this example, Business B does not maintain books and records that are separate from DE2. Instead, the activities of Business B are reflected on the books and records of DE2, which are maintained in Japanese yen. In addition, Business C has the U.S. dollar as its functional currency, maintains books and records that are separate from the books and records of DE2, and is an eligible QBU.

(B) *Analysis*—(1) Pursuant to paragraph (b)(4)(ii) of this section, DE1 and DE2 are not eligible QBUs. Moreover, pursuant to paragraph (b)(5) of this section, DE1 is not the owner of the Business A, Business B, or Business C eligible QBUs, and neither Business A nor DE2 is the owner of the Business B or Business C eligible QBUs. Instead, pursuant to paragraph (b)(5) of this section, U.S. Corp is the owner of the Business A, Business B, and Business C eligible QBUs.

(2) Because Business A and Business B are eligible QBUs with functional currencies that are different than the functional currency of U.S. Corp, Business A and Business B are section 987 QBUs under paragraph (b)(3)(i) of this section.

(3) The Business C eligible QBU has the same functional currency as U.S. Corp, the U.S. dollar. Therefore, the Business C eligible QBU is not a section 987 QBU under paragraph (b)(3)(i) of this section.

(iii) *Example 3: Section 987 grouping election*—(A) *Facts*. U.S. Corp owns all of the interests in DE1. DE1 owns Business A and Business B. For purposes of this example, assume Business B has the euro as its functional currency.

(B) *Analysis*—(1) Pursuant to paragraph (b)(4)(ii) of this section, DE1 is not an eligible QBU. Moreover, pursuant to paragraph (b)(5) of this section, DE1 is not the owner of the Business A or Business B eligible QBUs. Instead, pursuant to paragraph (b)(5) of this section, U.S. Corp is the owner of the Business A and Business B eligible QBUs.

(2) Business A and Business B constitute two separate eligible QBUs, each with the euro as its functional currency. Accordingly, Business A and Business B are section 987 QBUs of U.S. Corp under paragraph (b)(3)(i) of this section. U.S. Corp may elect to treat Business A and Business B as a single section 987 QBU pursuant to paragraph

(b)(3)(ii) of this section. If such election is made, pursuant to paragraph (b)(5) of this section, U.S. Corp would be the owner of the Business AB section 987 QBU that would include the activities of both the Business A section 987 QBU and the Business B section 987 QBU. In addition, pursuant to paragraph (b)(5) of this section, DE1 would not be treated as the owner of the Business AB section 987 QBU.

(c) *Exchange rates*. Solely for purposes of section 987, the spot rate, the yearly average exchange rate, and the historic rate are determined as provided in paragraphs (c)(1) through (3) of this section.

(1) *Spot rate*—(i) *In general*. Except as otherwise provided in this section, the spot rate means the rate determined under the rules of § 1.988–1(d)(1), (2), and (4) on the relevant date.

(ii) *Election to use a spot rate convention*. An owner may elect to use a spot rate convention that reasonably approximates the spot rate determined in paragraph (c)(1)(i) of this section. A spot rate convention may be based on the spot rate at the beginning of a reasonable period, the spot rate at the end of a reasonable period, the average of spot rates for a reasonable period, or spot and forward rates for a reasonable period. For this purpose, a reasonable period may not exceed three months. For example, in lieu of the spot rate determined in paragraph (c)(1)(i) of this section, the spot rate for all transactions during a monthly period may be determined pursuant to one of the following conventions: the spot rate at the beginning of the current month or at the end of the preceding month; the monthly average of daily spot rates for the current or preceding month; or an average of the beginning and ending spot rates for the current or preceding month. Similarly, in lieu of the spot rate determined in paragraph (c)(1)(i) of this section, the spot rate may be determined pursuant to an average of the spot rate and the 30-day forward rate on a day of the preceding month. Use of a spot rate convention that is consistent with the convention used for financial accounting purposes is generally presumed to reasonably approximate the rate in paragraph (c)(1)(i) of this section. However, the Commissioner may prescribe the spot rate as determined in paragraph (c)(1)(i) of this section or an appropriate spot rate pursuant to this paragraph (c)(1)(ii) if the Commissioner determines that the use of the convention would not clearly reflect income based on the facts and circumstances available at the time of the election. The election or revocation of a spot rate convention does not

change the spot rate with respect to any day of a taxable year before the election or revocation becomes effective. See paragraph (g) of this section for rules relating to section 987 elections.

(2) *Yearly average exchange rate*. For purposes of section 987, the yearly average exchange rate is a rate that represents an average exchange rate for the taxable year (or, if the section 987 QBU existed for less than the full taxable year, the portion of the year during which the section 987 QBU existed) computed under any reasonable method. For example, an owner may determine the yearly average exchange rate based on a daily, monthly, or quarterly averaging convention, whether weighted or unweighted, and may take into account forward rates for a period not to exceed three months. Use of an averaging convention that is consistent with the convention used for financial accounting purposes is generally presumed to be a reasonable method. However, the Commissioner may prescribe an appropriate yearly average exchange rate if the Commissioner determines that the use of the convention would not have been expected to clearly reflect income based on the facts and circumstances available at the time of the election.

(3) *Historic rate*—(i) *In general*. Except as otherwise provided in the section 987 regulations, the historic rate is determined as described in paragraphs (c)(3)(i)(A) through (E) of this section.

(A) *Assets generally*. In the case of an asset other than inventory that is acquired by a section 987 QBU (or otherwise becomes attributable to a section 987 QBU, including through a transfer), the historic rate is the yearly average exchange rate applicable to the year of acquisition (or the year in which the asset otherwise becomes attributable to the section 987 QBU).

(B) *Inventory under the simplified inventory method*. If a taxpayer has not elected under § 1.987–3(c)(2)(iv)(B) to use the historic inventory method, the historic rate for inventory is determined under this paragraph (c)(3)(i)(B).

(1) *LIFO inventory*. The historic rate for LIFO inventory is the yearly average exchange rate applicable to the year in which the inventory's LIFO layer arose.

(2) *Non-LIFO inventory*. The historic rate for non-LIFO inventory is the yearly average exchange rate for the relevant taxable year. For example, in determining the owner functional currency net value of a section 987 QBU on the last day of the current taxable year under § 1.987–4(d)(1)(i)(A), the historic rate for non-LIFO inventory is the yearly average exchange rate for the

current taxable year. In determining the owner functional currency net value of a section 987 QBU on the last day of the preceding taxable year under § 1.987–4(d)(1)(i)(B), the historic rate for non-LIFO inventory is the yearly average exchange rate for the preceding taxable year.

(C) *Inventory under the historic inventory method.* If a taxpayer has elected under § 1.987–3(c)(2)(iv)(B) to use the historic inventory method, each inventoriable cost with respect to a section 987 QBU's inventory may have a different historic rate. The historic rate for each inventoriable cost is the exchange rate at which the cost would be translated under § 1.987–3 if it were not an inventoriable cost.

(D) *Liabilities generally.* In the case of a liability that is incurred or assumed by a section 987 QBU, the historic rate is the yearly average exchange rate applicable to the year the liability is incurred or assumed.

(E) *Determination of historic rates after revocation of current rate election.* If a current rate election is revoked or otherwise ceases to be in effect, the historic rate of all historic items (other than non-LIFO inventory subject to the simplified inventory method) that were attributable to a section 987 QBU on the last day of the last taxable year in which the current rate election was in effect is the spot rate applicable to that day. Similarly, except as provided in paragraph (c)(3)(i)(B)(2) of this section, if a marked item becomes a historic item (such as when an asset of an insurance company ceases to be a separate account asset), the historic rate for the historic item is equal to the spot rate applicable to the last day of the last taxable year in which it was treated as a marked item.

(ii) *Date placed in service for depreciable or amortizable property.* In the case of depreciable or amortizable property, an owner may determine the historic rate by reference to the date such property is placed in service by the section 987 QBU rather than the date the property was acquired, provided that this convention is consistently applied for all such property attributable to that section 987 QBU.

(iii) *Changed functional currency.* In the case of a section 987 QBU or an owner of a section 987 QBU that previously changed its functional currency, § 1.985–5(d)(1)(ii)(A) and (e)(4)(i)(A), respectively, are taken into account in determining the historic rate for an item reflected on the balance sheet of the section 987 QBU immediately before the year of change.

(d) *Marked item*—(1) *In general.* Except as provided in paragraph (d)(2)

of this section, a marked item is an asset (*marked asset*) or liability (*marked liability*) that is attributable to a section 987 QBU under § 1.987–2(b) and that—

(i) Is denominated in, or determined by reference to, the functional currency of the section 987 QBU and would be a section 988 transaction if such item were held or entered into directly by the owner of the section 987 QBU;

(ii) Is a prepaid expense or a liability for an advance payment of unearned income, in either case having an original term of one year or less on the date the prepaid expense or liability for an advance payment of unearned income arises;

(iii) Is a section 988 transaction of the section 987 QBU;

(iv) Is an insurance reserve; or

(v) Is a separate account asset.

(2) *Current rate election.* A taxpayer may elect to treat all assets and liabilities that are attributable to a section 987 QBU under § 1.987–2(b) as marked items (a *current rate election*). See § 1.987–11(c) for rules suspending section 987 loss if a current rate election is in effect.

(e) *Historic item.* A historic item is an asset (*historic asset*) or liability (*historic liability*) that is attributable to a section 987 QBU under § 1.987–2(b) and that is not a marked item.

(f) *Example: Identification of marked and historic items.* The following example illustrates the application of paragraphs (d) and (e) of this section.

(1) *Facts.* U.S. Corp is a domestic corporation with the U.S. dollar as its functional currency and is the owner of Business A, a section 987 QBU that has the pound as its functional currency. Items reflected on Business A's balance sheet include £10,000, \$1,000, a building with a basis of £100,000, a light general purpose truck with a basis of £30,000, a computer with a basis of £1,000, a 60-day receivable for ¥15,000, an account payable of £5,000, and a foreign currency contract within the meaning of section 1256(g)(2) that requires Business A to exchange £100 for \$125 in 90 days.

(2) *Analysis.* Under paragraph (d) of this section, the £10,000, the \$1,000, the ¥15,000 receivable, the £5,000 account payable, and the £/\$ section 1256 foreign currency contract are marked items. The other items are historic items under paragraph (e) of this section.

(g) *Elections.* This paragraph (g) provides rules for making and revoking elections under the section 987 regulations (the *section 987 elections*). A section 987 election is made for the owner and for a taxable year and applies to every section 987 QBU owned by the owner while the election is in effect.

Once made, a section 987 election remains in effect until revoked.

(1) *Persons making the election.* A section 987 election is made or revoked by the authorized person. The authorized person is described in paragraph (g)(1)(i), (ii), (iii), or (iv) of this section. If there are multiple controlling domestic shareholders, references to “the authorized person” refer to all authorized persons acting in concert.

(i) *United States persons.* Except as provided in paragraph (g)(1)(iii) or (iv) of this section, if the owner of a section 987 QBU is a United States person, the owner is the authorized person.

(ii) *CFCs.* If the owner of a section 987 QBU is a controlled foreign corporation, the controlling domestic shareholders (determined under § 1.964–1(c)(5)(i)) of the controlled foreign corporation are treated as the authorized person.

(iii) *Consolidated groups.* If the owner is a member of a consolidated group, see § 1.1502–77.

(iv) *Partnerships.* If the owner of a section 987 QBU is a partnership, the election is made or revoked by the partnership. For a partnership that is not otherwise required to file a partnership return, see § 1.6031(a)–1(b)(5) for elections that can only be made by a partnership under section 703.

(2) *Consistency rules*—(i) *Consolidated groups.* A section 987 election is made or revoked by a consolidated group and applies to all members of the group. Therefore, the same section 987 elections will be in effect for all members of a consolidated group at all times. If a corporation becomes a member of a consolidated group, it is deemed to make or revoke any section 987 election as necessary to be consistent with the consolidated group. If a corporation ceases to be a member of a consolidated group and does not join another group, its section 987 elections are unaffected by its departure from the group. All members of a consolidated group are treated as a single United States person for purposes of applying paragraph (g)(2)(ii) of this section.

(ii) *CFCs and foreign partnerships.* If the authorized person makes or revokes an election on behalf of any person (including the authorized person) described in paragraphs (g)(2)(ii)(A) through (C) of this section (the *section 987 electing group*), then the election must be made or revoked on behalf of all members of the section 987 electing group for the first taxable year of each entity that ends with or within the taxable year of the United States person described in paragraph (g)(2)(ii)(A) of

this section in which the election or revocation became effective. If an entity that was not previously a member of the section 987 electing group becomes a member (for example, upon formation or acquisition), it is deemed to make or revoke any section 987 election as necessary to be consistent with the other members (without regard to the requirements of paragraph (g)(3)(ii) of this section). The following persons are described in this paragraph (g)(2)(ii):

(A) A United States person (the *relevant United States person*).

(B) Each controlled foreign corporation in which the relevant United States person owns (within the meaning of section 958(a)) more than fifty percent of the stock (by vote or value).

(C) In the case of an election that can be made by or for a partnership, each foreign partnership in which the relevant United States person owns (directly or indirectly) more than fifty percent of the capital and profits interest.

(iii) *Section 381(a) transactions*. If a corporation (*acquiring corporation*) acquires the assets of another corporation in a transaction described in section 381(a), the acquiring corporation's election status applies to all section 987 QBUs owned by the acquiring corporation after the transaction.

(3) *Manner of making or revoking elections*. The section 987 elections must be made in accordance with this paragraph (g)(3), except as provided in forms and instructions or other guidance as provided by the Secretary.

(i) *Statement must be attached to a return*. An authorized person that makes or revokes a section 987 election in accordance with this paragraph (g) must attach to its return the statement described in this paragraph (g)(3)(i) (or must provide the information described in this paragraph (g)(3)(i) in the manner prescribed in forms or instructions or other guidance). Each statement must include an identification of the election that is made or revoked (including the section and paragraph of the regulations under which the election is made); the name, address, and functional currency of each owner (or if the owner is a member of a consolidated group, the common parent of the consolidated group) for which the election is made or revoked; and the name, address, functional currency, and owner of each section 987 QBU to which the election applies. The elections provided in § 1.987–10 are made by reporting the election on the statement described in § 1.987–10(k). An election to use a spot rate convention under paragraph

(c)(1)(ii) of this section must describe the convention.

(ii) *Election requirements*—(A) *Consent required*. Except as provided in paragraph (g)(3)(ii)(B) or (C) of this section, a section 987 election may not be made or revoked without the consent of the Commissioner. A copy of the consent must be attached to the statement described in paragraph (g)(3)(i) of this section. For purposes of this paragraph (g)(3)(ii), the Commissioner's consent may be obtained only with a ruling or administrative pronouncement. See Revenue Procedure 2024–1, I.R.B. 2024–1 (or superseding guidance).

(B) *Current rate election, annual recognition election, and section 988 mark-to-market election*. Except as provided in paragraph (g)(3)(ii)(C) of this section, the authorized person may make a current rate election, an annual recognition election, or a section 988 mark-to-market election without the Commissioner's consent by filing the statement prescribed in paragraph (g)(3)(i) of this section with the Internal Revenue Service in accordance with the prescribed form or its instructions (or other guidance) on or before the first day of the taxable year to which the election applies, and attaching a copy of the statement to its return. Once made, a current rate election, annual recognition election, or section 988 mark-to-market election may not be revoked without the Commissioner's consent for any taxable year beginning within 60 months of the first day of the taxable year for which it was made. Once revoked, a new current rate election, annual recognition election, or section 988 mark-to-market election may not be made without the Commissioner's consent for any taxable year beginning within 60 months of the first day of the taxable year for which it was revoked.

(C) *First year to which the section 987 regulations apply*. The authorized person may make a section 987 election without the consent of the Commissioner on its original, timely filed (including extensions) return for the first taxable year of an owner in which both—

(1) The section 987 regulations apply (other than by applying solely to one or more terminating QBUs pursuant to § 1.987–15(a)(2)); and

(2) Either the owner or any member of its consolidated group or section 987 electing group is the owner of a section 987 QBU.

(iii) *Elections made under the 2016 and 2019 section 987 regulations*. Each section 987 election must be made by the authorized person under the rules of

this section without regard to whether the election was in effect under the 2016 and 2019 final regulations or under prior § 1.987–8T. In the first taxable year in which the section 987 regulations apply, any elections made under the 2016 and 2019 final regulations cease to be effective.

(4) *No change in method of accounting*. An election under section 987 is not treated as a change in method of accounting for purposes of sections 446 and 481.

(5) *Principles of § 1.964–1(c)(3) applicable to section 987 elections*. Except as otherwise provided in this paragraph (g), if the authorized person makes or revokes a section 987 election on behalf of a controlled foreign corporation, the authorized person must make or revoke the section 987 election in accordance with the rules and principles of § 1.964–1(c)(3).

(h) *Definitions*. The definitions in this paragraph (h) apply for purposes of the section 987 regulations.

1991 proposed regulations. 1991 proposed regulations means proposed §§ 1.987–1 through 1.987–3 as contained in 56 FR 48457–01 (September 25, 1991).

2006 proposed regulations. 2006 proposed regulations means: proposed §§ 1.861–9T(g)(2)(ii)(A)(1) and (g)(2)(vi); 1.985–5; 1.987–1 through 1.987–11; 1.988–1(a)(3) and (4), (a)(10)(ii), and (i); 1.988–4(b)(2); and 1.989(a)–1(b)(2)(i), and (b)(4) as contained in 71 FR 52876–01 (September 7, 2006).

2016 and 2019 section 987 regulations. 2016 and 2019 section 987 regulations means the following regulations:

(i) Sections 1.861–9T(g)(2)(ii)(A)(1) and (g)(2)(vi); 1.985–5; 1.987–1 through 1.987–10; 1.988–1(a)(4), (a)(10)(ii), and (i); 1.988–4(b)(2); and 1.989(a)–1(b)(2)(i), (b)(4), (d)(3) and (4), as contained in 26 CFR in part 1 in effect on April 1, 2017.

(ii) Sections 1.987–2T(c)(9), 1.987–4T(c)(2) and (f), and 1.987–7T, as contained in 26 CFR in part 1 in effect on April 1, 2017 (until they were revoked on May 13, 2019).

(iii) Sections 1.987–2(c)(9) and 1.987–4(c)(2) and (f), as contained in 26 CFR in part 1 in effect on April 1, 2020 (beginning on May 13, 2019).

(iv) Sections 1.987–1T (other than §§ 1.987–1T(g)(2)(i)(B) and (g)(3)(i)(H)), 1.987–3T, 1.987–6T, 1.988–1T, and 1.988–2T(i), as contained in 26 CFR in part 1 in effect on April 1, 2017 (until they expired on December 6, 2019).

Adjusted balance sheet. Adjusted balance sheet means a tax basis balance sheet in the functional currency of the eligible QBU, determined by—

(i) Preparing a balance sheet for the relevant date from the section 987 QBU's books and records (within the meaning of § 1.989(a)–1(d)) recorded in the section 987 QBU's functional currency and showing all assets and liabilities attributable to the section 987 QBU under § 1.987–2(b) (the *preliminary balance sheet*); and

(ii) Making adjustments necessary to conform the items reflected on the preliminary balance sheet to United States tax accounting principles (including adjustments to reflect items that were not reflected on the preliminary balance sheet but should be reflected under United States tax accounting principles, and adjustments to eliminate items that are reflected on the preliminary balance sheet but should not be reflected under United States tax accounting principles).

Annual recognition election. *Annual recognition election* has the meaning provided in § 1.987–5(b)(2).

Authorized person. *Authorized person* has the meaning provided in paragraph (g)(1) of this section.

Combination. *Combination* has the meaning provided in § 1.987–2(c)(9)(i).

Combined QBU. *Combined QBU* has the meaning provided in § 1.987–2(c)(9)(i).

Combining QBU. *Combining QBU* has the meaning provided in § 1.987–2(c)(9)(i).

Consolidated group. *Consolidated group* has the meaning provided in § 1.1502–1(h).

Controlled foreign corporation. *Controlled foreign corporation* (or *CFC*) has the meaning provided in section 957 (or, if applicable, section 953(c)(1)(B)).

Controlled group. *A controlled group* means all persons with the relationships to each other specified in section 267(b) or section 707(b).

Cumulative suspended section 987 loss. *Cumulative suspended section 987 loss* has the meaning provided in § 1.987–11(b).

Current rate election. *Current rate election* has the meaning provided in paragraph (d)(2) of this section.

Current year gain amount. *Current year gain amount* has the meaning provided in § 1.987–11(e)(3)(i).

Deferral event. *Deferral event* has the meaning provided in § 1.987–12(g)(1).

Deferred section 987 gain or loss. *Deferred section 987 gain or loss* has the meaning provided in § 1.987–12(b)(2). *Deferred section 987 gain or loss* does not include net unrecognized section 987 gain or loss or suspended section 987 loss.

Disregarded entity. *Disregarded entity* (or *DE*) means an entity disregarded as an entity separate from its owner for

Federal income tax purposes, including an entity described in § 301.7701–2(c)(2) of this chapter, a qualified subchapter S subsidiary under section 1361(b)(3), a qualified REIT subsidiary within the meaning of section 856(i)(2), and a trust all of which is treated (under subpart E of part I of subchapter J of Chapter 1 of the Code) as owned by the grantor or another person.

Disregarded transactions. *Disregarded transactions* has the meaning provided in § 1.987–2(c)(2)(ii).

Earnings only method. *Earnings only method* means a method of applying section 987 before the transition date under which gain or loss under section 987(3) is determined only with respect to the earnings of a section 987 QBU.

ECI. *ECI* means income that is effectively connected with the conduct of a trade or business within the United States.

Eligible pretransition method. *Eligible pretransition method* has the meaning provided in § 1.987–10(e)(4).

Eligible QBU. *Eligible QBU* has the meaning provided in paragraph (b)(4) of this section.

Financial instrument. *Financial instrument* has the meaning provided in § 1.1275–6(b)(3). It includes a financial instrument entered into between related parties or unrelated parties.

Foreign source income. *Foreign source income* means income from sources without the United States.

Generally accepted accounting principles. *Generally accepted accounting principles* means United States generally accepted accounting principles described in standards established and made effective by the Financial Accounting Standards Board.

Hedge. *Hedge* has the meaning provided in § 1.987–14(b)(1).

Hedged QBU. *Hedged QBU* has the meaning provided in § 1.987–14(b)(1).

Hedging gain or loss. *Hedging gain or loss* has the meaning provided in § 1.987–14(d)(1).

Historic asset. *Historic asset* has the meaning provided in paragraph (e) of this section.

Historic item. *Historic item* has the meaning provided in paragraph (e) of this section.

Historic liability. *Historic liability* has the meaning provided in paragraph (e) of this section.

Historic rate. *Historic rate* has the meaning provided in paragraph (c)(3) of this section.

Insurance reserve. *Insurance reserve* means an item that is a reserve under section 807(c) or section 953(b) (as applicable).

LIFO. *LIFO* means the last-in, first-out inventory method (as described in section 472).

LIFO inventory. *LIFO inventory* means inventory accounted for under the LIFO inventory method.

Liability. *Liability* means the amount of a liability on the adjusted balance sheet (or the amount that would be on the adjusted balance sheet if an adjusted balance sheet were prepared for that day).

Lookback gain amount. *Lookback gain amount* has the meaning provided in § 1.987–11(e)(3)(ii).

Lookback period. *Lookback period* has the meaning provided in § 1.987–11(e)(3)(iv).

Loss-to-the-extent-of-gain rule. *Loss-to-the-extent-of-gain rule* has the meaning provided in § 1.987–11(e)(1).

Marked asset. *Marked asset* has the meaning provided in paragraph (d) of this section.

Marked item. *Marked item* has the meaning provided in paragraph (d) of this section.

Marked liability. *Marked liability* has the meaning provided in paragraph (d) of this section.

Net accumulated unrecognized section 987 gain or loss. *Net accumulated unrecognized section 987 gain or loss* has the meaning provided in § 1.987–4(c).

Net unrecognized section 987 gain or loss. *Net unrecognized section 987 gain or loss* has the meaning provided in § 1.987–4(b). *Net unrecognized section 987 gain or loss* does not include deferred section 987 gain or loss or suspended section 987 loss.

Non-LIFO inventory. *Non-LIFO inventory* means inventory that is not accounted for under the LIFO inventory method.

Original deferral QBU. *Original deferral QBU* has the meaning provided in § 1.987–12(b).

Original deferral QBU owner. *Original deferral QBU owner* has the meaning provided in § 1.987–12(g)(3).

Original suspended loss QBU owner. *Original suspended loss QBU owner* has the meaning provided in § 1.987–13(l)(1).

Outbound loss event. *Outbound loss event* has the meaning provided in § 1.987–13(h)(2).

Outbound loss QBU. *Outbound loss QBU* has the meaning provided in § 1.987–13(h)(1).

Outbound section 987 loss. *Outbound section 987 loss* has the meaning provided in § 1.987–13(h)(4).

Owner. *Owner* has the meaning provided in paragraph (b)(5) of this section.

Prior § 1.987–1. *Prior § 1.987–1* means § 1.987–1, as contained in 26 CFR part 1 in effect on April 1, 2017.

Prior § 1.987-4. Prior § 1.987-4 means § 1.987-4, as contained in 26 CFR in part 1 in effect on April 1, 2017.

Prior § 1.987-5. Prior § 1.987-5 means § 1.987-5, as contained in 26 CFR in part 1 in effect on April 1, 2017.

Prior § 1.987-8T. Prior § 1.987-8T means § 1.987-8T, as contained in 26 CFR in part 1 in effect on April 1, 2017.

Prior § 1.987-10. Prior § 1.987-10 means § 1.987-10, as contained in 26 CFR in part 1 in effect on April 1, 2017.

Prior § 1.987-12. Prior § 1.987-12 means § 1.987-12, as contained in 26 CFR in part 1 in effect on April 1, 2020.

Prior § 1.987-12T. Prior § 1.987-12T means § 1.987-12T, as contained in 26 CFR in part 1 in effect on April 1, 2017.

QBU net value. QBU net value has the meaning provided in § 1.987-4(e)(2)(ii).

Recognition grouping. Recognition grouping has the meaning provided in § 1.987-11(f).

Remittance. Remittance has the meaning provided in § 1.987-5(c).

S corporation. S corporation has the meaning provided in section 1361(a)(1).

Section 904 category. Section 904 category means a separate category of income described in § 1.904-5(a)(4)(v).

Section 987 electing group. Section 987 electing group has the meaning provided in paragraph (g)(2)(ii) of this section.

Section 987 elections. Section 987 elections has the meaning provided in paragraph (g) of this section.

Section 987 gain or loss. Section 987 gain or loss means gain or loss that is recognized under § 1.987-5, deferred section 987 gain or loss, suspended section 987 loss, and pretransition gain or loss that is recognized under § 1.987-10(e)(5)(ii).

Section 987 hedging transaction. Section 987 hedging transaction has the meaning provided in § 1.987-14(b).

Section 987 QBU. Section 987 QBU has the meaning provided in paragraph (b)(3) of this section.

Section 987 regulations. Section 987 regulations has the meaning provided in paragraph (a) of this section.

Section 987 taxable income or loss. Section 987 taxable income or loss has the meaning provided in § 1.987-3(a).

Section 988 mark-to-market election. Section 988 mark-to-market election has the meaning provided in § 1.987-3(b)(4)(ii).

Separate account. Separate account means a separate set of financial records maintained with respect to an insurance contract or group of contracts to report assets and liabilities for specific products that are separated from the insurer's general account, provided the following requirements are met—

(i) Any liability of the separate account is the liability only of that

account and not the liability of any other separate account or the general account;

(ii) The separate account is not part of the company's general account and is protected from the general creditors of the company; and

(iii) The value of each contract supported by the separate account is supported proportionately by each of the assets in such account.

Separate account asset. Separate account asset means an asset that is reflected on the books and records of an eligible QBU and held in a separate account with respect to a separate account insurance contract. A separate account asset does not include an asset held in the general account.

Separate account insurance contract. Separate account insurance contract means a contract that would be treated as an insurance contract for Federal income tax purposes (except to the extent provided in this definition with respect to the requirements in section 72(s), 101(f), 817(h), or 7702) for which some or all of the assets supporting the insurance reserves are required to be held in a separate account under the insurance regulatory rules of the jurisdiction in which the contract is issued, and either—

(i) The contract qualifies as a variable contract under section 817(d) (treating foreign law as a State law or regulation); or

(ii) The contract would qualify as a variable contract under section 817(d) (treating foreign law as a State law or regulation) but for its failure to meet one or more of the requirements in section 72(s), 101(f), 817(h), or 7702, provided that the following requirements are met—

(A) The contract is regulated as a life insurance or annuity contract in the foreign jurisdiction in which it is issued;

(B) The contract reserves are computed or estimated on the basis of recognized mortality or morbidity tables and assumed rates of interest. For this purpose, the reflection of the investment return and the market value of assets in the separate account is considered an assumed rate of interest; and

(C) No policyholder, annuitant, insured, or beneficiary under the contract is a United States person.

Separated QBU. Separated QBU has the meaning provided in § 1.987-2(c)(9)(iii).

Separating QBU. Separating QBU has the meaning provided in § 1.987-2(c)(9)(iii).

Separation. Separation has the meaning provided in § 1.987-2(c)(9)(iii).

Separation fraction. In the case of a separated QBU, separation fraction means a fraction, the numerator of which is the aggregate adjusted basis of the gross assets attributable to the separated QBU immediately after the separation, and the denominator of which is the aggregate adjusted basis of the gross assets attributable to all separated QBUs immediately after the separation.

Spot rate. Spot rate has the meaning provided in paragraph (c)(1) of this section.

SRLY section 987 losses. SRLY section 987 losses has the meaning provided in § 1.987-11(e)(6)(ii).

Successor deferral QBU. Successor deferral QBU has the meaning provided in § 1.987-12(g)(2).

Successor deferral QBU owner. Successor deferral QBU owner has the meaning provided in § 1.987-12(c)(1).

Successor suspended loss QBU. Successor suspended loss QBU has the meaning provided in § 1.987-13(l)(2).

Successor suspended loss QBU owner. Successor suspended loss QBU owner has the meaning provided in § 1.987-13(l)(3).

Suspended section 987 loss.

Suspended section 987 loss means section 987 loss that is subject to the limitations on recognition described in § 1.987-11(e). See §§ 1.987-10(e)(5), 1.987-11(c) and (d), 1.987-12(c), and 1.987-13(h) for rules regarding when net unrecognized section 987 loss or deferred section 987 loss becomes suspended section 987 loss. Suspended section 987 loss does not include net unrecognized section 987 loss or deferred section 987 loss.

Tentative tested income group.

Tentative tested income group has the meaning provided in § 1.987-6(b)(2)(i)(D)(1).

Terminating QBU. Terminating QBU means a section 987 QBU, if both—

(i) The section 987 QBU terminates on any date on or after November 9, 2023, or the section 987 QBU terminates as a result of an entity classification election made under § 301.7701-3 of this chapter that is filed on or after November 9, 2023, and that is effective before November 9, 2023; and

(ii) When the section 987 QBU terminates, neither the section 987 regulations nor the 2016 and 2019 section 987 regulations would apply with respect to the section 987 QBU but for § 1.987-15(a)(2).

Termination. With respect to a section 987 QBU, termination has the meaning provided in § 1.987-8(b) and (c). With respect to a successor suspended loss QBU, the term *termination* has the meaning provided in § 1.987-13(j).

Trade or business. *Trade or business* has the meaning provided in § 1.989(a)–1(c).

Transfer. *Transfer* has the meaning provided in § 1.987–2(c).

Transition date. *Transition date* has the meaning provided in § 1.987–10(c).

United States person. *United States person* (or *U.S. person*) has the meaning provided in section 7701(a)(30).

United States shareholder. *United States shareholder* (or *U.S. shareholder*) has the meaning provided in section 951(b) (or, if applicable, section 953(c)(1)(A)).

U.S. source income. *U.S. source income* means income from sources within the United States.

Yearly average exchange rate. *Yearly average exchange rate* has the meaning provided in paragraph (c)(2) of this section.

§ 1.987–2 Attribution of items to eligible QBUs; definition of a transfer and related rules.

(a) *In general.* This section provides rules regarding when items are attributed to eligible QBUs and when they are treated as transferred to or from section 987 QBUs. Paragraph (b) of this section provides rules for attributing assets and liabilities, and items of income, gain, deduction, and loss, to an eligible QBU. Paragraph (c) of this section defines a transfer to or from a section 987 QBU. Paragraph (d) of this section provides translation rules for transfers to a section 987 QBU. Paragraph (e) of this section provides a cross-reference relating to the treatment of section 987 QBUs owned by consolidated groups.

(b) *Attribution of items to an eligible QBU—(1) General rules.* Except as provided in paragraphs (b)(2) and (3) of this section, items are attributable to an eligible QBU to the extent they are reflected on the separate set of books and records, as defined in § 1.989(a)–1(d)(1) and (2), of the eligible QBU. For purposes of this section, the term *item* refers to any asset or liability, and any item of income, gain, deduction, or loss. Items that are attributed to an eligible QBU pursuant to this section must be adjusted to conform to Federal income tax principles. An item that is not taken into account for financial accounting purposes, and therefore is not reflected on the separate set of books and records of an eligible QBU, is treated as reflected on the separate set of books and records of an eligible QBU to the extent it would have been so reflected if the item were taken into account for financial accounting purposes. Except as provided in § 1.989(a)–1(d)(3), these attribution rules apply solely for

purposes of section 987. For example, the allocation and apportionment of interest expense under section 864(e) is independent of these rules.

(2) *Exceptions for non-portfolio stock, interests in partnerships, and certain acquisition indebtedness.* (i) *In general.* Except as provided in paragraph (b)(2)(ii) of this section, the following items are not considered to be on the books and records of an eligible QBU:

(A) Stock of a corporation (whether domestic or foreign), other than stock of a corporation if the owner of the eligible QBU owns less than 10 percent of the total combined voting power of all classes of stock entitled to vote and less than 10 percent of the total value of all classes of stock of such corporation. For this purpose, section 958 (other than section 958(b)(1)) applies in determining ownership of a controlled foreign corporation and section 318(a) applies in determining ownership of other corporations, except that in applying section 318(a)(2)(C), the phrase “10 percent” is used instead of the phrase “50 percent.”

(B) An interest in a partnership (whether domestic or foreign).

(C) A liability that was incurred to acquire stock described in paragraph (b)(2)(i)(A) of this section or that was incurred to acquire a partnership interest described in paragraph (b)(2)(i)(B) of this section.

(D) Income, gain, deduction, or loss arising from the items described in paragraphs (b)(2)(i)(A) through (C) of this section. For example, if a dividend is received with respect to stock of a corporation described in paragraph (b)(2)(i)(A) of this section, the dividend is excluded from the income of the eligible QBU. *See also* paragraph (c)(2)(ii) of this section, treating the payment as received by the owner and contributed to the eligible QBU.

(ii) *Separate account assets.* Paragraph (b)(2)(i) of this section does not apply to separate account assets, liabilities related to separate account assets, or income, gain, deduction, or loss arising from those assets and liabilities.

(3) *Adjustments to items reflected on the books and records—(i) General rule.* If a principal purpose of recording (or not recording) an item on the books and records of an eligible QBU is the avoidance of Federal income tax under, or through the use of, section 987, the item must be allocated between or among the eligible QBU, the owner of such eligible QBU, and any other persons, entities (including DEs), or other QBUs within the meaning of § 1.989(a)–1(b) (including eligible QBUs) in a manner that reflects the

substance of the transaction. For purposes of this paragraph (b)(3)(i), relevant factors for determining whether such Federal income tax avoidance is a principal purpose of recording (or not recording) an item on the books and records of an eligible QBU include the factors set forth in paragraphs (b)(3)(ii) and (iii) of this section. The presence or absence of any factor or factors is not determinative. The weight given to any factor (whether or not set forth in paragraphs (b)(3)(ii) and (iii) of this section) depends on the facts and circumstances.

(ii) *Factors indicating no tax avoidance.* For purposes of paragraph (b)(3)(i) of this section, factors that may indicate that recording (or not recording) an item on the books and records of an eligible QBU did not have as a principal purpose the avoidance of Federal income tax under, or through the use of, section 987 include the recording (or not recording) of an item:

(A) For a significant and bona fide business purpose;

(B) In a manner that is consistent with the economics of the underlying transaction;

(C) In accordance with generally accepted accounting principles (or a similar comprehensive accounting standard);

(D) In a manner that is consistent with the treatment of similar items from year to year;

(E) In accordance with accepted conditions or practices in the particular trade or business of the eligible QBU;

(F) In a manner that is consistent with an explanation of existing internal accounting policies that is evidenced by documentation contemporaneous with the timely filing of a return for the taxable year; and

(G) As a result of a transaction between legal entities (for example, the transfer of an asset or the assumption of a liability), even if such transaction is not regarded for Federal income tax purposes (for example, a transaction between a DE and its owner).

(iii) *Factors indicating tax avoidance.* For purposes of paragraph (b)(3)(i) of this section, factors that may indicate that a principal purpose of recording (or not recording) an item on the books and records of an eligible QBU is the avoidance of Federal income tax under, or through the use of, section 987 include:

(A) The presence or absence of an item on the books and records that is the result of one or more transactions that are transitory, for example, due to a circular flow of cash or other property;

(B) The presence or absence of an item on the books and records that is the

result of one or more transactions that do not have substance; and

(C) The presence or absence of an item on the books and records that results in the taxpayer (or a person related to the taxpayer within the meaning of section 267(b) or section 707(b)) having offsetting positions with respect to the functional currency of a section 987 QBU.

(iv) *Section 988 transactions.* A section 988 transaction that is reflected on the books and records of an eligible QBU is not attributable to an eligible QBU if the transaction was entered into or was reflected on the eligible QBU's books and records with a principal purpose of generating fully or partially offsetting amounts of section 988 gain or loss and section 987 gain or loss (or if the taxpayer chose to denominate the section 988 transaction in a nonfunctional currency with such a principal purpose).

(c) *Transfers to and from section 987 QBUs—(1) In general.* The following rules apply for purposes of determining whether there is a transfer of an asset or a liability from an owner to a section 987 QBU, or from a section 987 QBU to an owner. These rules apply solely for purposes of section 987.

(2) *Disregarded transactions—(i) General rule.* An asset or liability is treated as transferred to a section 987 QBU from its owner if, as a result of a disregarded transaction, such asset or liability is reflected on the books and records of (or otherwise becomes attributable to) the section 987 QBU within the meaning of paragraph (b) of this section. Similarly, an asset or liability is treated as transferred from a section 987 QBU to its owner if, as a result of a disregarded transaction, such asset or liability is no longer reflected on the books and records of (or otherwise ceases to be attributable to) the section 987 QBU within the meaning of paragraph (b) of this section.

(ii) *Definition of a disregarded transaction.* For purposes of this section, a disregarded transaction means a transaction that is not regarded for Federal income tax purposes (for example, any transaction between separate section 987 QBUs of the same owner). For purposes of this paragraph (c), a disregarded transaction is treated as including events described in paragraphs (c)(2)(ii)(A) through (F) of this section.

(A) If the recording (or not recording) of an asset or liability on the books and records of a section 987 QBU of an owner is the result of such asset or liability being removed from (or included on) the books and records of the owner or another eligible QBU of the

owner, the asset or liability is treated as transferred to (or from) the section 987 QBU in a disregarded transaction.

(B) If an asset or liability that was previously attributable to a section 987 QBU of an owner begins to be attributable to the owner (or another eligible QBU of the owner) as a result of the application of paragraph (b)(2) or (3) of this section, the asset or liability is treated as having been transferred by the section 987 QBU in a disregarded transaction. If an asset or liability that was previously attributable to the owner (or another eligible QBU of the owner) begins to be attributable to the section 987 QBU as a result of the application of paragraph (b)(2) or (3) of this section, the asset or liability is treated as transferred to the section 987 QBU in a disregarded transaction.

(C) If an asset or liability that is attributable to a section 987 QBU is sold or exchanged (including in a nonrecognition transaction, such as an exchange under section 351) for an asset or liability that is not attributable to the section 987 QBU immediately after the sale or exchange, the sold or exchanged asset or liability that was attributable to the section 987 QBU immediately before the transaction is treated as transferred from the section 987 QBU to its owner in a disregarded transaction immediately before the sale or exchange for purposes of section 987 (including for purposes of recognizing section 987 gain or loss under § 1.987–5) and subsequently sold or exchanged by the owner.

(D) If an asset or liability of an owner of a section 987 QBU that is not attributable to a section 987 QBU is sold or exchanged (including in a nonrecognition transaction, such as an exchange under section 351) for an asset or liability that is attributable to the section 987 QBU immediately after the sale or exchange, the asset or liability that is attributable to the section 987 QBU immediately after the transaction is treated as received or assumed by the owner and transferred from the owner to the section 987 QBU in a disregarded transaction immediately after the sale or exchange for purposes of section 987 (including for purposes of recognizing section 987 gain or loss under § 1.987–5).

(E) If an asset or liability that is attributable to a section 987 QBU was received, transferred, assumed, or accrued in a regarded transaction (including the making or receiving of a payment) in which the related item of income, gain, deduction, or loss is not attributable to the section 987 QBU, the asset or liability is treated as though it was received, transferred, assumed, or

accrued by the owner or another eligible QBU and transferred to or from the section 987 QBU in a disregarded transaction. Similarly, if an asset or liability that is not attributable to a section 987 QBU was received, transferred, assumed, or accrued in a regarded transaction (including the making or receiving of a payment) in which the related item of income, gain, deduction, or loss is attributable to the section 987 QBU, the asset or liability is treated as though it was received, transferred, assumed, or accrued by the section 987 QBU and transferred to or from the section 987 QBU in a disregarded transaction. For example, if a section 987 QBU receives a dividend on an interest in stock that would be attributable to the section 987 QBU but for paragraph (b)(2)(i)(A) of this section, the owner is treated as receiving the dividend and transferring to the section 987 QBU the amount of the dividend in a disregarded transaction. Similarly, if a section 987 QBU pays interest on a liability that would be attributable to the section 987 QBU but for paragraph (b)(2)(i)(C) of this section, the section 987 QBU is treated as transferring to the owner the amount of the interest expense and the owner is treated as paying the interest expense in a disregarded transaction. *See also* paragraph (c)(7) of this section (application of general tax law principles).

(F) In the first taxable year in which an eligible QBU is treated as a section 987 QBU, all assets and liabilities attributable to the eligible QBU are treated as transferred from the owner to the section 987 QBU in a disregarded transaction on the first day on which the eligible QBU is treated as a section 987 QBU.

(iii) *Items derived from disregarded transactions ignored.* For purposes of section 987, disregarded transactions do not give rise to items of income, gain, deduction, or loss that are taken into account in determining section 987 taxable income or loss under § 1.987–3.

(3) through (6) [Reserved]

(7) *Application of general tax law principles.* General tax law principles, including the circular cash flow, step-transaction, economic substance, and substance-over-form doctrines, apply for purposes of determining whether there is a transfer of an asset or liability under this paragraph (c), including a transfer of an asset or liability pursuant to a disregarded transaction.

(8) *Interaction with § 1.988–1(a)(10).* See § 1.988–1(a)(10) for rules regarding the treatment of an intra-taxpayer transfer of a section 988 transaction.

(9) *Certain disregarded transactions not treated as transfers*—(i) *Combinations of section 987 QBUs.* The combination (a *combination*) of two or more separate section 987 QBUs (*combining QBUs*) that are directly owned by the same owner into one section 987 QBU (*combined QBU*) does not give rise to a transfer of any combining QBU's assets or liabilities to the owner under this paragraph (c). In addition, transactions between the combining QBUs occurring in the taxable year of the combination do not result in a transfer of the combining QBUs' assets or liabilities to the owner under this paragraph (c). For this purpose, a combination occurs when the assets and liabilities that were attributable to two or more combining QBUs begin to be attributable to a combined QBU and the separate existence of the combining QBUs ceases. A combination may result from any transaction or series of transactions in which the combining QBUs become a combined QBU. A combination may also result when an owner of two or more section 987 QBUs with the same functional currency becomes subject to a grouping election under § 1.987–1(b)(3)(ii) or when a section 987 QBU of an owner subject to a grouping election changes its functional currency to that of another section 987 QBU of the same owner. For purposes of determining net unrecognized section 987 gain or loss, deferred section 987 gain or loss, and cumulative suspended section 987 loss of a combined QBU, the combining QBUs are treated as having combined immediately before the beginning of the taxable year of combination. See §§ 1.987–4(f)(1), 1.987–11(b)(2), and 1.987–12(f)(1).

(ii) *Change in functional currency from a combination.* If, following a combination of section 987 QBUs described in paragraph (c)(9)(i) of this section, the combined section 987 QBU has a different functional currency than one or more of the combining section 987 QBUs, any such combining section 987 QBU is treated as changing its functional currency, and the owner of the combined section 987 QBU must comply with the regulations under section 985 regarding the change in functional currency. See §§ 1.985–1(c)(6) and 1.985–5.

(iii) *Separation of section 987 QBUs.* The separation (a *separation*) of a section 987 QBU (*separating QBU*) into two or more section 987 QBUs (*separated QBUs*) that, after the separation, are directly owned by the same owner does not result in a transfer of the separating QBU's assets or liabilities to the owner under this

paragraph (c). Additionally, transactions that occurred between the separating QBUs in the taxable year of the separation before the completion of the separation do not result in transfers for purposes of section 987. For this purpose, a separation occurs when the assets and liabilities that were attributable to a separating QBU begin to be attributable to two or more separated QBUs and each of the separated QBUs continues to perform a significant portion of the separating QBU's activities immediately after the separation. A separation may result from any transaction or series of transactions in which a separating QBU becomes two or more separated QBUs described in the preceding sentence. A separation may also result when a section 987 QBU that is subject to a grouping election under § 1.987–1(b)(3)(ii) changes its functional currency or when the grouping election is revoked. For purposes of determining net unrecognized section 987 gain or loss, deferred section 987 gain or loss, or cumulative suspended section 987 loss of a separated QBU, the separating QBU is treated as having separated immediately before the beginning of the taxable year of separation. See §§ 1.987–4(f)(2), 1.987–11(b)(3), and 1.987–12(f)(2).

(iv) *Special rules for successor suspended loss QBUs.* For purposes of determining whether a combination or separation has occurred with respect to a successor suspended loss QBU, the rules of paragraphs (c)(9)(i) and (iii) of this section are applied without regard to whether any of the combining QBUs, the combined QBU, the separating QBU, or the separated QBUs are section 987 QBUs. A combined QBU is a successor suspended loss QBU if either combining QBU was a successor suspended loss QBU, and a separated QBU is a successor suspended loss QBU if the separating QBU was a successor suspended loss QBU.

(10) *Examples.* The following examples illustrate the principles of this paragraph (c). For purposes of the examples, X and Y are domestic corporations, have the U.S. dollar as their functional currencies, and use the calendar year as their taxable years. Furthermore, except as otherwise provided, Business A and Business B are eligible QBUs that have the euro and the Japanese yen, respectively, as their functional currencies, and DE1 and DE2 are DEs. For purposes of determining whether any of the transfers in these examples result in remittances, see § 1.987–5.

(i) *Example 1: Loan to a section 987 QBU*—(A) *Facts.* X owns all of the

interests in DE1. DE1 owns Business A, which is a section 987 QBU of X. X owns €100 that are not reflected on the books and records of Business A. Business A is in need of additional capital and, as a result, X lends the €100 to DE1 for use in Business A in exchange for a note.

(B) *Analysis*—(1) The loan from X to DE1 is not regarded for Federal income tax purposes (because it is an interbranch transaction) and therefore is a disregarded transaction (as defined in paragraph (c)(2)(ii) of this section). Because DE1 is a DE, the DE1 note held by X and the liability of DE1 under the note are not taken into account under this section.

(2) As a result of the disregarded transaction, the €100 is reflected on the books and records of Business A and is attributable to Business A under paragraph (b) of this section. Therefore, X is treated as transferring €100 to its Business A section 987 QBU for purposes of section 987. This transfer is taken into account in determining the amount of any remittance for the taxable year under § 1.987–5(c). See § 1.988–1(a)(10)(ii) for the application of section 988 to X as a result of the transfer of nonfunctional currency to its section 987 QBU.

(ii) *Example 2: Transfer between section 987 QBUs*—(A) *Facts.* X owns Business A and Business B, both of which are section 987 QBUs of X. X owns equipment that is used in Business A and is reflected on the books and records of Business A. Because Business A has excess manufacturing capacity and X intends to expand the manufacturing capacity of Business B, the equipment formerly used in Business A is transferred to Business B for use by Business B. As a result of the transfer, the equipment is removed from the books and records of Business A and is recorded on the books and records of Business B.

(B) *Analysis.* The transfer of the equipment from the books and records of Business A to the books and records of Business B is not regarded for Federal income tax purposes (because it is an interbranch transaction) and therefore is a disregarded transaction (as defined in paragraph (c)(2)(ii) of this section). Therefore, for purposes of section 987, the Business A section 987 QBU is treated as transferring the equipment to X, and X is subsequently treated as transferring the equipment to the Business B section 987 QBU. These transfers are taken into account in determining the amount of any remittance for the taxable year under § 1.987–5(c).

(iii) *Example 3: Sale of property between two section 987 QBUs*—(A) *Facts.* X owns all of the interests in DE1 and DE2. DE1 and DE2 own Business A and Business B, respectively, both of which are section 987 QBUs of X. DE1 owns equipment that is used in Business A and is reflected on the books and records of Business A. For business reasons, DE1 sells a portion of the equipment used in Business A to DE2 in exchange for a fair market value amount of Japanese yen. The yen used by DE2 to acquire the equipment was generated by Business B and was reflected on Business B's books and records. Following the sale, the yen and the equipment will be used in Business A and Business B, respectively. As a result of such sale, the equipment is removed from the books and records of Business A and is recorded on the books and records of Business B. Similarly, as a result of the sale, the yen is removed from the books and records of Business B and is recorded on the books and records of Business A.

(B) *Analysis*—(1) The sale of equipment between DE1 and DE2 is a transaction that is not regarded for Federal income tax purposes (because it is an interbranch transaction) and therefore the transaction is a disregarded transaction (as defined in paragraph (c)(2)(ii) of this section). Pursuant to paragraph (c)(2)(iii) of this section, the sale does not give rise to an item of income, gain, deduction, or loss for purposes of determining section 987 taxable income or loss under § 1.987-3. However, the yen and equipment exchanged by DE1 and DE2 in connection with the sale must be taken into account as a transfer under paragraph (c)(2)(i) of this section.

(2) As a result of the disregarded transaction, the equipment ceases to be reflected on the books and records of Business A and becomes reflected on the books and records of Business B. Therefore, the Business A section 987 QBU is treated as transferring the equipment to X, and X is subsequently treated as transferring the equipment to the Business B section 987 QBU.

(3) Additionally, as a result of the disregarded transaction, the yen currency ceases to be reflected on the books and records of Business B and becomes reflected on the books and records of Business A. Therefore, the Business B section 987 QBU is treated as transferring the yen to X, and X is subsequently treated as transferring the yen from X to the Business A section 987 QBU. The transfers among Business A, Business B and X are taken into account in determining the amount of

any remittance for the taxable year under § 1.987-5(c).

(iv) through (ix) [Reserved]
(x) *Example 10: Contribution of a section 987 QBU's assets to a corporation*—(A) *Facts.* X owns Business A. X forms Z, a domestic corporation, contributing 50 percent of its Business A assets and liabilities to Z in exchange for all of the stock of Z. X and Z do not file a consolidated tax return.

(B) *Analysis.* Pursuant to paragraph (b)(2) of this section, the Z stock received in exchange for 50 percent of Business A's assets and liabilities is not reflected on the books and records of, and therefore is not attributable to, Business A for purposes of section 987 immediately after the exchange. As a result, pursuant to paragraphs (c)(2)(i) and (ii) of this section, 50 percent of the assets and liabilities of Business A are treated as transferred from Business A to X in a disregarded transaction immediately before the exchange. See § 1.1502-13(j)(9) if X and Z file a consolidated return.

(xi) *Example 11: Circular transfers*—(A) *Facts.* X owns Business A. On December 30, year 1, Business A purports to transfer €100 to X. On January 2, year 2, X purports to transfer €50 to Business A. On January 4, year 2, X purports to transfer another €50 to Business A. As of the end of year 1, X has net unrecognized section 987 loss with respect to Business A, such that a remittance, if respected, would result in recognition of a foreign currency loss under section 987.

(B) *Analysis.* Because the transfer by Business A to X is offset by the transfers from X to Business A that occurred in close temporal proximity, the purported transfers to and from Business A may be disregarded for purposes of section 987 pursuant to general tax principles under paragraph (c)(7) of this section.

(xii) *Example 12: Transfers without substance*—(A) *Facts.* X owns Business A and Business B. On January 1, year 1, Business A purports to transfer €100 to X. On January 4, year 1, X purports to transfer €100 to Business B. The account in which Business B deposited the €100 is used to pay the operating expenses and other costs of Business A. As of the end of year 1, X has net unrecognized section 987 loss with respect to Business A, such that a remittance, if respected, would result in recognition of a foreign currency loss under section 987.

(B) *Analysis.* Because Business A continues to have use of the transferred property, the €100 purported transfer from Business A to X may be disregarded for purposes of section 987

pursuant to general tax principles under paragraph (c)(7) of this section.

(xiii) *Example 13: Offsetting positions in section 987 QBUs*—(A) *Facts.* X owns Business A and Business B. Business A and Business B each have the euro as their functional currency. X has not made a grouping election under § 1.987-1(b)(3)(ii). On January 1, year 1, X borrows €1,000 from a third-party lender, records the liability with respect to the borrowing on the books and records of Business A, and records the borrowed €1,000 on the books and records of Business B. On December 31, year 2, when Business A has \$100 of net unrecognized section 987 loss and Business B has \$100 of net unrecognized section 987 gain resulting from the change in exchange rates with respect to the liability and the €1,000, X terminates the Business A section 987 QBU.

(B) *Analysis.* Under paragraph (b)(3) of this section, the fact that Business A and Business B have offsetting positions in the euro is a factor indicating that a principal purpose of recording the euro-denominated liability on the books and records of Business A and the borrowed euros on the books and records of Business B was the avoidance of tax under section 987. If such a principal purpose is present, the items must be reallocated (that is, the euros and the euro-denominated liability) between Business A, Business B, and X under paragraph (b)(3) of this section to reflect the substance of the transaction.

(xiv) *Example 14: Offsetting positions with respect to a section 987 QBU and a section 988 transaction*—(A) *Facts.* X owns all of the interests in DE1, and DE1 owns Business A. On January 1, year 1, X borrows €1,000 from a third-party lender and records the liability with respect to the borrowing on its books and records. X contributes the €1,000 loan proceeds to DE1 and the €1,000 are reflected on the books and records of Business A. On December 31, year 2, when Business A has \$100 of net unrecognized section 987 loss resulting from the change in exchange rates with respect to the €1,000 received from the borrowing, and when the euro-denominated borrowing, if repaid, would result in \$100 of gain under section 988, X terminates the Business A section 987 QBU.

(B) *Analysis.* Under paragraph (b)(3) of this section, the fact that X and Business A have offsetting positions in the euro is a factor indicating that a principal purpose of recording the borrowed euros on the books and records of Business A, or not recording the corresponding euro-denominated liability on the books and records of

Business A, was the avoidance of tax under section 987. If such a principal purpose is present, the items (that is, the euros and the euro-denominated liability) must be reallocated between Business A and X under paragraph (b)(3) of this section to reflect the substance of the transaction.

(xv) *Example 15: Offsetting positions with respect to a section 987 QBU and a section 988 transaction—(A) Facts.* X owns all of the stock of Y and all of the interests in DE1. DE1 owns Business A. X and Y do not file a consolidated return. On January 1, year 1, DE1 lends €1,000 to Y. X records the receivable with respect to the loan on Business A's books and records. On December 31, year 2, when Business A has \$100 of net unrecognized section 987 gain resulting from the loan, Y repays the €1,000 liability. The repayment of the euro-denominated borrowing results in \$100 of loss to Y under section 988. Business A does not make any remittances to X in year 2, so the offsetting gain with respect to the loan receivable has not been recognized by X.

(B) *Analysis.* Under paragraph (b)(3) of this section, the fact that Y (a related party to X) and Business A have offsetting positions in the euro is a factor indicating that a principal purpose of recording the euro-denominated receivable on the books and records of Business A, rather than on the books and records of X, was to avoid Federal income tax under, or through the use of, section 987. If such a principal purpose is present, the euro-denominated receivable must be reallocated between Business A and X under paragraph (b)(3) of this section to reflect the substance of the transaction. Other provisions (for example, section 267) may also apply to defer or disallow the loss. See § 1.1502–13(j)(9) if X and Y file a consolidated return.

(xvi) *Example 16: Borrowing by section 987 QBU followed by immediate distribution to owner—(A) Facts.* X owns all of the interests in DE1. DE1 owns Business A. On January 1, year 1, Business A borrows €1,000 from a bank. On January 2, year 1, Business A distributes the €1,000 it received from the bank to X. There are no other transfers between X and Business A during the year. At the end of the year, X has net unrecognized section 987 loss with respect to Business A such that a remittance would result in the recognition of foreign currency loss under section 987.

(B) *Analysis.* Under paragraph (b)(3) of this section, if a principal purpose of recording of the loan on the books and records of Business A, rather than on the books and records of X, was to avoid

Federal income tax under, or through the use of, section 987, the items must be reallocated to reflect the substance of the transaction (for example, by moving the loan onto the books of X, resulting in the transfer not being taken into account for purposes of section 987).

(xvii) *Example 17: Payment of interest by section 987 QBU on obligation of owner—(A) Facts.* X owns all of the interests in DE1. DE1 owns Business A. On January 1, X borrows €1,000 from a bank. On July 1, DE1 pays €20 in interest on X's €1,000 obligation to the bank, which is treated as a payment by Business A.

(B) *Analysis.* Under general tax law principles as provided in paragraph (c)(7) of this section, on July 1, year 1, Business A is treated for purposes of section 987 as making a transfer of €20 to X, and X is treated as making a €20 interest payment to the bank. See also paragraph (c)(2)(ii)(E) of this section for interest payments on loans that are not attributable to a section 987 QBU pursuant to paragraph (b)(2) or (3) of this section.

(xviii) *Example 18: Sale of the interests in a DE—(A) Facts.* X owns all of the interests in DE1, a disregarded entity. DE1 owns Business A, which is a section 987 QBU of X. X has made a current rate election under § 1.987–1(d)(2) but not an annual recognition election under § 1.987–5(b)(2). On December 31, year 1, X sells all of the interests in DE1 to FC, an unrelated foreign corporation, for \$150,000, when the exchange rate is €1 = \$1.2. The sale proceeds are reflected on X's books and records after the sale. At the time of the sale, all of DE1's assets are used in Business A and are reflected on the books and records of Business A. The assets have a basis of €100,000 and Business A has no liabilities. In year 1, X has net unrecognized section 987 gain with respect to Business A of \$20,000.

(B) *Analysis—(1)* Under paragraph (c)(2)(ii)(C) of this section, if an asset that is attributable to a section 987 QBU is sold or exchanged for an asset that is not attributable to the section 987 QBU immediately after the sale or exchange, the sold or exchanged asset is treated as transferred from the section 987 QBU to its owner in a disregarded transaction immediately before the sale or exchange and subsequently sold or exchanged by the owner. The sale of DE1 is treated as a sale of the assets of Business A in exchange for cash that is not reflected on the books and records of the Business A section 987 QBU. Therefore, the assets of Business A are treated as transferred from the Business A section 987 QBU to X, and X is treated as selling the assets to FC.

(2) The deemed transfer of all of Business A's assets to X results in a termination of the Business A section 987 QBU under § 1.987–8(b)(2) (substantially all assets transferred). Under § 1.987–5(c)(3) and § 1.987–8(e), a termination of a section 987 QBU is treated as a remittance of all the gross assets of the section 987 QBU to the owner on the date of the termination. Therefore, the owner's remittance proportion is one, and X recognizes all of its net unrecognized section 987 gain with respect to Business A, or \$20,000.

(3) Because a current rate election was in effect, all of the assets of Business A are marked items. Therefore, under § 1.987–5(f)(2), X's basis in the assets transferred from Business A is determined by translating Business A's functional currency basis in the assets into X's functional currency at the spot rate applicable to the date of the transfer, €1 = \$1.2. Consequently, immediately before the sale of the interests in DE1, X's functional currency basis in Business A's assets (which Business A held with a basis of €100,000) is \$120,000. X recognizes \$30,000 of gain under section 1001(a) on the sale of DE1.

(d) *Translation of items transferred to a section 987 QBU—(1) Marked items.* The adjusted basis of a marked asset, or the amount of a marked liability, transferred to a section 987 QBU is translated into the section 987 QBU's functional currency at the spot rate applicable to the date of transfer. If, and to the extent that, exchange gain or loss is recognized on the asset or liability transferred under § 1.988–1(a)(10)(ii), the adjusted basis of the marked asset, or the amount of the marked liability, is adjusted to take into account the exchange gain or loss recognized.

(2) *Historic items.* The adjusted basis of a historic asset, or the amount of a historic liability, transferred to a section 987 QBU is translated into the section 987 QBU's functional currency at the rate provided in § 1.987–1(c)(3).

(e) *Cross-reference.* See also § 1.1502–13(j)(9) regarding the treatment of intercompany transactions involving section 987 QBUs owned by a member of a consolidated group.

§ 1.987–3 Determination of section 987 taxable income or loss of an owner of a section 987 QBU.

(a) *In general.* This section provides rules for determining the taxable income or loss of an owner of a section 987 QBU (*section 987 taxable income or loss*). Paragraph (b) of this section provides rules for determining items of income, gain, deduction, and loss in the section 987 QBU's functional currency.

Paragraph (c) of this section provides rules for translating each item determined under paragraph (b) of this section into the functional currency of the owner of the section 987 QBU. Paragraph (d) of this section is reserved. Paragraph (e) of this section provides examples illustrating the application of the rules of this section.

(b) *Determination of each item of income, gain, deduction, or loss in the section 987 QBU's functional currency*—(1) *In general.* The owner of a section 987 QBU must determine each item of income, gain, deduction, or loss attributable to the section 987 QBU in the section 987 QBU's functional currency under Federal income tax principles.

(2) *Translation of items of income, gain, deduction, or loss that are denominated in a nonfunctional currency.* Except as otherwise provided in paragraph (b)(4) of this section, an item of income, gain, deduction, or loss (or the item's components and related items, such as gross receipts and amount realized) that is denominated in (or determined by reference to) a nonfunctional currency (including the functional currency of the owner) is translated into the section 987 QBU's functional currency at the spot rate on the date such item is properly taken into account. Paragraphs (e)(1) and (2) of this section (*Examples 1 and 2*) illustrate the application of this paragraph (b)(2).

(3) [Reserved]

(4) *Section 988 transactions*—(i) *In general.* Section 988 and the regulations under section 988 apply to section 988 transactions of a section 987 QBU. The determination of whether an asset or liability of a section 987 QBU is a section 988 transaction is determined by reference to the functional currency of the section 987 QBU. Section 988 gain or loss is determined in, and by reference to, the functional currency of the section 987 QBU. The amount of section 988 gain or loss determined under this paragraph (b)(4)(i) is translated into the owner's functional currency under paragraph (c) of this section.

(ii) *Section 988 mark-to-market election*—(A) *In general.* A taxpayer may elect to apply the section 988 mark-to-market method of accounting described in this paragraph (b)(4)(ii) with respect to all section 988 transactions that are properly attributable to a section 987 QBU and that are not otherwise accounted for under a mark-to-market method of accounting under section 475 or section 1256 (other than a section 988 transaction described in paragraph (b)(4)(ii)(B) of this section). Under the

section 988 mark-to-market method of accounting, the timing of section 988 gain or loss on section 988 transactions described in the preceding sentence is determined under the principles of section 1256. Only section 988 gain or loss is taken into account under the foreign currency mark-to-market method of accounting. Appropriate adjustments must be made to prevent the section 988 gain or loss from being taken into account again after it is recognized under this paragraph (b)(4)(ii). A section 988 transaction subject to the foreign currency mark-to-market method of accounting is not subject to the netting rule of section 988(b) and § 1.988-2(b)(8) (under which exchange gain or loss is limited to overall gain or loss realized in a transaction) in taxable years before the taxable year in which section 988 gain or loss would be recognized with respect to the section 988 transaction but for this election.

(B) *Built-in loss transactions contributed to a section 987 QBU.* Paragraph (b)(4)(ii)(A) of this section does not apply to a section 988 transaction if—

(1) The transaction was transferred to the section 987 QBU from its owner (or from another eligible QBU of the owner);

(2) Immediately before the transfer, the transaction was a section 988 transaction in the hands of the owner (or other eligible QBU of the owner) and was not subject to a mark-to-market method of accounting;

(3) If the owner (or other eligible QBU) had disposed of the section 988 transaction immediately before the transfer (and § 1.988-2(b)(8) did not apply), the owner would have recognized section 988 loss; and

(4) Section 988 loss was not recognized in connection with the transfer under § 1.988-1(a)(10).

(c) *Translation of items of income, gain, deduction, or loss of a section 987 QBU into the owner's functional currency*—(1) *In general.* Except as otherwise provided in this section, the exchange rate to be used by an owner in translating an item of income, gain, deduction, or loss attributable to a section 987 QBU (or the item's components and related items, such as gross receipts, amount realized, basis, and cost of goods sold) into the owner's functional currency, if necessary, is the yearly average exchange rate for the taxable year.

(2) *Exceptions.* Except as otherwise provided in paragraph (c)(2)(v) of this section, this paragraph (c)(2) applies only to taxable years for which neither the annual recognition election nor the current rate election is in effect.

(i) *Recovery of basis with respect to historic assets.* Except as otherwise provided in this paragraph (c)(2), the exchange rate to be used by the owner in translating any recovery of basis (whether through a sale or exchange; deemed sale or exchange; cost recovery deduction such as depreciation, depletion or amortization; or otherwise) with respect to a historic asset is the historic rate for the property to which such recovery of basis is attributable.

(ii) through (iii) [Reserved]

(iv) *Cost of goods sold computation*—(A) *General rule—simplified inventory method.* Except as otherwise provided in paragraph (c)(2)(iv)(B) of this section, cost of goods sold (COGS) for a taxable year is translated into the functional currency of the owner at the yearly average exchange rate for the taxable year in which the sale of inventory occurs (or the COGS is otherwise taken into account in computing taxable income) and adjusted as provided in paragraph (c)(3) of this section.

(B) *Election to use the historic inventory method.* In lieu of using the simplified inventory method described in paragraph (c)(2)(iv)(A) of this section, the owner of a section 987 QBU may elect under this paragraph (c)(2)(iv)(B) to translate inventoriable costs (including current-year inventoriable costs and costs that were capitalized into inventory in prior years) that are included in COGS at the historic rate for each such cost.

(v) *Translation of income to account for certain foreign income tax claimed as a credit.* The owner of a section 987 QBU claiming a credit under section 901 for foreign income taxes, other than foreign income taxes deemed paid under section 960, that are properly reflected on the books and records of the section 987 QBU (the creditable tax amount) must determine section 987 taxable income or loss attributable to the section 987 QBU by reducing the amount of section 987 taxable income or loss that otherwise would be determined under this section by an amount equal to the creditable tax amount, translated into U.S. dollars using the yearly average exchange rate for the taxable year in which the creditable tax is accrued, and by increasing the resulting amount by an amount equal to the creditable tax amount, translated using the same exchange rate that is used to translate the creditable taxes into U.S. dollars under section 986(a). This paragraph (c)(2)(v) applies whether or not a current rate election or an annual recognition election is in effect. See paragraph (e)(14) of this section (*Example 14*) for an illustration of this rule.

(3) *Adjustments to COGS required under the simplified inventory method.* This paragraph (c)(3) applies only to taxable years for which neither the annual recognition election nor the current rate election is in effect.

(i) *In general.* An owner of a section 987 QBU that uses the simplified inventory method described in paragraph (c)(2)(iv)(A) of this section must make the adjustment described in paragraph (c)(3)(ii) of this section. In addition, the owner must make the adjustment described in paragraph (c)(3)(iii) of this section with respect to any inventory for which the section 987 QBU does not use the LIFO inventory method and must make the adjustment described in paragraph (c)(3)(iv) of this section with respect to any inventory for which the section 987 QBU uses the LIFO inventory method. An owner of a section 987 QBU that uses the simplified inventory method must make all of the applicable adjustments described in paragraphs (c)(3)(ii) through (iv) of this section with respect to the section 987 QBU even in taxable years in which the amount of COGS is zero.

(ii) *Adjustment for cost recovery deductions included in inventoriable costs—(A) In general.* The translated COGS amount computed under paragraph (c)(2)(iv)(A) of this section is increased or decreased (as appropriate) by the amount described in paragraph (c)(3)(ii)(B) of this section. The adjustment is included as an adjustment to translated COGS computed under paragraph (c)(2)(iv)(A) of this section in full in the year to which the adjustment relates and is not allocated between COGS and ending inventory.

(B) *Amount of adjustment.* With respect to each cost recovery deduction attributable to a historic asset that is included in inventoriable costs for a taxable year, the adjustment is equal to—

(1) The amount of the cost recovery deduction included in inventoriable costs, translated at the historic rate for the property to which the deduction is attributable; less

(2) The amount of the cost recovery deduction included in inventoriable costs, translated at the yearly average exchange rate for the current taxable year.

(iii) *Adjustment for beginning inventory for non-LIFO inventory—(A) In general.* In the case of non-LIFO

inventory, the translated COGS amount computed under paragraph (c)(2)(iv)(A) of this section is increased or decreased (as appropriate) by the amount described in paragraph (c)(3)(iii)(B) of this section.

(B) *Amount of adjustment.* The adjustment is equal to—

(1) The ending non-LIFO inventory included on the closing balance sheet for the preceding taxable year, translated at the exchange rate described in paragraph (c)(3)(iii)(C) of this section (which is generally the yearly average exchange rate for the preceding taxable year); less

(2) The ending non-LIFO inventory included on the closing balance sheet for the preceding taxable year, translated at the yearly average exchange rate for the current taxable year.

(C) *Exchange rate—(1) In general.* Except as provided in paragraph (c)(3)(iii)(C)(2) of this section, the exchange rate used to translate non-LIFO inventory under paragraph (c)(3)(iii)(B)(1) of this section is the yearly average exchange rate for the preceding taxable year.

(2) *Revocation of current rate election or taxable year beginning on the transition date.* In the first taxable year in which a current rate election is revoked or otherwise ceases to be in effect (or in the taxable year beginning on the transition date), the exchange rate used to translate non-LIFO inventory under paragraph (c)(3)(iii)(B)(1) of this section is the spot rate applicable to the last day of the preceding taxable year.

(iv) *Adjustment for year of LIFO liquidation—(A) In general.* In the case of inventory with respect to which a section 987 QBU uses the LIFO inventory method, the translated COGS amount computed under paragraph (c)(2)(iv)(A) of this section is increased or decreased (as appropriate) by the amount described in paragraph (c)(3)(iv)(B) of this section.

(B) *Amount of adjustment.* With respect to each LIFO layer liquidated in whole or in part during the taxable year, the adjustment is equal to:

(1) The amount of the LIFO layer liquidated during the taxable year, translated at the historic rate that is used for translating the LIFO layer (which is generally the yearly average exchange rate for the year the LIFO layer arose); less

(2) The amount of the LIFO layer liquidated during the taxable year, translated at the yearly average exchange rate for the taxable year.

(d) [Reserved]

(e) *Examples.* The following examples illustrate the application of this section. For purposes of the examples, U.S. Corp is a domestic corporation that uses the calendar year as its taxable year and has the U.S. dollar as its functional currency. Except as otherwise indicated, U.S. Corp is the owner of Business A, a section 987 QBU with the euro as its functional currency, and U.S. Corp elects under paragraph (c)(2)(iv)(B) of this section to use the historic inventory method with respect to Business A but does not make any other elections.

(1) *Example 1: Item of income denominated in nonfunctional currency.* Business A accrues £100 of income from the provision of services. Under paragraph (b)(2) of this section, the £100 is translated into €90 at the spot rate on the date of accrual, without the use of a spot rate convention. In determining U.S. Corp's taxable income, the €90 of income is translated into dollars at the yearly average exchange rate under paragraph (c)(1) of this section.

(2) *Example 2: Asset sold for nonfunctional currency.* Business A sells a historic asset consisting of non-inventory property for £100. Under paragraph (b)(2) of this section, the £100 amount realized is translated into €85 at the spot rate on the sale date without the use of a spot rate convention. In determining U.S. Corp's taxable income, the €85 is translated into dollars at the yearly average exchange rate under paragraph (c)(1) of this section. The euro basis of the property is translated into dollars at the historic rate under paragraph (c)(2)(i) of this section.

(3) *Example 3: Historic inventory method—(i) Facts.* Business A uses a first-in, first-out (FIFO) method of accounting for inventory. Business A sells 1,200 units of inventory in year 2 for €3 per unit. The yearly average exchange rate is €1 = \$1.02 for year 1 and €1 = \$1.05 for year 2.

(ii) *Analysis—(A) Gross sales.* Business A's gross sales are translated under paragraph (c)(1) of this section at the yearly average exchange rate for the year of the sale. Business A's dollar gross sales will be computed as follows:

TABLE 1 TO PARAGRAPH (e)(3)(ii)(A)—GROSS SALES
[Year 2]

Month	Number of units	Amount in €	€/ \$ yearly average rate	Amount in \$
Jan	100	€ 300	€1 = \$1.05	\$315.00
Feb	200	600	€1 = \$1.05	630.00
March	0	0	€1 = \$1.05	0.00
April	200	600	€1 = \$1.05	630.00
May	100	300	€1 = \$1.05	315.00
June	0	0	€1 = \$1.05	0.00
July	100	300	€1 = \$1.05	315.00
Aug	100	300	€1 = \$1.05	315.00
Sept	0	0	€1 = \$1.05	0.00
Oct	0	0	€1 = \$1.05	0.00
Nov	100	300	€1 = \$1.05	315.00
Dec	300	900	€1 = \$1.05	945.00
	1,200	.....	.....	3,780.00

(B) *Translated basis of inventory.* The purchase price for each inventory unit was €1.50. Under § 1.987–1(c)(3)(i) and

paragraph (c)(2)(iv)(B) of this section, the basis of each item of inventory is translated into dollars at the yearly

average exchange rate for the year the inventory was acquired.

TABLE 2 TO PARAGRAPH (e)(3)(ii)(B)—OPENING INVENTORY AND PURCHASES
[Year 2]

Month	Number of units	Amount in €	€/ \$ yearly average rate	Amount in \$
Opening inventory (purchased in Dec. year 1)	100	€150	€1 = \$1.02	\$153.00
Purchases in year 2				
Jan	300	€ 450	€1 = \$1.05	\$472.50
Feb	0	0	€1 = \$1.05	0
March	0	0	€1 = \$1.05	0
April	300	450	€1 = \$1.05	472.50
May	0	0	€1 = \$1.05	0
June	0	0	€1 = \$1.05	0
July	300	450	€1 = \$1.05	472.50
Aug	0	0	€1 = \$1.05	0
Sept	0	0	€1 = \$1.05	0
Oct	0	0	€1 = \$1.05	0
Nov	300	450	€1 = \$1.05	472.50
Dec	0	0	€1 = \$1.05	0
	1,200	.....	.....	1,890.00

(C) *COGS.* Because Business A uses a FIFO method for inventory, Business A is considered to have sold in year 2 the 100 units of opening inventory purchased in year 1 (\$153.00), the 300 units purchased in January year 2 (\$472.50), the 300 units purchased in April year 2 (\$472.50), the 300 units purchased in July year 2 (\$472.50), and 200 of the 300 units purchased in November year 2 (\$315.00). Accordingly, Business A's translated dollar COGS for year 2 is \$1,885.50. Business A's opening inventory for year 3 is 100 units of inventory with a translated dollar basis of \$157.50.

(D) *Gross sales income.* Accordingly, for purposes of section 987, Business A has gross income in dollars of \$1,894.50

(\$3,780.00 – \$1,885.50) from the sale of inventory in year 2.

(4) *Example 4: Simplified inventory method—(i) Facts.* The facts are the same as in paragraph (e)(3) of this section (*Example 3*), except that U.S. Corp does not elect to use the historic inventory method with respect to Business A.

(ii) *Analysis.* Because U.S. Corp does not elect to use the historic inventory method, the simplified inventory method under paragraph (c)(2)(iv)(A) of this section applies.

(A) *Gross sales.* Business A's dollar gross sales will be computed as described in paragraph (e)(3)(ii)(A) of this section (*Example 3*). Therefore, Business A has gross sales of \$3,780.

(B) *COGS.* Business A sold 1,200 units of inventory in year 2, and the purchase price for each unit was €1.50. The total purchase price for the inventory sold in year 2 was €1,800. Under the simplified inventory method provided in paragraph (c)(2)(iv)(A) of this section, COGS for a taxable year is translated into the functional currency of the owner at the yearly average exchange rate for the taxable year in which the sale of inventory occurs. Therefore, before making the adjustments required under paragraph (c)(3) of this section, Business A's dollar COGS for year 2 is equal to \$1,890 (the purchase price for the inventory sold in year 2 (€1,800), translated at the yearly average exchange rate of €1 = \$1.05).

(C) *Adjustments required.* Because the simplified inventory method applies, Business A's COGS must be adjusted under paragraph (c)(3) of this section. No adjustment is required under paragraph (c)(3)(ii) of this section because no cost recovery deduction attributable to a historic asset is included in inventoriable costs for year 2. However, an adjustment for beginning inventory is required under paragraph (c)(3)(iii)(A) of this section because Business A uses a FIFO method of accounting for inventory.

(D) *Adjustment for beginning inventory.* The adjustment required under paragraph (c)(3)(iii)(A) of this section is equal to: the ending non-LIFO inventory included on Business A's closing balance sheet for the preceding taxable year (€150), translated at the yearly average exchange rate for year 1 (€1 = \$1.02), which is \$153; less the ending non-LIFO inventory included on Business A's closing balance sheet for the preceding taxable year (€150), translated at the yearly average exchange rate for year 2 (€1 = \$1.05), which is \$157.50. Therefore, there is a negative adjustment to COGS of \$4.50. Business A's COGS for year 2 is reduced from \$1,890 to \$1,885.50.

(E) *Gross sales income.* Accordingly, for purposes of section 987, Business A has gross income in dollars of \$1,894.50 (\$3,780.00 – \$1,885.50) from the sale of inventory in year 2.

(5) *Example 5: Depreciation expense that is not an inventoriable cost.* The facts are the same as in paragraph (e)(3) of this section (*Example 3*) except that during year 2, Business A incurred €100 of depreciation expense with respect to a truck. No portion of the depreciation expense is an inventoriable cost. The truck was purchased on January 15, year 1. The yearly average exchange rate for year 1 was €1 = \$1.02. Under paragraph (c)(2)(i) of this section, the €100 of depreciation is translated into dollars at the historic rate. The historic rate is the yearly average exchange rate for year 1. Accordingly, U.S. Corp takes into account depreciation of \$102 with respect to Business A in year 2.

(6) *Example 6: Translation of depreciation expense that is an inventoriable cost (historic inventory method).* The facts are the same as in paragraph (e)(5) of this section (*Example 5*) except that the €100 of depreciation expense incurred during year 2 with respect to the truck is an inventoriable cost. As a result, the depreciation expense is capitalized into the 1,200 units of inventory purchased by Business A in year 2. Of those 1,200 units, 1,100 units are sold during the year, and 100 units become ending

inventory. The portion of depreciation expense capitalized into inventory that is sold during year 2 is reflected in Business A's euro COGS and is translated at the €1 = \$1.02 yearly average exchange rate for year 1, the year in which the truck was purchased. The portion of the depreciation expense capitalized into the 100 units of ending inventory is not taken into account in year 2 but rather, will be taken into account in the year the ending inventory is sold, translated at the €1 = \$1.02 yearly average exchange rate for year 1.

(7) *Example 7: Sale of land.* Business A purchased raw land on October 16, year 1, for €8,000 and sold the land on November 1, year 2, for €10,000. The yearly average exchange rate was €1 = \$1.02 for year 1 and €1 = \$1.05 for year 2. Under paragraph (c)(1) of this section, the amount realized is translated into dollars at the yearly average exchange rate for year 2 (€10,000 × \$1.05 = \$10,500). Under paragraph (c)(2)(i) of this section, the basis is translated at the historic rate for year 1, which is the yearly average exchange rate under section 1.987–1(c)(3)(i) (€8,000 × \$1.02 = \$8,160). Accordingly, the amount of gain reported by U.S. Corp on the sale of the land is \$2,340 (\$10,500 – \$8,160).

(8) *Example 8: Current rate election.* The facts are the same as in paragraph (e)(7) of this section (*Example 7*), except that U.S. Corp makes a current rate election under § 1.987–1(d)(2). Under paragraph (c)(2) of this section, the exceptions to paragraph (c)(1) of this section generally do not apply in a taxable year for which an annual recognition election or a current rate election is in effect. As a result, all items of income, gain, deduction, and loss with respect to Business A are translated into U.S. Corp's functional currency at the yearly average exchange rate under paragraph (c)(1) of this section. Business A's gain on the sale of the land is determined in its functional currency and is equal to €2,000 (amount realized of €10,000 less basis of €8,000). This gain is translated at the yearly average exchange rate for year 2 of €1 = \$1.05, and the amount of gain reported by U.S. Corp on the sale of the land is \$2,100. The result would be the same if U.S. Corp made an annual recognition election under § 1.987–5(b)(2) (and did not make a current rate election).

(9) through (12) [Reserved]

(13) *Example 13: Section 988 transaction—(i) Facts.* Business A receives and accrues \$100 of income from the provision of services on January 1, 2021. Business A continues to hold the \$100 as a U.S. dollar-denominated demand deposit at a bank

on December 31, 2021. U.S. Corp has made a section 988 mark-to-market election under paragraph (b)(4)(ii) of this section. The euro-dollar spot rate without the use of a spot rate convention is €1 = \$1 on January 1, 2021, and €1 = \$2 on December 31, 2021, and the yearly average exchange rate for 2021 is €1 = \$1.50.

(ii) *Analysis—(A)* Under paragraph (b)(2) of this section, the \$100 earned by Business A is translated into €100 at the spot rate on January 1, 2021, as defined in § 1.987–1(c)(1) without the use of a spot rate convention. In determining U.S. Corp's taxable income, the €100 of services income is translated into \$150 at the yearly average exchange rate for 2021, as provided in paragraph (c)(1) of this section.

(B) Under paragraph (b)(4)(i) of this section, section 988 gain or loss for Business A's section 988 transactions is determined in, and by reference to, the euro, the functional currency of Business A. Accordingly, section 988 gain or loss must be determined on Business A's holding of the \$100 demand deposit in, and by reference to, the euro. Under § 1.988–2(a)(2), Business A is treated as having an amount realized of €50 when the \$100 is marked to market at the end of 2021 under paragraph (b)(4)(ii) of this section. Marking the dollars to market gives rise to a section 988 loss of €50 (€50 amount realized, less Business A's €100 basis in the \$100). In determining U.S. Corp's taxable income, that €50 loss is translated into a \$75 loss at the yearly average exchange rate for 2021, as provided in paragraph (c)(1) of this section.

(14) *Example 14: Payment of foreign income tax—(i) Facts.* Business A earns €100 of revenue from the provision of services and incurs €30 of general expenses and €10 of depreciation expense during 2021. Except as otherwise provided, U.S. Corp uses the yearly average exchange rate described in § 1.987–1(c)(2) to translate items of income, gain, deduction, and loss of Business A. Business A is subject to income tax in Country X at a 25 percent rate. U.S. Corp claims a credit with respect to Business A's foreign income taxes and elects under section 986(a)(1)(D) to translate the foreign income taxes at the spot rate on the date the taxes were paid. The yearly average exchange rate for 2021 is €1 = \$1.50. The historic rate used to translate the depreciation expense is €1 = \$1.00. The spot rate on the date that Business A paid its foreign income taxes was €1 = \$1.60.

(ii) *Analysis.* Because U.S. Corp has elected to translate foreign income taxes

at the spot rate on the date such taxes were paid rather than at the yearly average exchange rate, U.S. Corp must make the adjustments described in paragraph (c)(2)(v) of this section. Accordingly, U.S. Corp determines its section 987 taxable income or loss by

reducing the section 987 taxable income or loss that otherwise would be determined under this section by €15, translated into U.S. dollars at the yearly average exchange rate (€1 = \$1.50), and increasing the resulting amount by €15, translated using the same exchange rate

that is used to translate the creditable taxes into U.S. dollars under section 986(a) (€1 = \$1.60). Following these adjustments, Business A's section 987 taxable income for 2021 is \$96.50, computed as follows:

TABLE 3 TO PARAGRAPH (E)(14)(II)

	Amount in €	Translation rate	Amount in \$
Revenue	€100	€1 = \$1.50	\$150.00
General Expenses	(30)	€1 = \$1.50	(45.00)
Depreciation	(10)	€1 = \$1.00	(10.00)
Tentative section 987 taxable income	€60	.....	\$95.00
Adjustments under paragraph (c)(2)(v) of this section:			
Decrease by €15 tax translated at yearly average exchange rate (€1 = \$1.50)			(22.50)
Increase by €15 tax translated at spot rate on payment date (€1 = \$1.60)			24.00
Section 987 taxable income			\$96.50

§ 1.987-4 Determination of net unrecognized section 987 gain or loss of a section 987 QBU.

(a) *In general.* The net unrecognized section 987 gain or loss of a section 987 QBU is determined by the owner annually as provided in paragraph (b) of this section in the owner's functional currency. Only assets and liabilities attributable to the section 987 QBU are taken into account.

(b) *Calculation of net unrecognized section 987 gain or loss.* Net unrecognized section 987 gain or loss of a section 987 QBU for a taxable year equals the sum of:

(1) The section 987 QBU's net accumulated unrecognized section 987 gain or loss for all prior taxable years as determined in paragraph (c) of this section; and

(2) The section 987 QBU's unrecognized section 987 gain or loss for the current taxable year as determined in paragraph (d) of this section and § 1.987-14.

(c) *Net accumulated unrecognized section 987 gain or loss for all prior taxable years—*(1) *In general.* A section 987 QBU's net accumulated unrecognized section 987 gain or loss for all prior taxable years is the aggregate of the amounts determined under paragraph (d) of this section for all prior taxable years to which this section applies, reduced by amounts recognized under § 1.987-5(a), amounts treated as deferred section 987 gain or loss, and amounts treated as suspended section 987 loss for all prior taxable years to which this section applies. Accordingly, net accumulated unrecognized section 987 gain or loss is not reduced under this paragraph (c)(1) when deferred section 987 gain or loss is recognized (or suspended) under

§ 1.987-12 or when suspended section 987 loss is recognized under § 1.987-11 or § 1.987-13.

(2) *Additional adjustments for certain taxable years beginning on or before December 31, 2024.* For any section 987 QBU in existence before the transition date, *see* § 1.987-10(e)(5) and (f)(2) for additional adjustments to the section 987 QBU's net accumulated unrecognized section 987 gain or loss.

(d) *Calculation of unrecognized section 987 gain or loss for a taxable year.* The unrecognized section 987 gain or loss of a section 987 QBU for a taxable year is generally determined under paragraphs (d)(1) through (10) of this section. However, for taxable years in which a current rate election or an annual recognition election is in effect, the unrecognized section 987 gain or loss of a section 987 QBU for a taxable year is determined by applying only paragraphs (d)(1) through (5) and (10) of this section. *See* § 1.987-14 for additional adjustments that must be made to the unrecognized section 987 gain or loss of a section 987 QBU for a taxable year in connection with a section 987 hedging transaction.

(1) *Step 1: Determine the change in the owner functional currency net value of the section 987 QBU for the taxable year—*(i) *In general.* The change in the owner functional currency net value of the section 987 QBU for the taxable year equals—

(A) The owner functional currency net value of the section 987 QBU, determined in the functional currency of the owner under paragraph (e) of this section, on the last day of the taxable year; less

(B) The owner functional currency net value of the section 987 QBU, determined in the functional currency

of the owner under paragraph (e) of this section, on the last day of the preceding taxable year.

(ii) *Year section 987 QBU is terminated.* If a section 987 QBU is terminated within the meaning of § 1.987-8 during an owner's taxable year, the termination date is treated as the last day of the taxable year for purposes of this section.

(iii) *First taxable year of a section 987 QBU.* If the owner's taxable year is the first taxable year of a section 987 QBU, the owner functional currency net value of the section 987 QBU described in paragraph (d)(1)(i)(B) of this section is zero.

(iv) *First year in which an election is in effect or ceases to be in effect.* Except as otherwise provided, the owner functional currency net value of the section 987 QBU described in paragraph (d)(1)(i)(B) of this section is determined based on the elections that were (or were not) in effect on the last day of the preceding taxable year.

(2) *Step 2: Increase the amount determined in step 1 by the amount of assets transferred from the section 987 QBU to the owner—*(i) *In general.* The amount determined in paragraph (d)(1) of this section is increased by the total amount of assets transferred from the section 987 QBU to the owner during the taxable year translated into the functional currency of the owner as provided in paragraph (d)(2)(ii) of this section.

(ii) *Assets transferred from the section 987 QBU to the owner during the taxable year.* The total amount of assets transferred from the section 987 QBU to the owner for the taxable year translated into the functional currency of the owner equals the sum of:

(A) The amount of the functional currency of the section 987 QBU and the aggregate adjusted basis of all other marked assets, after taking into account § 1.988–1(a)(10), transferred to the owner during the taxable year determined in the functional currency of the section 987 QBU and translated into the functional currency of the owner at the spot rate applicable to the date of transfer; and

(B) The aggregate adjusted basis of all historic assets transferred to the owner during the taxable year determined in the functional currency of the section 987 QBU and translated into the functional currency of the owner at the historic rate for each such asset.

(3) *Step 3: Decrease the amount determined in steps 1 and 2 by the amount of assets transferred from the owner to the section 987 QBU*—(i) *In general.* The aggregate amount determined in paragraphs (d)(1) and (2) of this section is decreased by the total amount of assets transferred from the owner to the section 987 QBU during the taxable year determined in the functional currency of the owner as provided in paragraph (d)(3)(ii) of this section.

(ii) *Assets transferred from the owner to the section 987 QBU during the taxable year.* The total amount of assets transferred from the owner to the section 987 QBU for the taxable year equals the sum of:

(A) The amount of functional currency of the owner transferred to the section 987 QBU during the taxable year; and

(B) The aggregate adjusted basis of all other assets, after taking into account § 1.988–1(a)(10), transferred to the section 987 QBU during the taxable year determined in the functional currency of the owner immediately before the transfer.

(4) *Step 4: Decrease the amount determined in steps 1 through 3 by the amount of liabilities transferred from the section 987 QBU to the owner*—(i) *In general.* The aggregate amount determined in paragraphs (d)(1) through (3) of this section is decreased by the total amount of liabilities transferred from the section 987 QBU to the owner during the taxable year translated into the functional currency of the owner as provided in paragraph (d)(4)(ii) of this section.

(ii) *Liabilities transferred from the section 987 QBU to the owner during the taxable year.* The total amount of liabilities transferred from the section 987 QBU to the owner for the taxable year equals the sum of:

(A) The amount of marked liabilities, after taking into account § 1.988–

1(a)(10), transferred to the owner during the taxable year determined in the functional currency of the section 987 QBU and translated into the functional currency of the owner at the spot rate applicable to the date of transfer; and

(B) The amount of historic liabilities transferred to the owner during the taxable year determined in the functional currency of the section 987 QBU and translated into the functional currency of the owner at the historic rate for each such liability.

(5) *Step 5: Increase the amount determined in steps 1 through 4 by the amount of liabilities transferred from the owner to the section 987 QBU.* The aggregate amount determined in paragraphs (d)(1) through (4) of this section is increased by the total amount of liabilities, after taking into account § 1.988–1(a)(10), transferred from the owner to the section 987 QBU during the taxable year determined in the functional currency of the owner immediately before the transfer.

(6) *Step 6: Decrease or increase the amount determined in steps 1 through 5 by the section 987 taxable income or loss, respectively, of the section 987 QBU for the taxable year.* The aggregate amount determined in paragraphs (d)(1) through (5) of this section is decreased or increased by the section 987 taxable income or loss, respectively, computed under § 1.987–3 for the taxable year.

(7) *Step 7: Increase the amount determined in steps 1 through 6 by certain expenses or losses that are not deductible in computing the section 987 taxable income or loss of the section 987 QBU for the taxable year.* The aggregate amount determined under paragraphs (d)(1) through (6) of this section is increased by the amount of any expense or loss that reduces the basis of assets or increases the amount of liabilities attributable to the section 987 QBU for the taxable year but is not deductible in computing the section 987 QBU's taxable income or loss for the taxable year (such as business interest expense that is not deductible under section 163(j)). Items of expense or loss described in the preceding sentence are translated into the functional currency of the owner using the exchange rate that would apply under § 1.987–3(c) if they were deductible in computing the section 987 QBU's taxable income or loss for the taxable year. However, any foreign income taxes incurred by the section 987 QBU with respect to which the owner claims a credit are translated at the same rate at which such taxes were translated under section 986(a).

(8) *Step 8: Decrease the amount determined in steps 1 through 7 by the amount of certain income or gain that*

is not included in taxable income in computing the section 987 taxable income or loss of the section 987 QBU for the taxable year. The aggregate amount determined under paragraphs (d)(1) through (7) of this section is decreased by the amount of any income or gain that increases the basis of assets or reduces the amount of liabilities attributable to the section 987 QBU for the taxable year but is not included in taxable income in computing the section 987 QBU's taxable income or loss for the taxable year. Items of income or gain described in the preceding sentence are translated into the functional currency of the owner using the exchange rate that would apply under § 1.987–3(c) if they were included in taxable income in computing the section 987 QBU's taxable income or loss for the taxable year.

(9) *Step 9: Increase or decrease the amount determined in steps 1 through 8 by any income or gain, or any deduction or loss, respectively, that does not impact the adjusted balance sheet.* The aggregate amount determined under paragraphs (d)(1) through (8) of this section is increased by any items of income or gain taken into account in paragraph (d)(6) of this section (step 6) that do not increase the basis of assets or reduce the amount of liabilities attributable to the section 987 QBU for the taxable year, and decreased by any items of deduction or loss taken into account in paragraph (d)(6) of this section (step 6) that do not reduce the basis of assets or increase the amount of liabilities attributable to the section 987 QBU for the taxable year. Items of income, gain, deduction, or loss described in the preceding sentence are translated into the functional currency of the owner using the exchange rate that applied under § 1.987–3(c) in computing the section 987 QBU's taxable income or loss for the taxable year.

(10) *Step 10: Decrease or increase the amount determined in steps 1 through 9 by any increase or decrease, respectively, to the section 987 QBU's net assets that is not previously taken into account under steps 2 through 9*—(i) *In general.* Except as provided in paragraph (d)(10)(iii) of this section, the aggregate amount determined under paragraphs (d)(1) through (9) of this section is—

(A) Decreased by the residual increase to net assets (as defined in paragraph (d)(10)(ii) of this section), translated into the owner's functional currency at the yearly average exchange rate for the taxable year; or

(B) Increased by the residual decrease to net assets (as defined in paragraph

(d)(10)(ii) of this section), translated into the owner's functional currency at the yearly average exchange rate for the taxable year.

(ii) *Determining the residual increase or decrease to net assets*—(A) *In general.* The residual increase to net assets is the positive amount, if any, that would be determined under paragraphs (d)(1) through (9) of this section in the functional currency of the section 987 QBU if such amounts were determined in the functional currency of the section 987 QBU. The residual decrease to net assets is the negative amount, if any, that would be determined under paragraphs (d)(1) through (9) of this section in the functional currency of the section 987 QBU if such amounts were determined in the functional currency of the section 987 QBU.

(B) *Application of step 1 in the functional currency of the section 987 QBU if a current rate election is in effect.* In a taxable year in which a current rate election is in effect, for purposes of applying step 1 (paragraph (d)(1) of this section) in the functional currency of the section 987 QBU, the change in the net value of the section 987 QBU is determined by reference to the QBU net value described in paragraph (e)(2)(ii) of this section.

(C) *Application of steps 3 and 5 in the functional currency of the section 987 QBU.* For purposes of applying steps 3 and 5 (paragraphs (d)(3) and (5) of this section) in the functional currency of the section 987 QBU, the amount of assets and liabilities transferred from an owner to a section 987 QBU is determined by translating the basis of the assets and the amount of the liabilities under § 1.987–2(d).

(iii) *Modifications for taxable years to which a current rate election or an annual recognition election applies.* For any taxable year to which a current rate election or an annual recognition election applies, paragraphs (d)(10)(i) and (ii) of this section are applied by replacing “paragraphs (d)(1) through (9) of this section” with “paragraphs (d)(1) through (5) of this section.”

(e) *Determination of the owner functional currency net value of a section 987 QBU*—(1) *In general.* Except as provided in paragraph (e)(2) of this section, the owner functional currency net value of a section 987 QBU on the last day of a taxable year is equal to the aggregate amount of functional currency and the adjusted basis of each other asset on the section 987 QBU's adjusted balance sheet on that day, less the aggregate amount of each liability on the section 987 QBU's adjusted balance sheet on that day, in each case translated into the owner's functional

currency as provided in paragraphs (e)(1)(i) and (ii) of this section.

(i) *Marked item.* A marked item is translated into the owner's functional currency at the spot rate applicable to the last day of the relevant taxable year.

(ii) *Historic item.* A historic item is translated into the owner's functional currency at the historic rate.

(2) *Current rate election*—(i) *In general.* If a current rate election is in effect, the owner functional currency net value of a section 987 QBU on the last day of a taxable year is equal to the QBU net value described in paragraph (e)(2)(ii) of this section, translated into the owner's functional currency at the spot rate applicable to that day.

(ii) *QBU net value.* The QBU net value of a section 987 QBU on the last day of a taxable year is determined in the functional currency of the section 987 QBU and is equal to the aggregate amount of functional currency and the adjusted basis of each other asset that is attributable to the section 987 QBU on that day, less the aggregate amount of each liability that is attributable to the section 987 QBU on that day. The QBU net value of a section 987 QBU on the last day of a taxable year may be determined either by preparing an adjusted balance sheet or by following the steps described in paragraph (e)(2)(iii) of this section (provided that the calculation is made consistently for all years in which a current rate election is in effect). However, in the first taxable year in which a current rate election ceases to be in effect, the owner functional currency net value of the section 987 QBU for the preceding taxable year must be determined by preparing an adjusted balance sheet.

(iii) *Alternative calculation of QBU net value.* The QBU net value of a section 987 QBU on the last day of a taxable year can be computed using the following steps (each applied in the functional currency of the section 987 QBU). See paragraph (g)(2)(iii) of this section (*Example 2*) for an example illustrating this rule.

(A) *Step 1: Determine the QBU net value on the last day of the preceding taxable year.* Determine the QBU net value on the last day of the preceding taxable year under this paragraph (e)(2). If the owner's taxable year is the first taxable year of a section 987 QBU, the QBU net value on the last day of the preceding taxable year is zero. In the first taxable year in which a current rate election is in effect (other than the taxable year beginning on the transition date or the first taxable year of a section 987 QBU), the QBU net value on the last day of the preceding taxable year is determined by preparing an adjusted

balance sheet. In the taxable year beginning on the transition date (other than the first taxable year of a section 987 QBU), the QBU net value on the last day of the preceding taxable year may be determined either by preparing an adjusted balance sheet or by applying the steps described in this paragraph (e)(2)(iii) for each taxable year beginning with the first taxable year of the section 987 QBU.

(B) *Step 2: Adjust for transfers between the section 987 QBU and its owner.* The amount determined in paragraph (e)(2)(iii)(A) of this section is increased by the amount of each transfer described in paragraph (d)(3) or (4) of this section and decreased by the amount of each transfer described in paragraph (d)(2) or (5) of this section (in each case, after adjustment for gain or loss recognized under § 1.988–1(a)(10)). For this purpose, the amount of assets and liabilities transferred from an owner to a section 987 QBU is determined by translating the basis of the assets and the amount of the liabilities under § 1.987–2(d)(1).

(C) *Step 3: Adjust for income or loss of the section 987 QBU.* The amount determined in paragraph (e)(2)(iii)(B) of this section is increased by items of income and gain attributable to the section 987 QBU (including tax-exempt income described in paragraph (d)(8) of this section) for the taxable year and reduced by items of deduction and loss attributable to the section 987 QBU (including non-deductible expenses described in paragraph (d)(7) of this section) for the taxable year. However, no adjustment is made under the preceding sentence for any item of income, gain, deduction, or loss described in paragraph (d)(9) of this section.

(f) *Combinations and separations*—(1) *Combinations.* The net accumulated unrecognized section 987 gain or loss of a combined QBU for a taxable year is equal to the sum of the combining QBUs' net accumulated unrecognized section 987 gain or loss. See paragraph (f)(3)(i) of this section (*Example 1*) for an illustration of this rule.

(2) *Separations.* The net accumulated unrecognized section 987 gain or loss of a separated QBU for a taxable year is equal to the separating QBU's net accumulated unrecognized section 987 gain or loss multiplied by the separation fraction. For purposes of determining the owner functional currency net value and QBU net value of the separated QBUs on the last day of the taxable year preceding the taxable year of separation under paragraphs (d)(1)(i)(B) and (e) of this section, the assets and liabilities attributable to the separating QBU on

that day are deemed to be attributable to the separated QBUs on that day, and are apportioned between the separated QBUs in a reasonable manner that takes into account the assets and liabilities attributable to the separated QBUs immediately after the separation. See paragraph (f)(3)(ii) of this section (*Example 2*) for an illustration of this rule.

(3) *Examples.* The following examples illustrate the rules of paragraphs (f)(1) and (2) of this section. For purposes of these examples, assume that no section 987 elections are in effect.

(i) *Example 1: Combination of two section 987 QBUs that have the same owner—(A) Facts.* DC1, a domestic corporation, owns Entity A, a DE. Entity A conducts a manufacturing business that constitutes a section 987 QBU (*Manufacturing QBU*) that has the euro as its functional currency. Manufacturing QBU has a net accumulated unrecognized section 987 loss of \$100. DC1 also owns Entity B, a DE. Entity B conducts a sales business that constitutes a section 987 QBU (*Sales QBU*) that has the euro as its functional currency. Sales QBU has a net accumulated unrecognized section 987 gain of \$110. During the taxable year, Entity A merges into Entity B under local law pursuant to which Entity A ceases to exist, Entity B survives, and Entity B acquires all the assets and liabilities of Entity A. As a result, the books and records of Manufacturing QBU and Sales QBU are combined into a new single set of books and records. The combined entity has the euro as its functional currency.

(B) *Analysis.* Pursuant to § 1.987–2(c)(9)(i), Manufacturing QBU and Sales QBU are combining QBUs, and their combination does not give rise to a transfer that is taken into account in determining the amount of a remittance (as defined in § 1.987–5(c)). For purposes of computing net unrecognized section 987 gain or loss under this section for the year of the combination, the combination is deemed to have occurred on the last day of the owner's prior taxable year, such that the owner functional currency net value of the combined section 987 QBU at the end of that taxable year described under paragraph (d)(1)(i)(B) of this section takes into account items attributable to both Manufacturing QBU and Sales QBU at that time. Additionally, any transactions between Manufacturing QBU and Sales QBU occurring during the year of the merger will not result in transfers to or from a section 987 QBU. Pursuant to paragraph (f)(1) of this section, the combined QBU will have a net accumulated

unrecognized section 987 gain of \$10 (the \$100 loss from Manufacturing QBU plus the \$110 gain from Sales QBU).

(ii) *Example 2: Separation of two section 987 QBUs that have the same owner—(A) Facts.* DC1, a domestic corporation, owns Entity A, a DE. Entity A conducts a business in the Netherlands that constitutes a section 987 QBU (*Dutch QBU*) that has the euro as its functional currency. The business of Dutch QBU consists of manufacturing and selling bicycles and scooters and is recorded on a single set of books and records. On the last day of year 1, the adjusted basis of the gross assets of Dutch QBU is €1,000. In year 2, the net accumulated unrecognized section 987 loss of Dutch QBU from all prior taxable years is \$200. During year 2, Entity A separates the bicycle and scooter business such that each business begins to have its own books and records and to meet the definition of a section 987 QBU under § 1.987–1(b)(3) (hereafter, “bicycle QBU” and “scooter QBU”). There are no transfers between DC1 and Dutch QBU before the separation. After the separation, the aggregate adjusted basis of bicycle QBU's assets is €600 and the aggregate adjusted basis of scooter QBU's assets is €400. Each section 987 QBU continues to have the euro as its functional currency.

(B) *Analysis.* Pursuant to § 1.987–2(c)(9)(iii), bicycle QBU and scooter QBU are separated QBUs, and the separation of Dutch QBU, a separating QBU, does not give rise to a transfer taken into account in determining the amount of a remittance. For purposes of computing net unrecognized section 987 gain or loss under this section for year 2, the separation will be deemed to have occurred on the last day of the owner's prior taxable year, year 1. Pursuant to paragraph (f)(2) of this section and § 1.987–1(h), bicycle QBU will have a separation fraction of €600/€1,000 and net accumulated unrecognized section 987 loss of \$120 (€600/€1,000 × \$200), and scooter QBU will have a separation fraction of €400/€1,000 and net accumulated unrecognized section 987 loss of \$80 (€400/€1,000 × \$200).

(g) *Examples.* The following examples illustrate the provisions of this section. For purposes of the examples, U.S. Corp is a domestic corporation that uses the calendar year as its taxable year and has the dollar as its functional currency. Except as otherwise indicated, no section 987 elections are in effect. The examples are not intended to demonstrate when activities constitute a trade or business within the meaning of § 1.989(a)–1(b)(2)(ii)(A) and (c) and therefore whether a section 987 QBU is considered to exist.

(1) *Example 1: Determination of net unrecognized section 987 gain or loss—(i) Facts.* On July 1, year 1, U.S. Corp establishes Japan Branch, a section 987 QBU that has the yen as its functional currency, and U.S. Corp transfers to Japan Branch ¥100,000 with a basis of \$1,000 and raw land with a basis of \$500. On the same day, Japan Branch borrows ¥10,000 from a bank. In year 1, Japan Branch earns ¥12,000 for providing services and incurs ¥2,000 of related expenses. Japan Branch thus earns ¥10,000 of net income in year 1. The spot rate on July 1, year 1, is \$1 = ¥100; the spot rate on December 31, year 1, is \$1 = ¥120; and the average rate for the period of July 1, year 1, to December 31, year 1, is \$1 = ¥110. Thus, the ¥12,000 of services revenue when translated under § 1.987–3(c)(1) at the yearly average exchange rate equals \$109.09 (¥12,000 × (\$1/¥110)) = \$109.09. The ¥2,000 of expenses translated at the same yearly average exchange rate equals \$18.18 (¥2,000 × (\$1/¥110) = \$18.18). Thus, Japan Branch's net income translated into dollars equals \$90.91 (\$109.09 – \$18.18 = \$90.91).

(ii) *Analysis.* Under paragraph (a) of this section, U.S. Corp must compute the net unrecognized section 987 gain or loss of Japan Branch for year 1. Because this is Japan Branch's first taxable year, the net unrecognized section 987 gain or loss (as defined under paragraph (b) of this section) is equal to the branch's unrecognized section 987 gain or loss for year 1 as determined in paragraph (d) of this section. The calculations under paragraph (d) of this section are made as follows:

(A) *Step 1.* Under paragraph (d)(1) of this section (step 1), U.S. Corp must determine the change in the owner functional currency net value (OFCNV) of Japan Branch for year 1 in dollars. The change in the OFCNV of Japan Branch for year 1 is equal to the OFCNV of Japan Branch determined in dollars on the last day of year 1, less the OFCNV of Japan Branch determined in dollars on the last day of the preceding taxable year.

(1) The OFCNV of Japan Branch on December 31, year 1 is determined under paragraph (e) of this section as the sum of the basis of each asset on Japan Branch's adjusted balance sheet on December 31, year 1, less the sum of each liability on Japan Branch's adjusted balance sheet on that date, translated into dollars as provided in paragraphs (e)(1)(i) and (ii) of this section.

(2) For this purpose, Japan Branch will show the following assets and liabilities on its adjusted balance sheet

for December 31, year 1: cash of ¥120,000; raw land with a basis of ¥55,000 (\$500 translated under § 1.987–2(d)(2) at the historic rate of \$1 = ¥110); and liabilities of ¥10,000.

(3) Under paragraphs (e)(1)(i) and (ii) of this section, U.S. Corp will translate these items as follows. The ¥120,000 is a marked asset and the ¥10,000 liability

is a marked liability. These items are translated into dollars on December 31, year 1, using the spot rate on December 31, year 1, of \$1 = ¥120. The raw land is a historic asset and is translated into dollars under paragraph (e)(1)(ii) of this section at the historic rate, which under § 1.987–1(c)(3)(i)(A) is the yearly average exchange rate of \$1 = ¥110

applicable to the year the land was transferred to the QBU.

(4) The OFCNV of Japan Branch on December 31, year 1, in dollars is \$1,416.67. The determination of the OFCNV of Japan Branch on December 31, year 1, is shown below in dollars together with the corresponding amounts in yen.

TABLE 1 TO PARAGRAPH (g)(1)(ii)(A)(4)—OFCNV—END OF YEAR 1

	Amount in ¥	Translation rate	Amount in \$
Assets			
Yen	120,000	\$1 = ¥120 (spot rate-12/31/year 1)	\$1,000.00
Land	55,000	\$1 = ¥110 (historic rate-yearly average rate-year 1) ...	500.00
Total assets	175,000		1,500.00
Liabilities			
Bank loan	10,000	\$1 = ¥120 (spot rate-12/31/year 1)	83.33
Total liabilities	10,000		83.33
Year 1 ending net value	165,000		1,416.67

(5) Under paragraph (d)(1) of this section, the change in OFCNV of Japan Branch for year 1 is equal to the OFCNV of the branch determined in dollars on December 31, year 1, (which is \$1,416.67) less the OFCNV of the branch determined in dollars on the last day of the preceding taxable year. Because this is the first taxable year of Japan Branch, the OFCNV of Japan Branch determined in dollars on the last day of the preceding taxable year is zero under paragraph (d)(1)(iii) of this section. Accordingly, the change in OFCNV of Japan Branch for year 1 is \$1,416.67.

(B) *Step 2 (no adjustment)*. No adjustment is made under paragraph (d)(2) of this section (step 2) because no assets were transferred by Japan Branch to U.S. Corp during the taxable year.

(C) *Step 3*. On July 1, year 1, U.S. Corp transferred to Japan Branch ¥100,000 with a basis of \$1,000.00 and raw land with a basis of \$500.00 (equal to ¥55,000, translated under § 1.987–2(d)(2) at the historic rate of \$1 = ¥110). The total amount of assets transferred from U.S. Corp to Japan Branch in dollars is \$1,500, and the total amount of the transfer in yen is ¥155,000.

Therefore, under paragraph (d)(3) of this section (step 3), the amount determined in previous steps is reduced by \$1,500.00, from \$1,416.67 to negative \$83.33.

(D) *Steps 4 and 5 (no adjustment)*. No adjustment is made under paragraphs (d)(4) and (5) of this section (steps 4 and 5) because no liabilities were transferred by U.S. Corp to Japan Branch or by Japan Branch to U.S. Corp during the taxable year.

(E) *Step 6*. Under paragraph (d)(6) of this section (step 6), the amount determined in previous steps is decreased by the section 987 taxable income of Japan Branch of \$90.91, from negative \$83.33 to negative \$174.24.

(F) *Steps 7 through 9 (no adjustment)*. No adjustment is made under paragraphs (d)(7) through (9) of this section (steps 7 through 9) because all of Japan Branch's items of income or deduction for the taxable year impact the basis of Japan Branch's assets or the amount of its liabilities and are taken into account in computing taxable income.

(G) *Step 10 (no adjustment)—(1) Calculation of residual increase or decrease to net assets*. Under paragraph

(d)(10)(ii) of this section, the residual increase (or decrease) to net assets is the positive (or negative) amount, if any, that would be determined under paragraphs (d)(1) through (9) of this section (steps 1 through 9) in the functional currency of the section 987 QBU if such amounts were determined in the functional currency of the section 987 QBU. In year 1, the relevant steps that must be applied in the functional currency of Japan Branch (the yen) are paragraphs (d)(1), (3), and (6) of this section (steps 1, 3, and 6). For purposes of applying paragraph (d)(1) of this section (step 1) in yen, the change in the net value of Japan Branch is ¥165,000. See paragraph (g)(1)(ii)(A)(4) of this section. For purposes of applying paragraph (d)(3) of this section (step 3) in yen, the amount of assets transferred from U.S. Corp to Japan Branch is ¥155,000. See paragraph (g)(1)(ii)(C) of this section. For purposes of applying paragraph (d)(6) of this section (step 6) in yen, Japan Branch earned ¥10,000 of net income in year 1. The application of these steps results in no residual increase or decrease to the adjusted balance sheet, as shown below:

TABLE 2 TO PARAGRAPH (g)(1)(ii)(G)(1)—APPLICATION OF RELEVANT STEPS IN YEN

Change in net value in yen (step 1)	¥165,000
Subtract amount determined in yen under step 3 (transfers from owner to section 987 QBU)	(¥155,000)
Subtract amount determined in yen under step 6 (section 987 taxable income or loss)	(¥10,000)
Residual increase or decrease to the adjusted balance sheet	¥0

(2) *No residual increase or decrease to the adjusted balance sheet*. As explained in paragraph (g)(1)(ii)(G)(1) of this section, there is no residual

increase or decrease to the adjusted balance sheet of Japan Branch in year 1. Therefore, no adjustment is made under paragraph (d)(10) of this section (step

10). Accordingly, the unrecognized section 987 loss of Japan Branch for year 1 is \$174.24.

(2) *Example 2: Determination of net unrecognized section 987 gain or loss if a current rate election is in effect—(i) Facts.* The facts are the same as in paragraph (g)(1) of this section (*Example 1*), except that U.S. Corp makes a current rate election under § 1.987–1(d)(2) for year 1.

(ii) *Analysis.* Because a current rate election is in effect for year 1, the unrecognized section 987 gain or loss for year 1 is determined by applying only paragraphs (d)(1) through (5) and (10) of this section (steps 1 through 5 and step 10). The calculations under paragraph (d) of this section are made as follows:

(A) *Step 1.* The change in the OFCNV of Japan Branch for year 1 is equal to the OFCNV of Japan Branch determined in dollars on the last day of year 1, less the OFCNV of Japan Branch determined in dollars on the last day of the preceding taxable year.

(1) For this purpose, Japan Branch will show the same assets and liabilities on its adjusted balance sheet for December 31, year 1 as are described in paragraph (g)(1)(ii)(A)(2) of this section (*Example 1*), but the land is treated as a marked asset as a result of the current rate election. The adjusted balance sheet reflects cash of ¥120,000, raw land with a basis of ¥50,000 (\$500 translated under § 1.987–2(d)(1) at the July 1, year 1 spot rate of \$1 = ¥100), and liabilities of ¥10,000.

(2) Under paragraph (e)(2)(ii) of this section, because a current rate election is in effect, the OFCNV of Japan Branch at the end of year 1 is equal to the QBU net value, translated into U.S. dollars at the applicable spot rate on the last day of the taxable year. The QBU net value of Japan Branch at the end of year 1 is

¥160,000, as shown below. The OFCNV of Japan Branch is \$1,333.33, which is equal to the QBU net value of ¥160,000, translated at the applicable spot rate on December 31, year 1 of \$1 = ¥120.

TABLE 3 TO PARAGRAPH (g)(2)(ii)(A)(2)—QBU NET VALUE—YEAR 1

	Amount in ¥
Assets:	
Yen	120,000
Land	50,000
Total assets	170,000
Liabilities:	
Bank loan	10,000
Total liabilities	10,000
Year 1 QBU net value	160,000

(3) Under paragraph (d)(1) of this section, the change in OFCNV of Japan Branch for year 1 is equal to the OFCNV of the branch determined in dollars on December 31, year 1, (which is \$1,333.33) less the OFCNV of the branch determined in dollars on the last day of the preceding taxable year. Because this is the first taxable year of Japan Branch, the OFCNV of Japan Branch determined in dollars on the last day of the preceding taxable year is zero under paragraph (d)(1)(iii) of this section. Accordingly, the change in OFCNV of Japan Branch for year 1 is \$1,333.33.

(B) *Step 2 (no adjustment).* No adjustment is made under paragraph (d)(2) of this section (step 2) because no assets were transferred by Japan Branch to U.S. Corp during the taxable year.

(C) *Step 3.* On July 1, year 1, U.S. Corp transferred to Japan Branch ¥100,000 with a basis of \$1,000.00 and raw land with a basis of \$500.00 (equal

to ¥50,000, translated under § 1.987–2(d)(1) at the spot rate on July 31, year 1 of \$1 = ¥100). The total amount of assets transferred in dollars is \$1,500.00, and the amount of assets transferred in yen is ¥150,000. Therefore, under paragraph (d)(3) of this section (step 3), the amount determined in previous steps is reduced by \$1,500, from \$1,333.33 to negative \$166.67.

(D) *Steps 4 and 5 (no adjustment).* No adjustment is made under paragraphs (d)(4) and (5) of this section (steps 4 and 5) because no liabilities were transferred by U.S. Corp to Japan Branch or by Japan Branch to U.S. Corp during the taxable year.

(E) *Steps 6 through 9 do not apply.* Under paragraph (d) of this section, paragraphs (d)(6) through (9) of this section (steps 6 through 9) do not apply because a current rate election is in effect.

(F) *Step 10—(1) Application of relevant steps in Japan Branch's functional currency.* Under paragraph (d)(10)(iii) of this section, because a current rate election is in effect, the residual increase or decrease to net assets is determined by applying paragraphs (d)(1) through (5) of this section (steps 1 through 5) in the functional currency of the section 987 QBU. The relevant steps that must be applied under paragraph (d)(10) of this section in the functional currency of Japan Branch are paragraphs (d)(1) and (3) of this section (steps 1 and 3). Under paragraph (d)(10)(ii)(B) of this section, step 1 is applied by reference to Japan Branch's QBU net value. See paragraphs (g)(2)(ii)(A) and (C) of this section for amounts determined in yen. The residual increase to net assets is determined as follows:

TABLE 4 TO PARAGRAPH (g)(2)(ii)(F)(1)—APPLICATION OF RELEVANT STEPS IN YEN

Step 1: Change in net value	¥160,000
Step 3: Subtract amount of transfers from owner to section 987 QBU	(¥150,000)
Residual increase or decrease to the adjusted balance sheet	¥10,000

(2) *Residual increase or decrease to net assets.* As explained in paragraph (g)(2)(ii)(F)(1) of this section, the residual increase to Japan Branch's net assets in year 1 is ¥10,000. This amount, translated at the yearly average exchange rate of \$1 = ¥110, equals \$90.91. Therefore, the amount determined in previous steps is reduced by \$90.91, from negative \$166.67 to negative \$257.58. Accordingly, the unrecognized section 987 loss of Japan Branch for year 1 is \$257.58.

(iii) *Alternative computation of QBU net value.* Alternatively, for purposes of applying steps 1 and 10 (paragraphs (d)(1) and (10) of this section), U.S. Corp can determine QBU net value using the following steps under paragraph (e)(2)(iii) of this section.

(A) *Step 1: Determine QBU net value at the end of the preceding taxable year.* Because year 1 is the first taxable year in which Japan Branch exists, the QBU net value at the end of the preceding taxable year is zero.

(B) *Step 2: Adjust for transfers between the section 987 QBU and its owner.* During year 1, U.S. Corp transferred assets to Japan Branch with an aggregate basis of ¥150,000, as described in paragraph (g)(2)(ii)(C) of this section. Therefore, the amount determined in step 1 is increased from zero to ¥150,000.

(C) *Step 3: Adjust for income or loss of the section 987 QBU.* During year 1, Japan Branch earned ¥10,000 of net income. Therefore, the amount

determined in step 2 is increased from ¥150,000 to ¥160,000.

(D) *QBU net value.* Japan Branch's QBU net value at the end of the preceding taxable year is zero. This amount is increased by the transfer from U.S. Corp of ¥150,000 and by Japan Branch's taxable income of ¥10,000. Japan Branch did not have any tax-exempt income or non-deductible expenses in year 1. Accordingly, Japan Branch's QBU net value at the end of year 1 is ¥160,000.

(3) *Example 3: Determination of net unrecognized section 987 gain or loss when a current rate election is revoked—(i) Facts—(A) Background.* The facts in year 1 are the same as in paragraph (g)(2) of this section (*Example 2*). In year 9, a current rate election remains in effect, U.S. Corp has net unrecognized section 987 loss of \$1,000 with respect to Japan Branch, and Japan Branch does not make a remittance. On December 31, year 9, the adjusted balance sheet of Japan Branch shows the following assets and liabilities: cash of ¥120,000; raw land with a basis of ¥50,000; and liabilities of ¥10,000. Effective for year 10, U.S. Corp revokes the current rate election.

(B) *Operations in year 10.* In year 10, Japan Branch earns ¥12,000 for providing services and incurs ¥2,000 of related expenses. Japan Branch thus earns ¥10,000 of net income in year 10. On December 31, year 10, the adjusted balance sheet of Japan Branch shows the following assets and liabilities: cash of ¥130,000; raw land with a basis of ¥50,000; and liabilities of ¥10,000.

Assume that the spot rate on December 31, year 9, is \$1 = ¥120; the spot rate on December 31, year 10, is \$1 = ¥130; and the yearly average exchange rate for year 10 is \$1 = ¥125. Thus, the ¥12,000 of services revenue when properly translated under § 1.987–3(c)(1) at the yearly average exchange rate equals \$96.00 ($¥12,000 \times (\$1/¥125) = \$96.00$). The ¥2,000 of expenses translated at the same yearly average exchange rate equals \$16.00 ($¥2,000 \times (\$1/¥125) = \$16.00$). Thus, Japan Branch's net income translated into dollars equals \$80. There are no transfers of assets or liabilities between U.S. Corp and Japan Branch in year 10.

(ii) *Analysis—(A) Determination of OFCNV for year 9.* Under paragraph (d)(1)(iv) of this section, the OFCNV of a section 987 QBU on the last day of the preceding taxable year is determined based on the elections that were (or were not) in effect on the last day of that taxable year. In year 9, a current rate election was in effect. Therefore, in determining the OFCNV of Japan Branch for year 9, all assets and liabilities of Japan Branch (including the land) are treated as marked items. Under paragraph (e)(2)(ii) of this section, because a current rate election was in effect for year 9, the OFCNV of Japan Branch at the end of year 9 is equal to the QBU net value, translated into U.S. dollars at the applicable spot rate on the last day of the taxable year. The QBU net value of Japan Branch at the end of year 9 is ¥160,000, as shown below. The OFCNV of Japan Branch is \$1,333.33,

which is equal to the QBU net value of ¥160,000, translated at the applicable spot rate on December 31, year 9 of \$1 = ¥120.

TABLE 5 TO PARAGRAPH (g)(3)(ii)(A)—
QBU NET VALUE—END OF YEAR 9

	Amount in ¥
Assets:	
Yen	120,000
Land	50,000
Total assets	170,000
Liabilities:	
Bank loan	10,000
Total liabilities	10,000
Year 9 ending net value	160,000

(B) *Determination of OFCNV for year 10.* In year 10, a current rate election is not in effect. Therefore, in determining the OFCNV of Japan Branch for year 10, the land owned by Japan Branch is treated as a historic item. Under § 1.987–1(c)(3)(i)(E), the historic rate applicable to historic items that were attributable to Japan Branch on the last day of the last taxable year in which a current rate election was in effect (December 31, year 9) generally is equal to the spot rate applicable to that day. Therefore, the historic rate applicable to the land is the spot rate on December 31, year 9. The OFCNV of Japan Branch for year 10 is \$1,339.74, determined under paragraph (e) of this section as follows (together with the corresponding amounts in yen):

TABLE 6 TO PARAGRAPH (g)(3)(ii)(B)—OFCNV—END OF YEAR 10

	Amount in ¥	Translation rate	Amount in \$
Assets:			
Yen	¥130,000	\$1 = ¥130 (spot rate-12/31/year 10)	\$1,000.00
Land	50,000	\$1 = ¥120 (historic rate-spot rate-12/31/year 9)	416.67
Total assets	180,000		1,416.67
Liabilities:			
Bank loan	10,000	\$1 = ¥130 (spot rate-12/31/year 10)	76.92
Total liabilities	10,000		76.92
Year 10 ending net value	170,000		1,339.74

(C) *Determination of unrecognized section 987 gain or loss for year 10.* The unrecognized section 987 gain or loss of Japan Branch for year 10 is determined under paragraph (d) of this section as follows:

(1) *Step 1.* The change in the OFCNV of Japan Branch for year 10 is equal to the OFCNV of Japan Branch determined in dollars on the last day of year 10, less the OFCNV of Japan Branch determined in dollars on the last day of year 9.

Therefore, the change in OFCNV is equal to \$6.41 (\$1,339.74—\$1,333.33).

(2) *Steps 2 through 5 (no adjustment).* No adjustment is made under paragraphs (d)(2) through (5) of this section (steps 2 through 5) because no assets or liabilities were transferred by U.S. Corp to Japan Branch or by Japan Branch to U.S. Corp during the taxable year.

(3) *Step 6.* Under paragraph (d)(6) of this section (step 6), the amount

determined in previous steps is decreased by the section 987 taxable income of Japan Branch of \$80.00, from \$6.41 to negative \$73.59.

(4) *Steps 7 through 10 (no adjustment).* No adjustment is made under paragraphs (d)(7) through (10) of this section (steps 7 through 10) because all of Japan Branch's items of income or deduction for the taxable year impact the basis of Japan Branch's assets or the amount of its liabilities and are taken

into account in computing taxable income. In addition, Japan Branch does not have a residual increase or decrease to net assets (because the change in net value of ¥10,000 is equal to the amount of Japan Branch's net income in year 10). Accordingly, the unrecognized section 987 loss of Japan Branch for year 10 is negative \$73.59.

(D) *Determination of net unrecognized section 987 gain or loss.* In year 10, Japan Branch has net accumulated section 987 loss of \$1,000. Because U.S. Corp revoked the current rate election for year 10, the net accumulated section 987 loss of \$1,000 becomes suspended section 987 loss under § 1.987–11(d)(2) and Japan Branch's net accumulated section 987 loss is reduced to zero. Therefore, in year 10, Japan Branch's net unrecognized section 987 loss is equal to \$73.59, its unrecognized section 987 loss for year 10.

§ 1.987–5 Recognition of section 987 gain or loss.

(a) *Recognition of section 987 gain or loss by the owner of a section 987 QBU.* The taxable income of an owner of a section 987 QBU includes the owner's section 987 gain or loss recognized with respect to the section 987 QBU for the taxable year. Except as otherwise provided in the section 987 regulations (including § 1.987–11(c), § 1.987–12(b) or (e), or § 1.987–13(h) or (k)), for any taxable year the owner's section 987 gain or loss recognized with respect to a section 987 QBU is equal to:

(1) The owner's net unrecognized section 987 gain or loss with respect to the section 987 QBU determined under § 1.987–4 on the last day of such taxable year (or, if earlier, on the day the section 987 QBU is terminated under § 1.987–8); multiplied by

(2) The owner's remittance proportion for the taxable year, as determined under paragraph (b) of this section.

(b) *Remittance proportion*—(1) *In general.* Except as provided in paragraph (b)(2) of this section, the owner's remittance proportion with respect to a section 987 QBU for a taxable year is equal to:

(i) The amount of the remittance, as determined under paragraph (c) of this section, to the owner from the section 987 QBU for such taxable year; divided by

(ii) The sum of:

(A) The aggregate adjusted basis of the gross assets that are attributable to the section 987 QBU as of the end of the taxable year, determined in the functional currency of the section 987 QBU; and

(B) The amount of the remittance, as determined under paragraph (c) of this section.

(2) *Annual recognition election.* A taxpayer may elect to recognize its net unrecognized section 987 gain or loss with respect to the section 987 QBU on an annual basis (*annual recognition election*). For any taxable year in which the annual recognition election is in effect, the owner's remittance proportion with respect to a section 987 QBU is one. See paragraph (g) of this section for an example illustrating this rule. Additionally, for any taxable year of an original deferral QBU owner in which an annual recognition election is in effect, the remittance proportion with respect to any successor deferral QBU is one.

(c) *Remittance*—(1) *Definition.* A remittance is determined in the section 987 QBU's functional currency and equals the excess, if any, of:

(i) The aggregate of all amounts transferred from the section 987 QBU to the owner during the taxable year, as determined in paragraph (d) of this section; over

(ii) The aggregate of all amounts transferred from the owner to the section 987 QBU during the taxable year, as determined in paragraph (e) of this section.

(2) *Alternative calculation.* The amount of a remittance described in paragraph (c)(1) of this section may alternatively be determined under the following steps (each applied in the functional currency of the section 987 QBU). If the amount determined under this paragraph (c)(2) is negative, the amount of the remittance is zero.

(i) *Step 1: Determine the change in QBU net value.* The change in QBU net value is equal to the QBU net value on the date provided in paragraph (c)(3) of this section, less the QBU net value on the last day of the preceding taxable year. In the first taxable year in which the section 987 QBU exists, the QBU net value on the last day of the preceding taxable year is zero.

(ii) *Step 2: Adjust the amount determined in step 1 for income or loss of the section 987 QBU.* The amount determined in paragraph (c)(2)(i) of this section is reduced (including below zero) by items of income and gain attributable to the section 987 QBU (including tax-exempt income described in § 1.987–4(d)(8)) for the taxable year and increased by items of deduction and loss attributable to the section 987 QBU (including non-deductible expenses described in § 1.987–4(d)(7)) for the taxable year. However, no adjustment is made under the preceding sentence for any item of income, gain, deduction, or

loss described in § 1.987–4(d)(9) (items that do not impact the adjusted balance sheet).

(iii) *Step 3: Multiply the amount determined in step 2 by negative one.* The amount of a remittance is equal to the amount determined in paragraph (c)(2)(ii) of this section multiplied by negative one.

(3) *Day when a remittance is determined.* An owner's remittance from a section 987 QBU for a taxable year is determined on the last day of the taxable year (or, if earlier, on the day of the taxable year when the section 987 QBU is terminated under § 1.987–8).

(4) *Termination.* A termination of a section 987 QBU as determined under § 1.987–8 is treated as a remittance of all the gross assets of the section 987 QBU to the owner on the date of such termination. See § 1.987–8(e). Accordingly, for purposes of paragraph (b) of this section, the remittance proportion in the case of a termination is one.

(d) *Aggregate of all amounts transferred from the section 987 QBU to the owner for the taxable year.* For purposes of paragraph (c)(1)(i) of this section, the aggregate of all amounts transferred from the section 987 QBU to the owner for the taxable year is the aggregate amount of functional currency and the aggregate adjusted basis of the other assets transferred (after taking into account § 1.988–1(a)(10)), determined in the section 987 QBU's functional currency. Solely for this purpose, the amount of liabilities transferred from the owner to the section 987 QBU (determined in the section 987 QBU's functional currency under § 1.987–2(d) after taking into account § 1.988–1(a)(10)) is treated as a transfer of assets from the section 987 QBU to the owner with an adjusted basis equal to the amount of such liabilities.

(e) *Aggregate of all amounts transferred from the owner to the section 987 QBU for the taxable year.* For purposes of paragraph (c)(1)(ii) of this section, the aggregate of all amounts transferred from the owner to the section 987 QBU for the taxable year is the aggregate amount of functional currency and the aggregate adjusted basis of the assets transferred (determined in the section 987 QBU's functional currency under § 1.987–2(d) after taking into account § 1.988–1(a)(10)). Solely for this purpose, the amount of liabilities transferred from the section 987 QBU to the owner (determined in the section 987 QBU's functional currency after taking into account § 1.988–1(a)(10)) is treated as a transfer of assets from the owner to the

section 987 QBU with an adjusted basis equal to the amount of such liabilities.

(f) *Determination of owner's adjusted basis in transferred assets and amount of transferred liabilities*—(1) *In general.* The owner's adjusted basis in an asset or the amount of a liability received in a transfer from a section 987 QBU (whether or not such transfer is made in connection with a remittance) is determined in the owner's functional currency under the rules prescribed in paragraphs (f)(2) and (3) of this section.

(2) *Marked items.* The basis of a marked asset or amount of a marked liability is the amount determined by translating the section 987 QBU's functional currency basis of the asset or amount of the liability, after taking into account § 1.988–1(a)(10), into the owner's functional currency at the spot rate applicable to the date of transfer.

(3) *Historic items.* The basis of a historic asset or amount of a historic liability is the amount determined by translating the section 987 QBU's functional currency basis of the asset or amount of the liability into the owner's functional currency at the historic rate for the asset or liability.

(g) *Example—Calculation of section 987 gain or loss recognized.* The following example illustrates the calculation of section 987 gain or loss under this section. For purposes of this example, except as otherwise indicated, assume that no section 987 elections are in effect. Depreciation is ignored for purposes of this example.

(1) *Facts*—(i) *In general.* U.S. Corp, a domestic corporation with the dollar as its functional currency, operates in the United Kingdom through Business A, a section 987 QBU with the pound as its functional currency. The net unrecognized section 987 gain for Business A as determined under § 1.987–4 as of the last day of year 2 is \$80.

(ii) *Year 1 balance sheet.* At the end of year 1, the following assets are attributable to Business A: cash of £3,350; a computer with an adjusted basis of £500; and a machine with an adjusted basis of £500. Thus, the aggregate basis of Business A's assets is £4,350. Business A has no liabilities.

(iii) *Transfers and income in year 2.* During year 2, Business A earned income of £1,500. In addition, the following transfers took place between U.S. Corp and Business A in year 2. On January 5, year 2, U.S. Corp transferred to Business A £300 (acquired by U.S. Corp immediately before the transfer). On March 5, year 2, Business A transferred a machine (with an adjusted basis of £500) to U.S. Corp. On November 1, year 2, Business A

transferred £2,300 to U.S. Corp. On December 7, year 2, U.S. Corp transferred a truck to Business A. The adjusted basis of the truck, when properly translated into pounds under § 1.987–2(d), is £2,000.

(iv) *Year 2 balance sheet.* At the end of year 2, the following assets are attributable to Business A: cash of £2,850, a computer with a pound adjusted basis of £500, and a truck with a pound adjusted basis of £2,000. Thus, the aggregate basis of Business A's assets is £5,350. Business A has no liabilities.

(2) *Analysis.* U.S. Corp's section 987 gain with respect to Business A is determined as follows:

(i) *Computation of amount of remittance.* Under paragraphs (c)(1) and (2) of this section, U.S. Corp must determine the amount of the remittance for year 2 in the QBU's functional currency (pounds) on the last day of year 2. The amount of the remittance for year 2 is £500, determined as follows:

TABLE 1 TO PARAGRAPH (g)(2)(i)

Transfers from Business A to U.S. Corp in pounds	
Machine	£500
Pounds	£2,300
Aggregate transfers from Business A to U.S. Corp	£2,800
Transfers from U.S. Corp to Business A in pounds	
Truck	£2,000
Pounds	£300
Aggregate transfers from U.S. Corp to Business A	£2,300
Computation of amount of remittance:	
Aggregate transfers from Business A to U.S. Corp	£2,800
Less: aggregate transfers from U.S. Corp to Business A	(£2,300)
Total remittance	£500

(ii) *Alternative computation of remittance amount.* Under paragraph (c)(2) of this section, U.S. Corp can compute the amount of the remittance for year 2 using the following steps.

(A) *Step 1: Change in QBU net value.* The change in Business A's QBU net value is equal to £1,000 (£5,350—£4,350).

(B) *Step 2: Adjustment for income or loss.* The amount determined in step 1 (£1,000) is reduced by Business A's

income for year 2 of £1,500, to negative £500.

(C) *Step 3: Multiply by negative one.* The amount determined in step 2 (negative £500) is multiplied by negative one. The remittance for year 2 is equal to £500.

(iii) *Computation of section 987 QBU gross assets plus remittance.* Under paragraph (b)(1)(ii) of this section, Business A must determine the aggregate basis of its gross assets and must increase this amount by the amount of the remittance.

TABLE 2 TO PARAGRAPH (g)(2)(iii)

Computer	£500
Pounds	£2,850
Truck	£2,000
Aggregate gross assets	£5,350
Remittance	£500
Aggregate basis of Business A's gross assets at end of year 2, increased by amount of remittance	£5,850

(iv) *Computation of remittance proportion.* Under paragraph (b) of this section, Business A must compute the remittance proportion by dividing the £500 remittance amount by the £5,850 sum of the aggregate basis of Business A's gross assets and the amount of the remittance. The resulting remittance proportion is 0.085.

(v) *Computation of section 987 gain or loss.* The amount of U.S. Corp's section 987 gain or loss that is recognized with respect to Business A is determined under paragraph (a) of this section by multiplying the 0.085 remittance proportion by the \$80 of net unrecognized section 987 gain. U.S. Corp's resulting recognized section 987 gain for year 2 is \$6.80.

(3) *Annual recognition election.* If an annual recognition election under paragraph (b)(2) of this section were in effect for year 2, U.S. Corp's remittance proportion would be one. Accordingly, U.S. Corp would recognize all \$80 of the net unrecognized section 987 gain with respect to Business A.

§ 1.987–6 Character and source of section 987 gain or loss.

(a) *Ordinary income or loss.* Section 987 gain or loss is ordinary income or loss for Federal income tax purposes.

(b) *Character and source of section 987 gain or loss.* With respect to each section 987 QBU, the character and source of section 987 gain or loss is determined under this paragraph (b) for all purposes of the Internal Revenue Code, including sections 904(d), 907, and 954.

(1) *Timing of character and source determination.* The character and source of section 987 gain or loss is determined

based on the initial assignment pursuant to paragraph (b)(2)(i) of this section and may be reassigned in the year in which the section 987 gain or loss is recognized pursuant to paragraph (b)(2)(ii) of this section. The initial assignment is made in the earliest of the taxable years described in paragraphs (b)(1)(i) through (iv) of this section.

(i) The taxable year in which net unrecognized section 987 gain or loss is recognized.

(ii) The taxable year in which net unrecognized section 987 loss or pretransition loss becomes suspended section 987 loss.

(iii) The taxable year in which net unrecognized section 987 gain or loss becomes deferred section 987 gain or loss.

(iv) In the case of pretransition gain or loss that is recognized ratably over the transition period pursuant to the election under § 1.987–10(e)(5)(ii), the taxable year that includes the transition date.

(2) *Method for determining the character and source of section 987 gain or loss*—(i) *Initial assignment*—(A) *In general*. In the taxable year of the initial assignment, determined under paragraph (b)(1) of this section, the owner assigns gross section 987 gain or loss to the statutory and residual groupings in the same proportions as the proportions in which the tax book value of the assets of the section 987 QBU are assigned to the groupings under the asset method in §§ 1.861–9(g) and 1.861–9T(g), as modified by this paragraph (b)(2)(i). For purposes of applying the asset method, the owner takes into account only the assets that are attributable to the section 987 QBU under § 1.987–2(b). See § 1.987–11(e) and (f) (grouping of section 987 gain and loss and applying the loss-to-the-extent-of-gain rule on basis of the initial assignment of section 987 gain and loss under this paragraph (b)(2)(i)).

(B) *Special rules for applying the asset method to assign section 987 gain or loss*. For purposes of assigning gross section 987 gain or loss to the statutory and residual groupings under paragraph (b)(2)(i)(A) of this section, the proportions in which the tax book value of the assets of the section 987 QBU are assigned to the groupings described in paragraph (b)(2)(i)(A) of this section are determined without regard to section 987 gain or loss. Further, the section 987 gain or loss is assigned after any reattribution of gross income required under § 1.904–4(f)(2)(vi) or § 1.951A–2(c)(7)(ii)(B)(2) (or the principles thereof, as applicable), but before the allocation and apportionment of expenses or the application of

provisions that are based on a net income computation, such as the high-tax exception to passive category income in § 1.904–4(c), the high-tax exception to foreign base company income in § 1.954–1(d), and the high-tax exclusion from tested income in § 1.951A–2(c)(7).

(C) *Election to treat section 987 gain or loss that is assigned to subpart F income groups relating to foreign personal holding company income as attributable to section 988 transactions*—(1) *In general*. If an election is made under this paragraph (b)(2)(i)(C)(1), section 987 gain or loss assigned under paragraphs (b)(2)(i)(A) and (B) of this section to any grouping of passive foreign personal holding company income, as described in § 1.960–1(d)(2)(ii)(B)(2)(i), is treated as foreign currency gain of the owner

attributable to section 988 transactions not directly related to the business needs of the controlled foreign corporation, or as loss allocated and apportioned to such foreign currency gain. See § 1.987–1(g) for rules that apply to section 987 elections.

(2) *Coordination with § 1.954–2(g)*. The rules of § 1.954–2(g)(2), (3) and (4) apply without regard to any section 987 gain treated as gain from section 988 transactions, or loss allocated and apportioned to such gain, by reason of an election under paragraph (b)(2)(i)(C)(1) of this section.

(D) *Section 987 gain or loss assigned to tentative tested income rather than tested income*—(1) *In general*. In the case of a controlled foreign corporation, section 987 gain or loss is initially assigned to tentative tested income within a section 904 category (a *tentative tested income group*) under paragraphs (b)(2)(i)(A) and (B) of this section as though the election described in § 1.951A–2(c)(7)(viii) is in effect for the taxable year. As a result, section 987 gain or loss that would have initially been characterized as tested income if no election under § 1.951A–2(c)(7)(viii) was in effect is initially characterized as tentative tested income.

(2) *For purposes of the GILTI high-tax exclusion, section 987 gain or loss is not attributable to any tested unit*. In the case of a controlled foreign corporation, the initial assignment of section 987 gain or loss is made as though the section 987 gain or loss was not attributable to any tested unit for purposes of applying § 1.951A–2(c)(7) (GILTI high-tax exclusion). See paragraph (b)(2)(iii) of this section (applying the GILTI high-tax exclusion by treating all section 987 gain or loss in the same tentative tested income

group as composing a single tentative tested income item).

(ii) *Reassignment of section 987 gain or loss*. In the taxable year in which section 987 gain or loss is recognized (determined by taking into account §§ 1.987–5, 1.987–11(e), 1.987–12(c), and 1.987–13(b) through (d), if applicable), the section 987 gain or loss is sourced and characterized based on the initial assignment in paragraph (b)(2)(i) of this section, but with appropriate changes to account for the application of provisions that apply to the section 987 gain or loss based on a net income computation such as the high-tax exception to passive category income in § 1.904–4(c), the high-tax exception to foreign base company income in § 1.954–1(d), and the high-tax exclusion to tested income in § 1.951A–2(c)(7). Thus, for example, if an election under § 1.951A–2(c)(7)(viii) is in effect for the taxable year, section 987 gain or loss initially assigned to a tentative tested income group will be reassigned to a tested income group (as defined in § 1.960–1(d)(2)(ii)(C)) or to the residual income group (as defined in § 1.960–1(d)(2)(ii)(D)), as applicable, depending on whether the item of income (as described in paragraph (b)(2)(iii) of this section) is subject to a high rate of tax (as determined under § 1.951A–2(c)(7)(vi)). If no election is made under § 1.951A–2(c)(7)(viii) for a taxable year, all of the section 987 gain or loss that is recognized in the taxable year that was initially assigned to tentative tested income under paragraph (b)(2)(i) of this section, is reassigned to the appropriate tested income group (as defined in § 1.960–1(d)(2)(ii)(C)).

(iii) *Special rule for the application of the GILTI high-tax exclusion to section 987 gain or loss*. Section 987 gain in a tentative tested income group that is recognized by a controlled foreign corporation in a taxable year comprises a single tentative gross tested income item (as if it were allocable to its own tested unit) within the meaning of § 1.951A–2(c)(7)(ii), and section 987 loss in a tentative tested income group that is recognized by a controlled foreign corporation in the taxable year is allocated and apportioned to the corresponding tentative gross tested income item for purposes of calculating the tentative tested income item within the meaning of § 1.951A–2(c)(7)(iii). Thus, for purposes of applying the high-tax exclusion in § 1.951A–2(c)(7), all of the section 987 gain and loss in a tentative tested income group that is recognized by the controlled foreign corporation in a taxable year is a single tentative tested income item.

(3) *Allocation and apportionment of foreign income tax to section 987 items under section 861.* For purposes of applying the definition of a corresponding U.S. item in § 1.861–20(b), an item of foreign gross income and an item of section 987 gain or loss are treated as arising from the same transaction or other realization event only if the requirements in both paragraphs (b)(3)(i) and (ii) of this section are satisfied.

(i) *The foreign gross income is an item of foreign currency gain or loss.* The owner of the section 987 QBU, original deferral QBU owner, or original suspended loss QBU owner includes the foreign gross income under the laws of the foreign country in which it is a tax resident because under that foreign law it is required to recognize foreign currency gain or loss with respect to its interest in the section 987 QBU or with respect to a successor deferral QBU or successor suspended loss QBU.

(ii) *The same event or events give rise to both the foreign gross income and the section 987 gain or loss.* The remittance under § 1.987–5(c) that gave rise to the item of section 987 gain or loss comprises one or more of the events that gave rise to the item of foreign gross income described in paragraph (b)(3)(i) of this section.

(c) *Examples.* The following examples illustrate the application of this section. For purposes of the examples, except as otherwise indicated, assume that no section 987 elections are in effect.

(1) *Example 1: Initial assignment and reassignment of section 987 gain or loss—(i) Facts.* CFC is a controlled foreign corporation with the Swiss franc (Sf) as its functional currency. CFC is the owner of Business A, a section 987 QBU that has the euro as its functional currency. For year 1, CFC does not have an election described in § 1.951A–2(c)(7)(viii) in effect but is subject to an election under paragraph (b)(2)(i)(C) of this section. CFC recognizes section 987 gain of Sf10,000 under § 1.987–5. Business A has average total assets of Sf1,000,000 in year 1, which generate income (other than section 987 gain) as follows: Sf750,000 of assets that produce gross income in the statutory grouping for foreign source general category tested income under sections 904(d)(1)(A) and 951A; and Sf250,000 of assets that produce foreign source passive gross income in one of the groupings described in §§ 1.960–1(d)(2)(ii)(B)(2)(i) and 1.954–1(c)(1)(iii)(B) (subpart F income groups relating to passive foreign personal holding company income).

(ii) *Analysis.* Under paragraphs (b)(2)(i)(A), (B), and (D) of this section,

Sf7,500 (Sf750,000/Sf1,000,000 × Sf10,000) of the section 987 gain is initially assigned to the statutory grouping of foreign source general category tentative tested income. Because an election under § 1.951A–2(c)(7)(viii) is not in effect for the taxable year in which the section 987 gain is recognized, the section 987 gain is reassigned under paragraph (b)(2)(ii) of this section to foreign source general category tested income. The remaining Sf2,500 (Sf250,000/Sf1,000,000 × Sf10,000) is characterized under paragraphs (b)(2)(i)(A) and (B) of this section by reference to assets that give rise to foreign source passive gross income in one of the groupings described in § 1.960–1(d)(2)(ii)(B)(2)(i) (subpart F income groups relating to passive foreign personal holding company income) and is therefore generally treated under the election in paragraph (b)(2)(i)(C) of this section as foreign source foreign currency gain of CFC attributable to section 988 transactions not directly related to the business needs of the controlled foreign corporation. All of the section 987 gain is treated as ordinary income under paragraph (a) of this section.

(2) *Example 2: Effect of GILTI high-tax exclusion—(i) Facts.* The facts are the same as in paragraph (c)(1) of this section (*Example 1*) except that CFC does have an election described in § 1.951A–2(c)(7)(viii) in effect. Without regard to the section 987 gain or loss, CFC has two tentative gross tested income items: Sf100,000 of gross tentative tested income attributable to a CFC tested unit (the CFC item) and Sf5,000,000 of gross tentative tested income attributable to a Business A tested unit (the Business A item). CFC accrues Sf1,010,000 of current year taxes and has no other current year deductions. CFC is not required by its country of tax residence to include in foreign gross income foreign currency gain or loss with respect to its interest in a foreign QBU. For purposes of § 1.951A–2(c)(7)(iii)(A), Sf1,000,000 of current year tax is allocated and apportioned to the Business A item and Sf10,000 is allocated and apportioned to the CFC item. At all relevant times Sf1 = \$1.

(ii) *Analysis.* As in paragraph (c)(1)(ii) of this section (*Example 1*), Sf7,500 of section 987 gain is initially assigned to the statutory grouping of foreign source general category tentative tested income. Under paragraph (b)(2)(iii) of this section, the section 987 gain comprises a single tentative gross tested income item of the CFC (the section 987 item). Therefore, the CFC has three tentative gross tested income items: the section

987 item, the CFC item, and the Business A item. No tax is allocated and apportioned to the section 987 item. See paragraph (b)(3) of this section. Applying § 1.951A–2(c)(7)(vi), the effective tax rate of the section 987 item is 0% (\$0/\$7,500), the effective tax rate of the CFC item is 10% (\$10,000/\$100,000), and the effective tax rate of the Business A item is 20% (\$1,000,000/\$5,000,000). An election under § 1.951A–2(c)(7)(viii) is in effect; therefore, the section 987 gain is reassigned based on the application of § 1.951A–2(c)(7). Because the section 987 item was not subject to an effective tax rate of greater than 90 percent of the maximum rate of tax specified in section 11, it is reassigned under paragraph (b)(2) of this section to foreign source general category tested income. The remaining Sf2,500 of section 987 gain is foreign source foreign currency gain of CFC attributable to section 988 transactions not directly related to the business needs of the controlled foreign corporation for the reasons stated in paragraph (c)(1)(ii) of this section (*Example 1*).

(3) *Example 3: Section 987 gain or loss treated as attributable to section 988 transactions—(i) Facts.* The facts are the same as in paragraph (c)(1) of this section (*Example 1*) except that CFC recognizes section 987 loss of Sf40,000, Sf5,000 of which is characterized under paragraphs (b)(2)(i)(A) and (B) of this section by reference to assets that give rise to foreign source passive gross income in a separate subpart F income group for non-related party interest income of Business A and Sf5,000 of which is characterized by reference to assets that give rise to foreign source passive gross income in a separate subpart F income group for gains from certain property transactions of Business A not derived from the active conduct of a trade or business. CFC otherwise has Sf12,000 of net foreign currency gain determined under § 1.954–2(g) that is taken into account in determining the excess of foreign currency gain over foreign currency losses characterized as foreign personal holding company income under section 954(c)(1)(D).

(ii) *Analysis.* Under paragraph (b)(2)(i)(C) of this section, the Sf10,000 total section 987 loss characterized by reference to assets that give rise to foreign source passive gross income in one of the groupings described in §§ 1.960–1(d)(2)(ii)(B)(2)(i) and 1.954–1(c)(1)(iii)(B) (subpart F income groups relating to passive foreign personal holding company income) is treated as foreign source foreign currency loss of

CFC attributable to section 988 transactions. Accordingly, CFC will aggregate the \$10,000 section 987 loss with the \$12,000 net foreign currency gain and will have \$2,000 of net foreign currency gain characterized as passive foreign personal holding company income under section 954(c)(1)(D).

(4) *Example 4: Section 987 gain or loss assigned to passive foreign personal holding company income*—(i) *Facts*. The facts are the same as in paragraph (c)(3) of this section (*Example 3*) except that CFC is not subject to an election under paragraph (b)(2)(i)(C) of this section.

(ii) *Analysis*. As the CFC is not subject to an election under paragraph (b)(2)(i)(C) of this section, \$5,000 of section 987 loss is initially assigned to the statutory grouping for foreign source passive gross income in a separate subpart F income group for non-related party interest income of Business A, and \$5,000 is initially assigned to the statutory grouping for foreign source passive gross income in a separate subpart F income group for gains from certain property transactions of Business A not derived from the active conduct of a trade or business. The \$12,000 net foreign currency gain is foreign source passive gross income in a separate subpart F income group for foreign currency gain of CFC attributable to section 988 transactions of CFC. As a result, if the net income in a subpart F income group to which either section 987 loss is assigned is less than zero, that loss will not reduce any other category of subpart F income, including CFC's foreign currency gain from section 988 transactions, except by reason of the earnings and profit limitation in section 952(c)(1). See § 1.954-1(c)(1)(ii).

§ 1.987-7 Application of the section 987 regulations to partnerships and S corporations.

(a) *Overview*. This section provides rules relating to the application of the section 987 regulations to partnerships and S corporations. Paragraph (b) of this section provides the general rule that the section 987 regulations do not apply to partnerships. Paragraph (c) of this section identifies certain provisions of the section 987 regulations that are applicable to partnerships, subject to certain modifications. Paragraph (d) of this section provides special rules relating to suspended section 987 loss. Paragraph (e) of this section provides rules for adjusting a partner's basis in its partnership interest. Paragraph (f) of this section provides that S corporations are treated in the same manner as partnerships for purposes of the section

987 regulations. Paragraph (g) of this section provides examples that illustrate the rules of this section.

(b) *Section 987 regulations generally do not apply to partnerships*. Except as otherwise provided in this section, the section 987 regulations do not apply to a partnership, and the section 987 regulations do not apply to an eligible QBU if a partnership is the owner for Federal income tax purposes of the eligible QBU's assets and liabilities. However, a taxpayer must apply sections 987 and 989(a) to partnerships and eligible QBUs of partnerships in a reasonable manner using a method that is applied consistently from year to year with respect to a particular partnership or eligible QBU. In addition, all members of the same controlled group must apply the same method consistently with respect to a particular partnership or eligible QBU.

(c) *Provisions of the section 987 regulations that apply to partnerships*—(1) *In general*—(i) *Eligible QBU*. The rules described in paragraph (c)(2) of this section apply to an eligible QBU if a partnership is the owner for Federal income tax purposes of the eligible QBU's assets and liabilities and either—

(A) The partnership (or a partner) treats the eligible QBU as a qualified business unit of the partnership that is subject to section 987 (for example, under an entity approach); or

(B) A partner in the partnership treats all or a portion of the eligible QBU as a qualified business unit of the partner that is subject to section 987 (for example, under an aggregate approach).

(ii) *Partnership*. The rules described in paragraph (c)(2) of this section apply to a partnership if a partner in the partnership treats the partnership itself (or an interest in the partnership) as a qualified business unit that is subject to section 987 (for example, under an entity approach).

(2) *Applicable provisions*—(i) *In general*. Sections 1.987-6 (character and source of section 987 gain or loss), 1.987-9(d) (information on a dedicated section 987 form), §§ 1.987-11 through 1.987-13 (suspended section 987 loss, deferral of section 987 gain or loss, and suspended section 987 loss upon terminations, respectively), and § 1.987-15 (applicability dates) apply to a QBU described in paragraph (c)(1) of this section, subject to the modifications described in this paragraph (c) and in paragraph (d) of this section.

(ii) *Annual recognition election*. An annual recognition election under § 1.987-5(b)(2) applies to a QBU described in paragraph (c)(1) of this section, subject to the modifications described in this paragraph (c). In each

taxable year of the owner of a QBU described in paragraph (c)(1) of this section in which an annual recognition election is in effect, the owner recognizes any unrecognized gain or loss with respect to the QBU under section 987(3) (other than suspended section 987 loss) as though the QBU terminated on the last day of the taxable year. Appropriate adjustments must be made to prevent the gain or loss from being taken into account again after it is recognized under this paragraph (c)(2)(ii) (for example, in the case of a taxpayer applying the 1991 proposed regulations, by adjusting the equity and basis pools to reflect the gain or loss recognized). The rules of § 1.987-1(g) apply with respect to an annual recognition election that is made by or for an owner of a QBU described in paragraph (c)(1) of this section.

(iii) *Section 988 mark-to-market election*. A section 988 mark-to-market election under § 1.987-3(b)(4)(ii) applies to a QBU described in paragraph (c)(1) of this section. The rules of § 1.987-1(g) apply with respect to a section 988 mark-to-market election that is made by or for an owner of a QBU described in paragraph (c)(1) of this section.

(3) *Modifications to applicable provisions*—(i) *In general*. An owner of a QBU described in paragraph (c)(1) of this section must adapt the rules described in paragraph (c)(2) of this section as necessary to recognize section 987 gain or loss in a manner that is consistent with the principles of those rules. For purposes of applying this section and the rules described in paragraph (c)(2) of this section to a QBU described in paragraph (c)(1) of this section, the definitions provided in the section 987 regulations apply with appropriate modifications. For example, in the case of a QBU described in paragraph (c)(1) of this section, the term section 987 gain or loss means gain or loss recognized under section 987(3), the term owner means the person that recognizes gain or loss under section 987(3), and the term section 987 QBU means any qualified business unit subject to section 987 (including a QBU described in paragraph (c)(1) of this section). In addition, references to other rules of the section 987 regulations must be adapted as necessary to apply section 987 in a manner that is consistent with the principles of this section and the rules described in paragraphs (c)(2) of this section. For example, references to the recognition of section 987 gain or loss under § 1.987-5 encompass any recognition of gain or loss under section 987(3).

(ii) *Controlled group*. For purposes of applying §§ 1.987-12 and 1.987-13, if a

partner in a partnership is treated as the owner of an eligible QBU described in paragraph (c)(1)(i) of this section (for example, under an aggregate approach) before the QBU terminates, each member of the partnership's controlled group is treated as a member of the partner's controlled group at any time that the partner (or any member of the partner's controlled group, determined without regard to this paragraph (c)(3)(ii)) continues to be a direct or indirect partner in the partnership. This paragraph (c)(3)(ii) does not apply for purposes of the de minimis rule in § 1.987-11(c)(2).

(4) *Terminating QBUs.* In the case of a terminating QBU described in paragraph (c)(1) of this section, the rules of this section and the rules described in paragraph (c)(2) of this section apply immediately before the termination, but § 1.987-10 does not apply because § 1.987-10 is not applicable to a QBU described in paragraph (c)(1) of this section.

(d) *Suspended section 987 loss—(1) In general—(i) Rules of § 1.987-11(c) and (d)(2) do not apply.* The rules of § 1.987-11(c) and (d)(2) do not apply to a QBU described in paragraph (c)(1) of this section.

(ii) *Suspension of section 987 loss.* Except as provided in paragraph (d)(2) of this section, any loss that would otherwise be recognized under section 987(3) (after applying § 1.987-12) with respect to a QBU described in paragraph (d)(1)(ii)(A) or (B) of this section is not recognized and becomes suspended section 987 loss.

(A) *Eligible QBU.* This paragraph (d)(1)(ii) applies to an eligible QBU described in paragraph (c)(1)(i) of this section.

(B) *Partnership.* This paragraph (d)(1)(ii) applies to a partnership (or a partnership interest) described in paragraph (c)(1)(ii) of this section if at least 95 percent of the interests in partnership capital and profits are owned, directly or indirectly, by persons related to each other within the meaning of section 267(b) or section 707(b). For this purpose, ownership of an interest in partnership capital or profits is determined in accordance with the rules for constructive ownership provided in section 267(c), other than section 267(c)(3).

(2) *Exceptions—(i) Method under which historic items do not give rise to section 987 gain or loss.* Paragraph (d)(1)(ii) of this section does not apply to an eligible QBU described in paragraph (d)(1)(ii)(A) of this section if section 987 is consistently applied to the QBU using a method under which historic items of the QBU do not give

rise to section 987 gain or loss (for example, a method that follows the principles of §§ 1.987-3 through 1.987-5).

(ii) *Annual recognition election.* Paragraph (d)(1)(ii) of this section does not apply in a taxable year in which an annual recognition election is in effect.

(iii) *De minimis rule.* Paragraph (d)(1)(ii) of this section does not apply in a taxable year described in § 1.987-11(c)(2).

(3) *Recognition of suspended section 987 loss—(i) In general.* Except as provided in paragraph (d)(3)(ii) of this section, suspended section 987 loss with respect to a QBU described in paragraph (d)(1)(ii)(A) or (B) of this section is recognized under the rules of §§ 1.987-11(e) and 1.987-13.

(ii) *Partnership that is not engaged in a trade or business.* In the case of a partnership described in paragraph (d)(1)(ii)(B) of this section that is not engaged in a trade or business, suspended section 987 loss cannot be recognized under § 1.987-13(b) through (d) (and thus can only be recognized under § 1.987-11(e)).

(iii) *Application of the loss-to-the-extent-of-gain rule.* If a partner in a partnership is the owner of a section 987 QBU described in paragraph (c)(1) of this section and also owns one or more section 987 QBUs that are not described in paragraph (c)(1) of this section, the loss-to-the-extent-of-gain rule of § 1.987-11(e) is applied by taking into account all of the owner's section 987 gain and suspended section 987 loss in each recognition grouping with respect to all of its section 987 QBUs (whether or not they are described in paragraph (c)(1) of this section).

(e) *Adjustments to the basis of a partner's interest in the partnership.* When, and to the extent that, a partner recognizes section 987 gain or loss, defers section 987 gain or loss, or suspends section 987 loss at the partner level with respect to a partnership described in paragraph (c)(1)(ii) of this section or an eligible QBU of the partnership described in paragraph (c)(1)(i) of this section, the principles of sections 704(d) and 705 apply as though the item of income or loss was part of the partner's distributive share of partnership items. Thus, proper adjustments must be made to the partner's adjusted basis in the partnership under the principles of section 705, taking into account the principles of section 704(d).

(f) *S corporations treated as partnerships.* For purposes of the section 987 regulations, S corporations are treated in the same manner as partnerships and shareholders of S

corporations are treated in the same manner as partners of partnerships.

(g) *Examples.* The following examples illustrate the principles of this section. For purposes of these examples, DC1 and DC2 are domestic corporations, and P is a foreign partnership. P is also the owner for Federal income tax purposes of the assets and liabilities of Business A, an eligible QBU that has the pound as its functional currency. DC1 and DC2 each own 50% of the capital and profits interests in P. If P is treated as a qualified business unit under section 989(a), P would have the euro as its functional currency due to activities unrelated to Business A.

(1) *Example 1: Aggregate approach to section 987—(i) Facts.* DC1 and DC2 each apply section 987 using an aggregate approach, under which each partner's indirect interest in Business A is treated as a section 987 QBU of the partner. DC1 and DC2 each use the earnings and capital method described in the 1991 proposed regulations to apply section 987 with respect to Business A. Neither DC1 nor DC2 has made an annual recognition election. Under the earnings and capital method, but for the application of paragraph (d)(1)(ii) of this section, DC1 and DC2 each would recognize section 987 loss of \$10 million in year 1 with respect to Business A.

(ii) *Analysis—(A) Application of loss suspension rule to Business A.* Business A is an eligible QBU described in paragraph (c)(1)(i) of this section because a partnership (P) is the owner of Business A's assets and liabilities for federal income tax purposes and P's partners treat Business A as a section 987 QBU. Therefore, under paragraph (d)(1)(ii) of this section, the section 987 loss of DC1 and DC2 that would otherwise be recognized in year 1 becomes suspended section 987 loss, which DC1 and DC2 may recognize in year 1 or in future taxable years under §§ 1.987-11(e) and 1.987-13(b) through (d).

(B) *Annual recognition election.* If DC1 and DC2 were subject to an annual recognition election in year 1, they would recognize section 987 gain or loss with respect to Business A as though Business A terminated at the end of year 1, and the loss suspension rule of paragraph (d)(1)(ii) of this section would not apply.

(C) *FEET method.* If DC1 and DC2 applied section 987 to Business A under the principles of §§ 1.987-3 through 1.987-5, such that historic items of Business A did not give rise to section 987 gain or loss, the loss suspension rule of paragraph (d)(1)(ii) of this section would not apply.

(2) *Example 2: Entity approach to section 987*—(i) *Facts*. P applies section 987 to Business A using an entity approach, under which Business A is treated as a section 987 QBU of P. P is treated as a qualified business unit under section 989(a) and uses the euro as its functional currency. P uses the earnings and capital method described in the 1991 proposed regulations to apply section 987 with respect to Business A. Under the earnings and capital method, but for the application of paragraph (d)(1)(ii) of this section, P would recognize section 987 loss of \$10 million in year 1 with respect to Business A. In addition, DC1 and DC2 apply section 987 to P using an entity approach, treating each partner's interest in P as a section 987 QBU. DC1 and DC2 each use the earnings and capital method described in the 1991 proposed regulations to apply section 987 with respect to P. Under the earnings and capital method, but for the application of paragraph (d)(1)(ii) of this section, DC1 and DC2 each would recognize section 987 loss of \$10 million in year 1 with respect to P. Neither DC1 nor DC2 has made an annual recognition election.

(ii) *Analysis*—(A) *Business A treated as a QBU subject to section 987*. Business A is an eligible QBU described in paragraph (c)(1)(i) of this section because a partnership (P) is the owner of Business A's assets and liabilities for Federal income tax purposes, and P treats Business A as a QBU subject to section 987. Therefore, the loss suspension rule in paragraph (d)(1)(ii) of this section applies to suspend P's recognition of section 987 loss with respect to Business A.

(B) *Treatment of P as a section 987 QBU*. P is a partnership described in paragraph (c)(1)(ii) of this section because DC1 and DC2 each treat their interest in P as a section 987 QBU. Under paragraph (d)(1)(ii)(B) of this section, if DC1 and DC2 are related within the meaning of section 267(b) or section 707(b), the loss suspension rule in paragraph (d)(1)(ii) of this section applies to suspend DC1's and DC2's recognition of section 987 loss with respect to their interest in P. However, if DC1 and DC2 are unrelated, the loss suspension rule in paragraph (d)(1)(ii) of this section does not apply.

§ 1.987–8 Termination of a section 987 QBU.

(a) *Scope*. This section provides rules regarding the termination of a section 987 QBU. Paragraph (b) of this section provides general rules for determining when a termination occurs. Paragraph (c) of this section provides exceptions to

the general termination rules for certain transactions described in section 381(a). Paragraph (d) of this section is reserved. Paragraph (e) of this section describes certain effects of terminations. Paragraph (f) of this section contains examples that illustrate the principles of this section.

(b) *In general*. Except as provided in paragraph (c) of this section, a section 987 QBU terminates if the conditions described in any one of paragraphs (b)(1) through (6) of this section are satisfied.

(1) *Trade or business ceases*. A section 987 QBU ceases its trade or business. When a section 987 QBU ceases its trade or business is determined based on all the facts and circumstances, provided that an owner may continue to treat a section 987 QBU as a section 987 QBU for a reasonable period during the winding up of such trade or business, which period may in no event exceed two years from the date on which such QBU ceases its activities carried on for profit. See paragraph (f)(1) of this section (*Example 1*).

(2) *Substantially all assets transferred*. The section 987 QBU transfers substantially all (within the meaning of section 368(a)(1)(C)) of its assets to its owner. For purposes of this paragraph (b)(2), the amount of assets transferred from the section 987 QBU to its owner as a result of a transaction is reduced by the amount of assets transferred from the owner to the section 987 QBU pursuant to the same transaction. See paragraphs (f)(2), (6), and (7) of this section (*Examples 2, 6, and 7*).

(3) *Owner no longer a CFC*. A foreign corporation that is a controlled foreign corporation that is the owner of a section 987 QBU ceases to be a controlled foreign corporation as a result of a transaction or series of transactions after which persons that were related to the corporation within the meaning of section 267(b) immediately before the transaction or series of transactions collectively own sufficient interests in the corporation such that the corporation would continue to be considered a controlled foreign corporation if such persons were United States shareholders within the meaning of section 951(b). See paragraph (f)(3) of this section (*Example 3*).

(4) *Owner ceases to exist*. The owner of the section 987 QBU ceases to exist (including in connection with a transaction described in section 381(a)). See paragraph (f)(4) of this section (*Example 4*).

(5) *Section 987 QBU ceases to be an eligible QBU with a functional currency different from its owner*. The section 987

QBU ceases to be an eligible QBU that has a functional currency different from its owner. See § 1.985–5(d)(2) and (e)(4)(iii) (providing that a termination resulting from a change in functional currency occurs on the last day of the last taxable year ending before the year of change).

(6) *Change in form of ownership*. An individual or corporation that was the direct owner of a section 987 QBU ceases to be the direct owner of the section 987 QBU (for example, because the assets of the section 987 QBU are transferred to a partnership).

(c) *Transactions described in section 381(a)*—(1) *Liquidations*.

Notwithstanding paragraph (b) of this section, a termination does not occur when the owner (*distributor*) of a section 987 QBU ceases to exist in a liquidation described in section 332 pursuant to which it transfers the section 987 QBU to another corporation (*distributee*), except in the following cases:

(i) The distributor is a domestic corporation and the distributee is a foreign corporation.

(ii) The distributor is a foreign corporation and the distributee is a domestic corporation.

(iii) The distributor and the distributee are both foreign corporations and the functional currency of the distributee is the same as the functional currency of the distributor's section 987 QBU.

(2) *Reorganizations*. Notwithstanding paragraph (b) of this section, a termination does not occur when the owner (*transferor*) of the section 987 QBU ceases to exist in a reorganization described in section 381(a)(2) pursuant to which it transfers the section 987 QBU to another corporation (*acquiring corporation*), except in the following cases:

(i) The transferor is a domestic corporation and the acquiring corporation is a foreign corporation.

(ii) The transferor is a foreign corporation and the acquiring corporation is a domestic corporation.

(iii) The transferor is a controlled foreign corporation immediately before the transfer, the acquiring corporation is a foreign corporation that is not a controlled foreign corporation immediately after the transfer, and the acquiring corporation was related to the transferor within the meaning of section 267(b) immediately before the transfer.

(iv) The transferor and the acquiring corporation are foreign corporations and the functional currency of the acquiring corporation is the same as the functional currency of the transferor's section 987 QBU.

(d) [Reserved]

(e) *Effect of terminations.* A termination of a section 987 QBU as determined in this section is treated as a remittance of all the gross assets of the section 987 QBU to its owner immediately before the section 987 QBU terminates. Thus, except as otherwise provided in the section 987 regulations, a termination generally results in the recognition of any net unrecognized section 987 gain or loss of the section 987 QBU (unless it is treated as deferred section 987 gain or loss or suspended section 987 loss). See § 1.987–5(c)(3) (generally recognizing section 987 gain or loss on a termination) and §§ 1.987–11 through 1.987–13 (suspending section 987 gain or loss and deferring section 987 loss in certain instances).

(f) *Examples.* The following examples illustrate the principles of this section. Except as otherwise provided, U.S. Corp is a domestic corporation that has the U.S. dollar as its functional currency, and Business A is a section 987 QBU.

(1) *Example 1: Cessation of operations*—(i) *Facts.* U.S. Corp is the owner of Business A, a sales office of U.S. Corp in Country X. Business A ceases sales activities on December 31, year 1. During year 2, Business A sells all of the assets used in its sales activities and winds up its business, settling outstanding accounts.

(ii) *Analysis.* Business A's trade or business ceases on December 31, year 1. The cessation of Business A's trade or business causes a termination of the Business A section 987 QBU under paragraph (b)(1) of this section on December 31, year 1, unless U.S. Corp chooses to continue to treat Business A as a section 987 QBU until completion of the wind-up activities in year 2. If U.S. Corp chooses to continue to treat Business A as a section 987 QBU during the wind-up of Business A, the Business A section 987 QBU would terminate under paragraph (b)(1) of this section upon completion of the wind-up in year 2.

(2) *Example 2: Transfer of a section 987 QBU to a member of a consolidated group*—(i) *Facts.* U.S. Corp, the owner of Business A, transfers all the assets and liabilities of Business A to DS, a domestic corporation all of the stock of which is owned by U.S. Corp, in a transaction qualifying under section 351. U.S. Corp and DS are members of the same consolidated group.

(ii) *Analysis.* Pursuant to § 1.987–2(c)(2)(i) and (ii), as a result of the deemed exchange of the assets and liabilities of Business A for DS stock in a section 351 transaction, Business A is treated as transferring its assets and liabilities to U.S. Corp immediately

before the transfer by U.S. Corp of the assets and liabilities to DS. Because a section 351 transaction is not a transaction described in section 381(a)(2), the transfer of all of the assets of Business A to U.S. Corp causes a termination of the Business A section 987 QBU under paragraph (b)(2) of this section.

(3) *Example 3: Cessation of controlled foreign corporation status*—(i) *Facts.* Foreign parent (FP) is a foreign corporation that owns all the stock of U.S. Corp, a domestic corporation. U.S. Corp owns all of the stock of FC, a controlled foreign corporation as defined in section 957. FC is the owner of Business A. U.S. Corp liquidates into FP. FC no longer constitutes a controlled foreign corporation after the liquidation.

(ii) *Analysis.* Because FC ceases to qualify as a controlled foreign corporation as a result of a transaction after which persons that were related to FC within the meaning of section 267(b) immediately before the transaction collectively own sufficient interests in FC such that FC would continue to be considered a controlled foreign corporation if such persons were United States shareholders within the meaning of section 951(b), the Business A section 987 QBU terminates pursuant to paragraph (b)(3) of this section.

(4) *Example 4: Section 332 liquidation*—(i) *Facts.* U.S. Corp owns all of the stock of FC, a foreign corporation. FC is the owner of Business A. Pursuant to a liquidation described in section 332, FC distributes all of its assets and liabilities to U.S. Corp.

(ii) *Analysis.* FC's liquidation causes a termination of the Business A section 987 QBU as provided in paragraph (b)(4) of this section because FC ceases to exist as a result of the liquidation. The exception for certain section 332 liquidations provided under paragraph (c)(1) of this section does not apply because U.S. Corp is a domestic corporation and FC is a foreign corporation. See paragraph (c)(1)(ii) of this section.

(5) [Reserved]

(6) *Example 6: Deemed transfers to a CFC upon a check-the-box election*—(i) *Facts.* In year 1, U.S. Corp forms an entity in a foreign country, Entity A. Entity A owns Business A, which has the pound as its functional currency. Entity A forms Entity B in another foreign country. Entity B owns Business B, a section 987 QBU that has the euro as its functional currency. At the time of formation, Entity A and Entity B elect to be DEs. In year 6, Entity A files an election on Form 8832 to be classified as a corporation under § 301.7701–

3(g)(1)(iv) of this chapter and becomes a CFC (FC) owned directly by U.S. Corp. FC has the pound as its functional currency.

(ii) *Analysis*—(A) Under § 1.987–1(b)(5), U.S. Corp is the owner of Business A and Business B. In year 6, when Entity A elects to be classified as a corporation, U.S. Corp is deemed to contribute the assets and liabilities of Business A and Business B to FC under section 351 in exchange for FC stock. Pursuant to § 1.987–2(c)(2)(i) and (ii), as a result of the deemed exchange of the assets and liabilities of Business A and Business B for FC stock in a section 351 transaction, Business A and Business B are each treated as transferring their assets and liabilities to U.S. Corp immediately before U.S. Corp's transfer of such assets and liabilities to FC. The transfer of assets from Business A and Business B to U.S. Corp causes terminations of those section 987 QBUs under paragraph (b)(2) of this section. The assets and liabilities of Business A and Business B are now owned by FC, but because FC and Business A have the same functional currency, only Business B qualifies as a section 987 QBU to which section 987 applies.

(B) Terminations also would have occurred in year 6 if U.S. Corp had contributed Entity A and Entity B to an existing foreign corporation owned by U.S. Corp or to a newly created foreign corporation owned by U.S. Corp pursuant to a section 351 exchange because the transfer of all of the assets of Business A and Business B would cause terminations of those section 987 QBUs under paragraph (b)(2) of this section.

(7) *Example 7: Sale of a section 987 QBU to a member of a consolidated group*—(i) *Facts.* U.S. Corp, the owner of Business A, sells all of the assets and liabilities of Business A to DS, a domestic corporation, in exchange for cash. U.S. Corp and DS are members of the same consolidated group. The cash received on the sale is recorded on the books of U.S. Corp.

(ii) *Analysis.* Pursuant to § 1.987–2(c)(2)(i) and (ii), Business A is treated as transferring all of its assets and liabilities to U.S. Corp immediately before the sale by U.S. Corp to DS. As a result of this deemed transfer from Business A to U.S. Corp, the Business A section 987 QBU terminates under paragraph (b)(2) of this section.

§ 1.987–9 Recordkeeping requirements.

(a) *In general.* An owner (or the authorized person on behalf of an owner) must keep a copy of the statement described in § 1.987–1(g)(3)(i) for each section 987 election made by or

on behalf of the owner (if not required to be made on a form published by the Commissioner) and reasonable records sufficient to establish section 987 taxable income or loss and section 987 gain or loss with respect to each section 987 QBU, successor deferral QBU, and successor suspended loss QBU, as applicable, for each taxable year.

(b) *Supplemental information.* A person's obligation to maintain records under section 6001 and paragraph (a) of this section is not satisfied unless the following information is maintained in those records with respect to each section 987 QBU, successor deferral QBU, and successor suspended loss QBU for each taxable year:

(1) The amount of the items of income, gain, deduction, or loss attributed to the section 987 QBU in the functional currency of the section 987 QBU and its owner.

(2) The adjusted balance sheet of the section 987 QBU in the functional currency of the section 987 QBU and its owner. If a current rate election is in effect and the owner computes QBU net value under § 1.987-4(e)(2)(iii) without preparing an adjusted balance sheet, the information needed to apply § 1.987-4(e)(2)(iii) must be maintained in lieu of an adjusted balance sheet.

(3) The exchange rates used to translate items of income, gain, deduction, or loss of the section 987 QBU into the owner's functional currency and, if a spot rate convention is used, the manner in which the convention is determined.

(4) The exchange rates used to translate the assets and liabilities of the section 987 QBU into the owner's functional currency and, if a spot rate convention is used, the manner in which the convention is determined.

(5) The amount of assets and liabilities transferred by the owner to the section 987 QBU determined in the functional currency of the owner and the section 987 QBU.

(6) The amount of assets and liabilities transferred by the section 987 QBU to the owner determined in the functional currency of the owner and the section 987 QBU.

(7) The amount of the unrecognized section 987 gain or loss for the taxable year determined under § 1.987-4(d).

(8) The amount of the net accumulated unrecognized section 987 gain or loss for the taxable year determined under § 1.987-4(c).

(9) The amount of the remittance and the remittance proportion for the taxable year.

(10) The computations required under §§ 1.861-9(g) and 1.861-9T(g) for purposes of sourcing and characterizing

section 987 gain or loss, deferred section 987 gain or loss, suspended section 987 loss, or pretransition gain or loss under § 1.987-6.

(11) The cumulative suspended section 987 loss in each recognition grouping.

(12) The outstanding deferred section 987 gain or loss in each recognition grouping.

(13) The transition information required to be determined under § 1.987-10(k).

(14) The identification required under § 1.987-14(c) with respect to a section 987 hedging transaction.

(c) *Retention of records.* The records required by this section, or records that support the information required on a form published by the Commissioner regarding section 987, must be maintained and kept available for inspection by the Internal Revenue Service for so long as the contents thereof may become relevant in the administration of the Internal Revenue Code.

(d) *Information on a dedicated section 987 form.* Information necessary to determine section 987 gain or loss and section 987 taxable income or loss must be reported on a form prescribed for that purpose (or, until that form is published, on Form 8858 or its successor) in accordance with the applicable forms and instructions. A taxpayer satisfies its obligation described in paragraphs (a) and (b) of this section to the extent that the taxpayer provides the specific information required on Form 8858 (or its successor) or other form prescribed for this purpose (including the information required by the instructions accompanying those forms).

§ 1.987-10 Transition rules.

(a) *Overview—(1) In general.* This section provides transition rules for the first taxable year in which the section 987 regulations apply. Paragraph (b) of this section describes the scope of this section's application. Paragraph (c) of this section provides rules for determining the transition date. Paragraph (d) of this section provides rules relating to the application of the section 987 regulations after the transition date. Paragraph (e) of this section provides rules relating to the determination and recognition of pretransition gain or loss. Paragraph (f) of this section provides special rules for section 987 QBUs to which the fresh start transition method was applied. Paragraph (g) of this section is reserved. Paragraph (h) of this section provides rules relating to the source and character of pretransition gain or loss.

Paragraph (i) of this section is reserved. Paragraph (j) of this section provides adjustments to avoid double counting or omissions. Paragraph (k) of this section provides reporting requirements that apply in the taxable year beginning on the transition date. Paragraph (l) of this section provides examples illustrating the rules of this section.

(2) *Terms defined under prior § 1.987-12.* For purposes of this section, the terms *deferral QBU*, *deferral QBU owner*, *successor QBU*, *outbound loss QBU*, *outbound section 987 loss*, and *qualified successor* have the meaning provided in prior § 1.987-12.

(b) *Scope—(1) Owner of a section 987 QBU.* Except as provided in paragraph (f) of this section, any person that is an owner of a section 987 QBU on the applicable transition date and any person that is the owner of a terminating QBU on the termination date must apply the rules of this section with respect to the section 987 QBU.

(2) *Deferral QBU owner and owner of outbound loss QBU.* Except as provided in paragraph (f) of this section, a deferral QBU owner or the owner of an outbound loss QBU must apply the rules of this section with respect to the deferral QBU or outbound loss QBU if the deferral event or outbound loss event occurred before the applicable transition date. This paragraph (b)(2) does not apply to the owner of a terminating QBU.

(c) *Transition date—(1) In general.* Except as provided in paragraph (c)(2) of this section, the transition date for a section 987 QBU, deferral QBU, or outbound loss QBU is the first day of the first taxable year described in § 1.987-15(a)(1), (b), or (c) to which this section applies.

(2) *Terminating QBU—(i) In general.* With respect to a terminating QBU, the transition date is the day after the termination date. Until the transition date described in paragraph (c)(1) of this section, the owner of the terminating QBU must apply the section 987 regulations with respect to the terminating QBU, and any section 987 gain or loss attributable thereto, without regard to any section 987 elections (other than the election described in § 1.987-6(b)(2)(i)(C)).

(ii) *Ordering rule.* In the case of a terminating QBU, the transition rules of this section are applied immediately before the termination, and the consequences of the termination are determined under the section 987 regulations after applying this section.

(d) *Application of the section 987 regulations after the transition date—(1) Owner functional currency net value on the last day of the preceding taxable*

year. Except as provided in paragraph (f) of this section, for purposes of applying § 1.987–4 in the taxable year beginning on the transition date, the owner functional currency net value of a section 987 QBU on the last day of the preceding taxable year under § 1.987–4(d)(1)(i)(B) is determined by translating the assets and liabilities that are attributable to the section 987 QBU on the day before the transition date into the owner's functional currency at the transition exchange rate described in paragraph (d)(3) of this section.

(2) *Determination of historic rate.* If a current rate election is not in effect for the taxable year beginning on the transition date, the historic rate for historic items that are attributable to a section 987 QBU on the day before the transition date (other than non-LIFO inventory subject to the simplified inventory method under § 1.987–3(c)(2)(iv)(A)) is the transition exchange rate described in paragraph (d)(3) of this section.

(3) *Transition exchange rate—(i) In general.* Except as provided in paragraph (d)(3)(ii) of this section, the transition exchange rate is the spot rate applicable to the day before the transition date.

(ii) *Earnings only method.* If an earnings only method described in paragraph (e)(4)(ii) of this section was applied with respect to a section 987 QBU before the transition date, and a current rate election is not in effect in the taxable year beginning on the transition date, the transition exchange rate for each historic item (other than inventory subject to the simplified inventory method under § 1.987–3(c)(2)(iv)(A)) is the pretransition translation rate described in paragraph (e)(2)(i)(C) of this section. This paragraph (d)(3)(ii) does not apply with respect to a terminating QBU.

(e) *Pretransition gain or loss—(1) In general.* Except as provided in paragraph (f) of this section, pretransition gain or loss is determined and recognized under this paragraph (e).

(2) *Amount of pretransition gain or loss for an owner that applied an eligible pretransition method—(i) Owner of a section 987 QBU.* If an owner of a section 987 QBU described in paragraph (b)(1) of this section applied an eligible pretransition method with respect to the section 987 QBU, the amount of pretransition gain or loss with respect to the section 987 QBU is equal to the sum of the deemed termination amount described in paragraph (e)(2)(i)(A) of this section and the owner functional currency net value adjustment described in paragraph (e)(2)(i)(B) of this section. See paragraphs (l)(1) through (3) of this

section (*Examples 1 through 3*) for an illustration of this rule.

(A) *Deemed termination amount.* The deemed termination amount is the amount of section 987 gain or loss that would have been recognized by the owner under the eligible pretransition method if the section 987 QBU terminated and transferred all of its assets and liabilities to the owner on the day before the transition date and §§ 1.987–12 and 1.987–13 and prior § 1.987–12 did not apply.

(B) *Owner functional currency net value adjustment.* The owner functional currency net value adjustment may be either positive or negative and is equal to the amount described in paragraph (e)(2)(i)(B)(1) of this section reduced by the amount described in paragraph (e)(2)(i)(B)(2) of this section.

(1) The basis of the assets, reduced by the amount of liabilities, that are attributable to the section 987 QBU on the day before the transition date, translated into the owner's functional currency at the transition exchange rate.

(2) The basis of the assets, reduced by the amount of liabilities, that are attributable to the section 987 QBU on the day before the transition date, translated into the owner's functional currency at the pretransition translation rate.

(C) *Pretransition translation rate.* The pretransition translation rate is the rate that would be used under the eligible pretransition method to determine the basis of an asset or the amount of a liability in the hands of the owner of a section 987 QBU if the section 987 QBU transferred all of its assets and liabilities to the owner on the day before the transition date.

(ii) *Deferral QBU owner.* If a deferral QBU owner described in paragraph (b)(2) of this section applied an eligible pretransition method with respect to the deferral QBU, the amount of pretransition gain or loss with respect to the deferral QBU is equal to the deferred section 987 gain or loss (determined under prior § 1.987–12) that was not recognized before the transition date with respect to the deferral QBU.

(iii) *Owner of an outbound loss QBU.* If the owner of an outbound loss QBU described in paragraph (b)(2) of this section applied an eligible pretransition method with respect to the outbound loss QBU, the pretransition loss with respect to the outbound loss QBU is equal to the outbound section 987 loss that was not added to the basis of stock or recognized under prior § 1.987–12 before the transition date with respect to the outbound loss QBU.

(3) *Amount of pretransition gain or loss for an owner that did not apply an*

eligible pretransition method—(i) In general. If the owner of a section 987 QBU described in paragraph (b)(1) of this section did not apply an eligible pretransition method with respect to the section 987 QBU, the amount of pretransition gain or loss with respect to the section 987 QBU is determined under paragraph (e)(3)(ii) of this section. See paragraph (l)(4) of this section (*Example 4*) for an illustration of this rule.

(ii) *Computation of pretransition gain or loss.* With respect to a section 987 QBU described in paragraph (e)(3)(i) of this section, pretransition gain or loss is equal to the amount described in paragraph (e)(3)(ii)(A) of this section reduced by the amount described in paragraph (e)(3)(ii)(B) of this section.

(A) The sum of the owner's annual unrecognized section 987 gain or loss determined under paragraph (e)(3)(iii) of this section with respect to the section 987 QBU for all taxable years ending before the transition date and beginning after September 7, 2006, in which it was the owner of the section 987 QBU.

(B) The total net amount of section 987 gain or loss recognized by the owner with respect to the section 987 QBU in all taxable years ending before the transition date and beginning after September 7, 2006.

(iii) *Annual unrecognized section 987 gain or loss.* An owner of a section 987 QBU described in paragraph (e)(3)(i) of this section determines annual unrecognized section 987 gain or loss with respect to a section 987 QBU under the rules of § 1.987–4(d), applied as though a current rate election was in effect for all relevant taxable years, and subject to the following modifications—

(A) Only § 1.987–4(d)(1) and (10)

(steps 1 and 10) are applied; and
(B) Section 1.987–4(d)(10) is applied by replacing “paragraphs (d)(1) through (9) of this section” with “paragraph (d)(1) of this section.”

(iv) *Deferral QBU owner.* If a deferral QBU owner described in paragraph (b)(2) of this section did not apply an eligible pretransition method with respect to the deferral QBU, the pretransition gain or loss with respect to the deferral QBU is equal to the amount that would be determined under paragraph (e)(3)(ii) of this section with respect to the deferral QBU if the transition date was the day of the deferral event, reduced by the amount of deferred section 987 gain or loss (determined under prior § 1.987–12) recognized before the actual transition date.

(v) *Owner of an outbound loss QBU.* If the owner of an outbound loss QBU

described in paragraph (b)(2) of this section did not apply an eligible pretransition method with respect to the outbound loss QBU, the pretransition loss with respect to the outbound loss QBU is equal to the amount that would be determined under paragraph (e)(3)(ii) of this section with respect to the outbound loss QBU if the transition date was the day of the outbound loss event, reduced by any outbound section 987 loss recognized or added to the basis of stock under prior § 1.987–12 before the actual transition date.

(4) *Eligible pretransition method.* An eligible pretransition method means a method of applying section 987 before the transition date that is described in paragraphs (e)(4)(i) through (iii) of this section. An owner is treated as applying an eligible pretransition method with respect to a section 987 QBU only if it applied an eligible pretransition method with respect to the QBU on a return filed before November 9, 2023.

(i) *Earnings and capital method.* An earnings and capital method is an eligible pretransition method if it is applied in a reasonable manner. For purposes of this paragraph (e)(4)(i), an earnings and capital method means a method of applying section 987 that requires section 987 gain or loss to be determined and recognized with respect to both the earnings of the section 987 QBU and capital contributed to the section 987 QBU (for example, the method prescribed in the 1991 proposed regulations under section 987). See paragraph (l)(1) of this section (*Example 1*) for an illustration of this rule.

(ii) *Other reasonable methods.* Any reasonable method of applying section 987 is an eligible pretransition method if it produces the same total amount of income over the life of the owner of a section 987 QBU as the method described in paragraph (e)(4)(i) of this section (taking into account the aggregate of section 987 gain or loss, section 987 taxable income or loss, and income or loss recognized by the owner of the section 987 QBU with respect to property transferred between the section 987 QBU and the owner or any QBU of the owner). See paragraph (l)(2) of this section (*Example 2*) for an illustration of this rule.

(iii) *Other earnings only methods.* An earnings only method that does not meet the requirements of paragraph (e)(4)(ii) of this section is an eligible pretransition method, provided that—

(A) The earnings only method was first applied by the owner on a return filed before November 9, 2023;

(B) The earnings only method was applied consistently to all section 987 QBUs of the owner since the first

taxable year in which the owner applied an eligible pretransition method; and

(C) The owner of the section 987 QBU otherwise applied section 987 in a reasonable manner. See paragraph (l)(3) of this section (*Example 3*) for an illustration of this rule.

(iv) *Error in the application of a section 987 method.* If an owner generally applied section 987 with respect to a section 987 QBU before the transition date under a method described in paragraph (e)(4)(i), (ii), or (iii) of this section but made errors in the application of the method or failed to apply the method to every taxable year since the QBU's inception, the owner is considered to have applied an eligible pretransition method with respect to the QBU. However, pretransition gain or loss must be determined under paragraph (e)(2) of this section as though the eligible pretransition method was applied without error since the section 987 QBU's inception. See paragraph (l)(5) of this section (*Example 5*) for an illustration of this rule.

(v) *Certain consistent practices not treated as errors—(A) In general.* If an owner generally applied section 987 with respect to a section 987 QBU before the transition date under a method described in paragraph (e)(4)(i), (ii), or (iii) of this section and used a consistent practice described in paragraph (e)(4)(v)(B) of this section for purposes of applying that method, the owner is considered to have applied an eligible pretransition method with respect to the QBU. In addition, the consistent practice is not treated as an error under paragraph (e)(4)(iv) of this section. Therefore, the owner must take the consistent practice into account in determining pretransition gain or loss under paragraph (e)(2) of this section. See paragraph (l)(6) of this section (*Example 6*) for an illustration of this rule.

(B) *Practices not treated as errors—(1) Reasonable conventions.* The use of a reasonable convention (for example, the use of a yearly average exchange rate rather than the applicable spot rate to translate frequently recurring transfers) is a practice described in this paragraph (e)(4)(v)(B).

(2) *Disregarded transactions.* If, in determining the amount of a remittance that requires the recognition of gain or loss under section 987(3), an owner of a QBU consistently disregarded certain transfers to or from the QBU (other than transfers from the QBU to the owner that would be treated as distributions if the QBU were treated as a separate corporation), the owner is considered to have applied a practice described in this

paragraph (e)(4)(v)(B) with respect to the QBU, provided that the owner otherwise accounts for the disregarded transfers in a reasonable manner (for example, under the method described in the 1991 proposed regulations, by taking the disregarded transfers into account in computing equity and basis pools so as to properly reflect the owner's net equity in the QBU and its functional currency basis in the QBU).

(vi) *Deferral of section 987 gain or loss until termination is not reasonable.* For purposes of this paragraph (e)(4), a method under which the owner of a section 987 QBU defers the recognition of section 987 gain or loss until the section 987 QBU is terminated, sold, or liquidated is not a reasonable method.

(vii) *Anti-abuse rule.* If an owner changes its pretransition method of applying section 987 with a principal purpose of reducing its pretransition gain or increasing its pretransition loss, the Commissioner may redetermine pretransition gain or loss based on the owner's original method of applying section 987 or by treating the owner as not applying an eligible pretransition method.

(5) *Recognition of pretransition gain or loss—(i) In general.* Except as provided in paragraph (e)(5)(ii) of this section, pretransition gain is recognized under paragraph (e)(5)(i)(A) of this section and pretransition loss is recognized under paragraph (e)(5)(i)(B) of this section.

(A) *Pretransition gain.* Pretransition gain with respect to a section 987 QBU is treated as net accumulated unrecognized section 987 gain (within the meaning of § 1.987–4(c)). Pretransition gain with respect to a deferral QBU is treated as deferred section 987 gain and is attributed to one or more successor deferral QBUs under the principles of § 1.987–12(b)(2) and (c)(2).

(B) *Pretransition loss—(1) In general.* Except as provided in paragraph (e)(5)(i)(B)(2) of this section, pretransition loss with respect to a section 987 QBU, a deferral QBU, or an outbound loss QBU is treated as suspended section 987 loss with respect to the section 987 QBU, the deferral QBU, or the outbound loss QBU. In the case of a deferral QBU or outbound loss QBU, suspended section 987 loss is attributed to one or more successor suspended loss QBUs under the principles of § 1.987–13(b)(1) and (c)(1).

(2) *Current rate election.* If a current rate election is in effect (and an annual recognition election is not in effect) in the taxable year beginning on the transition date, pretransition loss with respect to a section 987 QBU (other than

a terminating QBU) is treated as net accumulated unrecognized section 987 loss (within the meaning of § 1.987–4(c)), and pretransition loss with respect to a deferral QBU is treated as deferred section 987 loss and is attributed to one or more successor deferral QBUs under the principles of § 1.987–12(b)(2) and (c)(2).

(ii) *Election to recognize pretransition section 987 gain or loss ratably over the transition period*—(A) *In general.* A taxpayer may elect to recognize pretransition gain or loss ratably over the transition period. If an election is made to recognize pretransition gain or loss ratably over the transition period, then paragraph (e)(5)(i) of this section does not apply, and each owner to which the election applies recognizes one tenth of its pretransition gain or loss with respect to each section 987 QBU, original deferral QBU, and outbound loss QBU in each taxable year for ten taxable years beginning with the taxable year that begins on the transition date described in paragraph (c)(1) of this section. See § 1.987–1(g) for rules relating to section 987 elections (including consistency rules).

(B) *Special rules for certain transactions*—(1) *Scope.* This paragraph (e)(5)(ii)(B) applies if a corporation (*acquiring corporation*) acquires the assets of an owner that is subject to an election under paragraph (e)(5)(ii)(A) of this section in a transaction described in section 381(a), and either the owner is a foreign corporation and the acquiring corporation is a domestic corporation or the owner is a domestic corporation and the acquiring corporation is a foreign corporation. This paragraph (e)(5)(ii)(B) also applies to any transaction entered into with a principal purpose of avoiding the recognition of pretransition gain under paragraph (e)(5)(ii)(A) of this section.

(2) *Recognition of pretransition gain or loss.* In the case of a transaction described in paragraph (e)(5)(ii)(B)(1) of this section, pretransition gain or loss that has not been recognized under paragraph (e)(5)(ii)(A) of this section ceases to be subject to the election to be recognized ratably over the transition period. Any unrecognized pretransition gain is recognized immediately before the transaction, and any unrecognized pretransition loss becomes suspended section 987 loss immediately before the transaction. As a result, the suspended section 987 loss may be recognized to the extent of section 987 gain recognized in the same recognition grouping pursuant to § 1.987–11(e). See also § 1.987–13(g) (providing that any remaining suspended section 987 loss does not carry over to the acquiring

corporation upon an inbound transaction to which section 381(a) applies).

(C) *Terminating QBU.* This paragraph (e)(5)(ii)(C) applies with respect to a terminating QBU if, in the taxable year beginning on the transition date described in paragraph (c)(1) of this section, the owner of the terminating QBU elects to recognize pretransition gain or loss ratably over the transition period. Any deferred section 987 gain or loss or suspended section 987 loss with respect to the terminating QBU that was not recognized before the transition date described in paragraph (c)(1) of this section is treated as pretransition gain or loss for purposes of this paragraph (e)(5)(ii) (and ceases to be treated as deferred section 987 gain or loss or suspended section 987 loss). The pretransition gain or loss is recognized ratably over ten taxable years beginning with the taxable year that begins on the transition date described in paragraph (c)(1) of this section.

(6) *Predecessor of an owner*—(i) *In general.* For purposes of this paragraph (e), references to an owner of a section 987 QBU, a deferral QBU owner, and the owner of an outbound loss QBU include a predecessor described in paragraph (e)(6)(ii) of this section.

(ii) *Predecessor.* If a corporation (*acquiring corporation*) becomes the owner of a section 987 QBU in a transaction described in section 381(a) in which the section 987 QBU does not terminate, the corporation that was the owner of the section 987 QBU immediately before the transaction is a predecessor of the acquiring corporation. If a corporation (*acquiring corporation*) becomes a qualified successor of a deferral QBU owner or the owner of an outbound loss QBU (each, a *transferor corporation*), the transferor corporation is a predecessor of the acquiring corporation. A predecessor of a corporation includes the predecessor of a predecessor of the corporation.

(7) *Small business election*—(i) *Scope.* This paragraph (e)(7) applies if the owner of a QBU meets the threshold described in paragraph (e)(7)(ii) of this section and the QBU meets the threshold described in paragraph (e)(7)(iii) of this section. This paragraph (e)(7) does not apply with respect to a terminating QBU.

(ii) *Owner threshold.* An owner of a QBU meets the requirements of this paragraph (e)(7)(ii) if the owner would qualify for the small business exemption provided in section 163(j)(3) for the taxable year beginning on the transition date described in paragraph (c)(1) of this section.

(iii) *QBU threshold.* A QBU meets the requirements of this paragraph (e)(7)(iii) if the assets attributable to the QBU have an adjusted basis (translated at the spot rate applicable to the last day of each taxable year) of \$10 million or less at the end of each of the three taxable years of the owner ending before the transition date described in paragraph (c)(1) of this section (or, if the QBU was not in existence for three taxable years, each taxable year ending before the transition date in which the QBU existed). For this purpose, all QBUs owned by members of the same controlled group that have the same country of residence (as defined in section 988(a)(3)(B)) are treated as a single QBU. Solely for purposes of applying this paragraph (e)(7)(iii) in the case of a deferral QBU or outbound loss QBU described in paragraph (b)(2) of this section, the termination date is treated as the transition date.

(iv) *Small business election.* If the owner of a QBU meets the requirements of paragraph (e)(7)(ii) of this section, the owner may elect to treat all QBUs that meet the requirements of paragraph (e)(7)(iii) of this section as having no pretransition gain or loss.

(f) *QBUs to which the fresh start transition method was applied*—(1) *In general.* Paragraphs (d) and (e) of this section do not apply with respect to any section 987 QBU, deferral QBU, or outbound loss QBU with respect to which the taxpayer applied the rules of prior § 1.987–10 (or applied § 1.987–10 of the 2006 proposed regulations in a reasonable manner) on a return filed before November 9, 2023 or pursuant to paragraph (f)(3) of this section.

(2) *Application of the section 987 regulations after the transition date*—(i) *Owner functional currency net value on the last day of the preceding taxable year.* For purposes of applying § 1.987–4 with respect to a section 987 QBU described in paragraph (f)(1) of this section for the taxable year beginning on the transition date, the owner functional currency net value of the section 987 QBU on the last day of the preceding taxable year under § 1.987–4(d)(1)(i)(B) is the amount that was determined for the preceding taxable year under prior § 1.987–4(d)(1)(A) or § 1.987–4(d)(1)(A) of the 2006 proposed section 987 regulations, as applicable.

(ii) *Determination of historic rate.* For purposes of applying the section 987 regulations with respect to historic items (other than inventory subject to the simplified inventory method under § 1.987–3(c)(2)(iv)(A)) that are attributable to the section 987 QBU on the day before the transition date, a taxpayer must use the same historic

rates as were used under the taxpayer's application of the 2016 and 2019 section 987 regulations or the 2006 proposed section 987 regulations, as applicable, in place of the historic rates that otherwise would be determined under § 1.987–1(c)(3).

(iii) *Unrecognized section 987 gain or loss—(A) Net accumulated unrecognized section 987 gain or loss of a section 987 QBU.* In taxable years beginning on or after the transition date, for purposes of calculating the net accumulated unrecognized section 987 gain or loss of a section 987 QBU described in paragraph (f)(1) of this section under § 1.987–4(c)—

(1) Amounts determined under prior § 1.987–4(d) or under § 1.987–4(d) or § 1.987–10 of the 2006 proposed section 987 regulations, as applicable, are included in amounts determined under § 1.987–4(d) for all prior taxable years; and

(2) Amounts taken into account under prior § 1.987–5(a) or under § 1.987–5(a) of the 2006 proposed section 987 regulations, as applicable, are included in amounts recognized under § 1.987–5(a) for all prior taxable years. For this purpose, amounts taken into account under prior § 1.987–5(a) or under § 1.987–5(a) of the 2006 proposed section 987 regulations, as applicable, are determined without regard to prior § 1.987–12 or prior § 1.987–12T.

(B) *Deferred section 987 gain or loss attributable to a successor deferral QBU.* In the taxable year beginning on the transition date, the outstanding deferred section 987 gain or loss (as determined under prior § 1.987–12) of a deferral QBU described in paragraph (f)(1) of this section becomes deferred section 987 gain or loss (within the meaning of § 1.987–12). The deferred section 987 gain or loss is attributed to one or more successor deferral QBUs under the principles of § 1.987–12(b)(2) and (c)(2).

(C) *Outbound section 987 loss attributable to a successor suspended loss QBU.* In the taxable year beginning on the transition date, outbound section 987 loss of an outbound loss QBU described in paragraph (f)(1) of this section that has not been recognized or added to the basis of stock under prior § 1.987–12 becomes suspended section 987 loss. The suspended section 987 loss is attributed to one or more successor suspended loss QBUs under the principles of § 1.987–13(b)(1) and (c)(1).

(3) *Taxpayers that are required to transition using the fresh start transition method.* If a taxpayer is subject to a consent agreement under which it is required to apply the fresh start transition method with respect to a

section 987 QBU, then the taxpayer must apply the transition rules of prior § 1.987–10 to that section 987 QBU for the taxable year beginning on the transition date and immediately before the taxpayer applies this section. In applying this section, the taxpayer is treated as having applied prior § 1.987–10 to the section 987 QBU.

(g) [Reserved]

(h) *Determination of source and character—(1) In general.* Except as provided in paragraph (h)(2) of this section, the source and character of pretransition gain or loss is determined under the rules of § 1.987–6. *See* § 1.987–6(b)(1) (timing of source and character determination).

(2) *Deferral QBU or outbound loss QBU.* Notwithstanding paragraph (h)(1) of this section and § 1.987–6, the source and character of pretransition gain or loss with respect to a deferral QBU or an outbound loss QBU described in paragraph (b)(2) of this section is the same as the source and character of the outstanding deferred section 987 gain or loss (determined under prior § 1.987–12) of the deferral QBU or the outbound section 987 loss of the outbound loss QBU (determined under prior § 1.987–12(e)).

(i) [Reserved]

(j) *Adjustments to avoid double counting or omissions.* If a difference between the treatment of any item under the section 987 regulations and the treatment of the item under the taxpayer's prior section 987 method would result in income, gain, deduction, or loss (including section 988 gain or loss) being taken into account more than once or not being taken into account, then pretransition gain or loss, as determined under paragraphs (e)(2) and (3) of this section, is adjusted to account for the difference. In case of a QBU described in paragraph (f)(1) of this section, appropriate adjustments must be made under the principles of paragraph (e)(5) of this section. In the case of a terminating QBU, the determination as to whether an adjustment is required under this paragraph (j) is made after taking into account section 988 gain or loss recognized in connection with the termination.

(k) *Reporting—(1) In general.* Except as otherwise provided in this paragraph (k), a statement titled “Section 987 Transition Information” must be attached to an owner's timely filed (including extensions) return for the taxable year beginning on the transition date providing the following information for each QBU described in paragraph (k)(2) of this section:

(i) A description of each QBU, the QBU's principal place of business, and a description of the prior method used by the taxpayer to determine its section 987 gain or loss, deferred section 987 gain or loss, or outbound section 987 loss with respect to the QBU, including an explanation as to whether such method was an eligible pretransition method.

(ii) The pretransition gain or loss with respect to each QBU and the computations used to determine pretransition gain or loss.

(iii) Whether the authorized person has elected to recognize pretransition gain or loss ratably over the transition period pursuant to paragraph (e)(5)(ii) of this section.

(iv) Whether the authorized person has made a small business election under paragraph (e)(7) of this section and the computations used to determine eligibility for the election.

(v) With respect to each QBU for which any adjustment is made under paragraph (j) of this section, a description of each adjustment and the basis for computing the adjustment.

(vi) A list of the QBUs described in paragraph (f)(1) of this section, or a statement that no QBUs are described in paragraph (f)(1) of this section.

(2) *QBUs for which reporting is required—(i) In general.* Except as provided in paragraph (k)(2)(ii) of this section, the information described in paragraph (k)(1) of this section must be provided with respect to—

(A) Each section 987 QBU described in paragraph (b)(1) of this section;

(B) Each deferral QBU described in paragraph (b)(2) of this section and each of its successor deferral QBUs; and

(C) Each outbound loss QBU described in paragraph (b)(2) of this section and each of its successor suspended loss QBUs.

(ii) *QBUs to which the fresh start transition method was applied.* A taxpayer is not required to provide the information described in paragraphs (k)(1)(i) through (iv) of this section with respect to a QBU described in paragraph (f)(1) of this section.

(3) *Attachments not required where information is reported on a form.* This paragraph (k) does not apply to the extent provided on a form or instructions published by the Commissioner.

(4) *No change in method of accounting.* The application of this section is not treated as a change in method of accounting for purposes of sections 446 and 481.

(l) *Examples.* The following examples illustrate the application of this section. For purposes of the examples, DC is a

domestic corporation with the U.S. dollar as its functional currency and Branch is a section 987 QBU with the euro as its functional currency. DC has a taxable year ending December 31, and the transition date is January 1, year 4. For purposes of the examples, except as otherwise indicated, assume that no section 987 elections are in effect.

(1) *Example 1: Earnings and capital method*—(i) *Facts*—(A) *Formation of Branch and Branch's operations*. DC formed Branch on November 30, year 1, with a contribution of €150. In year 1, Branch purchased a parcel of unimproved land for €100. In year 2, Branch earned €25. In year 3, Branch again earned €25. On June 30, year 3, Branch distributed €100 cash to DC, and DC immediately exchanged the €100 for \$135.

(B) *Exchange rates*. The relevant exchange rates are shown below.

TABLE 1 TO PARAGRAPH (I)(1)(i)(B)—EXCHANGE RATES

	Spot rate	Yearly average exchange rate
November 30, Year 1	€1 = \$1.	
December 31, Year 1	€1 = \$1.10.	
December 31, Year 2	€1 = \$1.20.	
June 30, Year 3	€1 = \$1.35.	
December 31, Year 3	€1 = \$1.40.	
Year 1		€1 = \$1.05.
Year 2		€1 = \$1.15.

TABLE 1 TO PARAGRAPH (I)(1)(i)(B)—EXCHANGE RATES—Continued

	Spot rate	Yearly average exchange rate
Year 3		€1 = \$1.25.

(C) *Pretransition method*. DC used the method prescribed in the 1991 proposed regulations under section 987 with respect to Branch before the transition date. Under this method, DC maintains an equity pool in euros (Branch's functional currency) and a basis pool in U.S. dollars (DC's functional currency). When Branch makes a remittance (whether out of earnings or capital), DC recognizes section 987 gain or loss equal to the difference between the amount of the remittance (translated into U.S. dollars at the spot rate on the date of the remittance) and the portion of the basis pool attributable to the remittance. DC's basis in assets distributed from Branch is equal to Branch's basis in the assets, translated into U.S. dollars at the spot rate on the date of the remittance. Branch's earnings are translated into U.S. dollars at the average exchange rate for the taxable year. DC otherwise applies section 987 in a reasonable manner.

(D) *Application of the pretransition method before the transition date*. For

purposes of determining section 987 gain or loss recognized as a result of the June 30, year 3, remittance, DC was required to determine the amount in Branch's equity and basis pools. Branch's equity pool was equal to €200, and its basis pool was equal to \$210, as shown in the table below. Because the remittance was equal to 50% of the equity pool (€100), 50% of the basis pool, or \$105, was attributable to the remittance. The amount of the remittance was \$135 (€100 translated at the spot rate on June 30, year 3, of €1 = \$1.35). Therefore, in year 3, DC recognized section 987 gain of \$30, equal to the difference between the amount of the remittance (\$135) and the portion of the basis pool attributable to the remittance (\$105). As a result of the remittance, the equity pool was reduced by the amount distributed (€100), and the basis pool was reduced by the portion of the basis pool attributable to the remittance (\$105). Therefore, after the remittance, the equity pool was equal to €100, and the basis pool was equal to \$105. In the hands of DC, the euros distributed had a basis of \$135 (equal to the €100 distribution translated at the spot rate on June 30, year 3, of €1 = \$1.35). DC did not recognize section 988 gain or loss when it exchanged the euros for \$135.

TABLE 2 TO PARAGRAPH (I)(1)(i)(D)—YEAR 3 EQUITY AND BASIS POOLS

	Equity pool	Translation rate	Basis pool
Contribution (11/30/Year 1)	€150	€1 = \$1	\$150
Year 2 Earnings	€25	€1 = \$1.15	28.75
Year 3 Earnings	€25	€1 = \$1.25	31.25
Total	€200		210

(ii) *Analysis*—(A) *DC's method is an eligible pretransition method*. Before the transition date, DC followed the method prescribed in the 1991 proposed regulations under section 987 with respect to Branch. This method is an eligible pretransition method under paragraph (e)(4)(i) of this section. Therefore, DC determines its pretransition gain or loss with respect to Branch under paragraph (e)(2) of this section.

(B) *Pretransition gain or loss*. Under paragraph (e)(2) of this section, DC's pretransition gain or loss with respect to Branch is equal to the sum of the deemed termination amount described in paragraph (e)(2)(i)(A) of this section and the owner functional currency net value adjustment described in paragraph (e)(2)(i)(B) of this section. As explained in paragraphs (I)(1)(ii)(B)(1) and (2) of this section (*Example 1*), DC's

deemed termination amount is \$35 and its owner functional currency net value adjustment is zero. Therefore, DC has \$35 of pretransition gain with respect to Branch. Under paragraph (e)(5)(i)(A) of this section, the pretransition gain is treated as Branch's net accumulated unrecognized section 987 gain. However, if DC elects to recognize its pretransition gain ratably over the transition period under paragraph (e)(5)(ii) of this section, the pretransition gain is not treated as net accumulated unrecognized section 987 gain. Instead, DC recognizes \$3.50 (one tenth of its pretransition gain) for each of the ten taxable years from year 4 through year 13.

(1) *Deemed termination amount*. Under paragraph (e)(2)(i)(A) of this section, the deemed termination amount is the amount of section 987 gain or loss that would have been recognized by DC

under the eligible pretransition method if Branch terminated and transferred all its assets and liabilities to DC (the land with a basis of €100) on December 31, year 3. Under DC's eligible pretransition method, DC would have recognized section 987 gain of \$35, determined by subtracting the remaining basis pool of \$105 from the amount of the remittance of \$140 (€100 translated at the spot rate on December 31, year 3, of €1 = \$1.40). Therefore, the deemed termination amount is \$35.

(2) *Owner functional currency net value adjustment*. On December 31, year 3, Branch had no liabilities and only one asset: land with a basis of €100. Under paragraph (e)(2)(i)(B) of this section, the owner functional currency net value adjustment is equal to the basis of the land, translated into U.S. dollars at the transition exchange rate, reduced by the basis of the land,

translated into U.S. dollars at the pretransition translation rate. Under paragraph (d)(3)(i) of this section, the transition exchange rate is the spot rate applicable to December 31, year 3. Under paragraph (e)(2)(i)(C) of this section, the pretransition translation rate is the rate that would be used under DC's eligible pretransition method to determine the basis of the land in the hands of DC if Branch transferred the land to DC on December 31, year 3. Under DC's eligible pretransition method, if Branch transferred the land to DC, DC's basis in the land would be equal to Branch's basis (€100) translated at the spot rate on the date of the remittance. Therefore, the pretransition translation rate on December 31, year 3, is equal to the spot rate on December 31, year 3. Consequently, the owner functional currency net value adjustment is zero.

(C) *Determination of unrecognized section 987 gain or loss in year 4.* For purposes of determining unrecognized section 987 gain or loss in year 4 under § 1.987-4(d), the owner functional currency net value of Branch on the last day of year 3 is determined by translating the €100 basis of the land at the transition exchange rate, which is the spot rate on December 31, year 3 (€1 = \$1.40). Therefore, the owner functional currency net value of Branch on the last day of year 3 is \$140.

(2) *Example 2: Earnings only method described in paragraph (e)(4)(ii) of this*

section—(i) Facts—(A) In general. The facts and exchange rates are the same as in paragraph (l)(1) of this section (*Example 1*), except that DC uses an earnings only method with respect to Branch before the transition date, as described in paragraph (l)(2)(i)(B) of this section. In addition, a current rate election is in effect for Year 4.

(B) *Pretransition method.* Under the earnings only method, DC maintains an equity pool in euros (Branch's functional currency) and a basis pool in U.S. dollars (DC's functional currency) with respect to Branch's earnings. DC also maintains separate equity and basis pools with respect to Branch's capital. Distributions are treated as being made first out of earnings and then out of capital. When Branch makes a remittance out of earnings, DC recognizes section 987 gain or loss equal to the difference between the amount of the remittance (translated into U.S. dollars at the spot rate on the date of the remittance) and the portion of the earnings basis pool attributable to the remittance. No section 987 gain or loss is recognized on a distribution out of capital. DC's basis in assets distributed out of Branch's earnings is equal to Branch's basis in the assets translated at the spot rate on the date of the remittance. DC's basis in assets distributed out of Branch's capital is equal to the portion of the capital basis pool attributable to the distribution. Branch's earnings are translated into

U.S. dollars at the average exchange rate for the taxable year. DC otherwise applies section 987 in a reasonable manner.

(C) *Application of the pretransition method before the transition date.* On June 30, year 3, Branch distributed €100 cash to DC. Of this amount, €50 represented a remittance out of earnings, and €50 represented a distribution out of capital.

(1) *Remittance out of earnings.* For purposes of determining section 987 gain or loss recognized on the remittance, Branch's earnings equity pool was equal to €50, and its earnings basis pool was equal to \$60, as shown in the table below. Because Branch remitted 100% of the earnings equity pool (€50), the entire earnings basis pool, or \$60, was attributable to the remittance. The value of the remittance was \$67.50 (€50 translated at the spot rate on June 30, year 3, of €1 = \$1.35). Therefore, in year 3, DC recognized section 987 gain of \$7.50, equal to the difference between the value of the remittance (\$67.50) and the portion of the basis pool attributable to the remittance (\$60). As a result of the remittance, the earnings equity pool and the earnings basis pool were each reduced to zero. In the hands of DC, the €50 distributed out of earnings had a basis of \$67.50 (€50 translated at the spot rate on June 30, year 3, of €1 = \$1.35).

TABLE 3 TO PARAGRAPH (l)(2)(i)(C)(1)—EARNINGS EQUITY AND BASIS POOLS

	Equity pool	Translation rate	Basis pool
Year 2 Earnings	€25	€1 = \$1.15	\$28.75
Year 3 Earnings	€25	€1 = \$1.25	31.25
Total	€50 .....	.....	60

(2) *Distribution out of capital.* The basis of the €50 distributed out of capital was equal to the portion of the capital basis pool attributable to the distribution. For this purpose, the capital equity pool was equal to €150,

and the capital basis pool was equal to \$150, as shown in the table below. Because Branch distributed 33% of the capital equity pool, or €50, 33% of the capital basis pool, or \$50, was attributable to the distribution. In the

hands of DC, the €50 distributed out of capital had a basis of \$50. As a result of the capital distribution, the capital equity pool was reduced to €100 and the capital basis pool was reduced to \$100.

TABLE 4 TO PARAGRAPH (l)(2)(i)(C)(2)—CAPITAL EQUITY AND BASIS POOLS

	Equity pool	Translation rate	Basis pool
Contribution (11/30/Year 1)	€150	€1 = \$1	\$150
Total	€150 .....	.....	150

(3) *Section 988 gain recognized.* On June 30, year 3, DC exchanged €100 with an aggregate basis of \$117.50 (equal to the sum of the \$67.50 basis of

the remittance out of earnings and the \$50 basis of the distribution out of capital) for \$135. Therefore, DC

recognized \$17.50 of gain under section 988.

(ii) *Analysis—(A) DC's method is an eligible pretransition method.* Before the

transition date, DC followed a reasonable method of applying section 987 that would result in the same total amount of income over the life of DC (\$125) as an earnings and capital method, as explained in paragraphs (l)(2)(ii)(A)(1) and (2) of this section (*Example 2*). Therefore, this method is an eligible pretransition method under paragraph (e)(4)(ii) of this section. Consequently, DC determines its pretransition gain or loss with respect to Branch under paragraph (e)(2) of this section.

(1) *DC's total amount of income under its pretransition method.* Under DC's pretransition method, DC recognized \$7.50 of section 987 gain and \$17.50 of section 988 gain in year 3. In addition, on December 31, year 3, DC had \$40 of embedded gain in its capital equity and basis pools (equal to the difference between its capital equity pool of €100, translated at the spot rate on December 31, year 3, of €1 = \$1.40, and its capital basis pool of \$100) which will be taken into account in the future (when Branch distributes property out of capital and the property is sold). DC also recognized \$60 of earnings with respect to Branch (\$28.75 in year 2 and \$31.25 in year 3). Thus, DC's total income (recognized and unrecognized) with respect to Branch is \$125.

(2) *DC's total amount of income under an earnings and capital method.* If DC had instead applied an earnings and capital method, as described in paragraph (l)(1)(i)(C) of this section (*Example 1*), DC would have recognized section 987 gain of \$30 in year 3 and would not have recognized section 988 gain in year 3, as explained in paragraph (l)(1)(i)(D) of this section. On December 31, year 3, DC would have unrecognized section 987 gain in its equity and basis pools of \$35 (see paragraph (l)(1)(ii)(B)(1) of this section (*Example 1*)). DC would also have recognized \$60 of earnings with respect to Branch (\$28.75 in year 2 and \$31.25 in year 3). Thus, DC's total income (recognized and unrecognized) with respect to Branch is \$125.

(B) *Pretransition gain or loss.* Under paragraph (e)(2) of this section, DC's pretransition gain or loss with respect to Branch is equal to sum of the deemed termination amount described in paragraph (e)(2)(i)(A) of this section and the owner functional currency net value adjustment described in paragraph (e)(2)(i)(B) of this section. As explained in paragraphs (l)(2)(ii)(B)(1) and (2) of this section (*Example 2*), the deemed termination amount is zero and the owner functional currency net value adjustment is \$40. Therefore, DC has \$40 of pretransition gain with respect to

Branch. Under paragraph (e)(5)(i)(A) of this section, the pretransition gain is treated as Branch's net accumulated unrecognized section 987 gain. However, if DC elects to recognize its pretransition gain ratably over the transition period under paragraph (e)(5)(ii) of this section, the pretransition gain is not treated as net accumulated unrecognized section 987 gain. Instead, DC recognizes \$4 (one tenth of its pretransition gain) for each of the ten taxable years from year 4 through year 13.

(1) *Deemed termination amount.* Under paragraph (e)(2)(i)(A) of this section, the deemed termination amount is the amount of section 987 gain or loss that would have been recognized by DC under the eligible pretransition method if Branch terminated and transferred all of its assets and liabilities to DC on December 31, year 3. Under DC's eligible pretransition method, if Branch had transferred all of its assets and liabilities to DC, this would have been treated as a distribution out of capital. Under its eligible pretransition method, DC would not have recognized section 987 gain or loss on a distribution out of capital. Therefore, the deemed termination amount is zero.

(2) *Owner functional currency net value adjustment.* On December 31, year 3, Branch had no liabilities and only one asset: land with a basis of €100. Under paragraph (e)(2)(i)(B) of this section, the owner functional currency net value adjustment is equal to the basis of Branch's land, translated into U.S. dollars at the transition exchange rate, reduced by the basis of Branch's land, translated into U.S. dollars at the pretransition translation rate on December 31, year 3. Under paragraph (e)(2)(i)(C) of this section, the pretransition translation rate is the rate that would be used under the eligible pretransition method to determine the basis of the land in the hands of DC if Branch transferred the land to DC. Under DC's eligible pretransition method, DC's basis in assets distributed from Branch is equal to the portion of the capital basis pool attributable to the distribution. If Branch transferred the land with a basis of €100 to DC on December 31, year 3, its remaining capital basis pool of \$100 would be attributable to the distribution, and the land would have a basis of \$100 in the hands of DC. Because the land had a basis of €100 in the hands of Branch, and would have a basis of \$100 in the hands of DC if it were distributed on December 31, year 3, the pretransition translation rate is €1 = \$1. Under paragraph (d)(3)(i) of this section, because a current rate election is in

effect for year 4, the transition exchange rate is the spot rate applicable to December 31, year 3. The €100 basis of Branch's land, translated at the spot rate on December 31, year 3 of €1 = \$1.40 is equal to \$140. The €100 basis of Branch's land, translated at the pretransition translation rate on December 31, year 3 of €1 = \$1 is equal to \$100. Therefore, the owner functional currency net value adjustment is equal to \$40 (\$140 – \$100).

(C) *Determination of unrecognized section 987 gain or loss in year 4.* For purposes of determining unrecognized section 987 gain or loss in year 4 under § 1.987–4(d), the owner functional currency net value of Branch on the last day of year 3 is determined by translating the €100 basis of the land at the transition exchange rate, which is the spot rate on December 31, year 3 (€1 = \$1.40). Therefore, the owner functional currency net value of Branch on the last day of year 3 is \$140.

(iii) *Alternative facts—(A) No current rate election.* Assume the facts are the same as described in paragraph (l)(2)(i) of this section (*Example 2*), except that a current rate election is not in effect for year 4.

(B) *Analysis.* As explained in paragraph (l)(2)(ii)(A) of this section (*Example 2*), DC determines its pretransition gain or loss with respect to Branch under paragraph (e)(2) of this section. Because a current rate election is not in effect, the transition exchange rate is determined under paragraph (d)(3)(ii) of this section.

(1) *Transition exchange rate.* DC applied an earnings only method described in paragraph (e)(4)(ii) of this section before the transition date. Under paragraph (d)(3)(ii) of this section, because a current rate election is not in effect for year 4, the transition exchange rate for Branch's land is equal to the pretransition translation rate. As explained in paragraph (l)(2)(ii)(B)(2) of this section (*Example 2*), the pretransition translation rate is €1 = \$1.

(2) *Pretransition gain or loss.* Because the transition exchange rate for the land (Branch's sole asset) is equal to the pretransition translation rate, the owner functional currency net value adjustment is zero. As explained in paragraph (l)(2)(ii)(B)(1) of this section (*Example 2*), the deemed termination amount is also zero. Therefore, DC has no pretransition gain or loss with respect to Branch.

(3) *Determination of unrecognized section 987 gain or loss in year 4.* For purposes of determining unrecognized section 987 gain or loss in year 4 under § 1.987–4(d), the owner functional currency net value of Branch on the last

day of year 3 is determined by translating the €100 basis of the land at the transition exchange rate, which is the pretransition translation rate of €1 = \$1. Therefore, the owner functional currency net value of Branch on the last day of year 3 is \$100.

(3) *Example 3: Earnings only method described in paragraph (e)(4)(iii) of this section—(i) Facts—(A) In general.* The facts and exchange rates are the same as in paragraph (l)(1) of this section (*Example 1*), except that DC used an earnings only method with respect to Branch before the transition date, as described in paragraph (l)(3)(i)(B) of this section.

(B) *Pretransition method.* Under the earnings only method, DC maintains an equity pool in euros (Branch’s functional currency) and a basis pool in U.S. dollars (DC’s functional currency) with respect to Branch’s earnings. However, DC does not maintain separate equity and basis pools with respect to Branch’s capital. Distributions are treated as being made first out of

earnings and then out of capital. When Branch makes a remittance out of earnings, DC recognizes section 987 gain or loss equal to the difference between the amount of the remittance (translated into U.S. dollars at the spot rate on the date of the remittance) and the portion of the earnings basis pool attributable to the remittance. No section 987 gain or loss is recognized on a distribution out of capital. Under DC’s pretransition method, DC’s basis in assets distributed by Branch (whether out of earnings or capital) is equal to Branch’s basis in the assets translated at the spot rate on the date of the distribution. Branch’s earnings are translated into U.S. dollars at the average exchange rate for the taxable year. DC first applied its earnings only method on a return filed before November 9, 2023. In addition, DC applied its earnings only method consistently to all of its section 987 QBUs and otherwise applied section 987 in a reasonable manner.

(C) *Application of the pretransition method before the transition date.* On

June 30, year 3, Branch distributed €100 cash to DC. Of this amount, €50 represented a remittance out of earnings, and €50 represented a distribution out of capital.

(1) *Remittance out of earnings.* For purposes of determining section 987 gain or loss recognized on the remittance, Branch’s earnings equity pool was equal to €50, and its earnings basis pool was equal to \$60, as shown in the table below. Because Branch remitted 100% of the earnings equity pool (€50), the entire earnings basis pool, or \$60, was attributable to the remittance. The value of the remittance was \$67.50 (€50 translated at the spot rate on June 30, year 3, of €1 = \$1.35). Therefore, in year 3, DC recognized section 987 gain of \$7.50, equal to the difference between the value of the remittance (\$67.50) and the portion of the basis pool attributable to the remittance (\$60). As a result of the remittance, the earnings equity pool and the earnings basis pool were each reduced to zero.

TABLE 5 TO PARAGRAPH (l)(3)(i)(C)(1)—EARNINGS EQUITY AND BASIS POOLS

	Equity pool	Translation rate	Basis pool
Year 2 Earnings	€25	€1 = \$1.15	\$28.75
Year 3 Earnings	€25	€1 = \$1.25	31.25
Total	€50	.....	60

(2) *Basis of euros distributed.* In the hands of DC, the €100 distributed had a basis of \$135 (€100 translated at the spot rate on June 30, year 3, of €1 = \$1.35). DC did not recognize gain or loss under section 988 when it exchanged the €100 for \$135.

(ii) *Analysis—(A) DC’s method is an eligible pretransition method.* Unlike in paragraph (l)(2) of this section (*Example 2*), DC’s earnings only method would not result in the same total amount of income over the life of DC as an earnings and capital method described in paragraph (e)(4)(i) of this section because DC does not maintain capital basis and equity pools and DC translates the basis of all property distributed from Branch at the spot rate on the distribution date. However, this method is an eligible pretransition method under paragraph (e)(4)(iii) of this section because DC first applied its earnings only method on a return filed before November 9, 2023, DC applied its earnings only method consistently to all of its section 987 QBUs, and DC otherwise applied section 987 in a reasonable manner. Consequently, DC determines its pretransition gain or loss with respect to Branch under paragraph (e)(2) of this section.

(B) *Pretransition gain or loss.* Under paragraph (e)(2) of this section, DC’s pretransition gain or loss with respect to Branch is equal to the sum of the deemed termination amount described in paragraph (e)(2)(i)(A) of this section and the owner functional currency net value adjustment described in paragraph (e)(2)(i)(B) of this section. As explained in paragraphs (l)(3)(ii)(B)(1) and (2) of this section (*Example 3*), the deemed termination amount is zero and the owner functional currency net value adjustment is zero. Therefore, DC has no pretransition gain or loss with respect to Branch.

(1) *Deemed termination amount.* Under paragraph (e)(2)(i)(A) of this section, the deemed termination amount is the amount of section 987 gain or loss that would have been recognized by DC under the eligible pretransition method if Branch terminated and transferred all of its assets and liabilities to DC on December 31, year 3. Under DC’s eligible pretransition method, if Branch had transferred all of its assets and liabilities to DC, it would have been treated as a distribution out of capital. Under its eligible pretransition method, DC would not have recognized section 987 gain or loss on a distribution out of

capital. Therefore, the deemed termination amount is zero.

(2) *Owner functional currency net value adjustment.* On December 31, year 3, Branch has no liabilities and only one asset: land with a basis of €100. Under paragraph (e)(2)(i)(B) of this section, the owner functional currency net value adjustment is equal to the basis of the land, translated into U.S. dollars at the transition exchange rate, reduced by the basis of the land, translated into U.S. dollars at the pretransition translation rate. Under paragraph (d)(3)(i) of this section, the transition exchange rate is the spot rate applicable to December 31, year 3. Under paragraph (e)(2)(i)(C) of this section, the pretransition translation rate is the rate that would be used under DC’s eligible pretransition method to determine the basis of the land in the hands of DC if Branch transferred the land to DC on December 31, year 3. Under DC’s eligible pretransition method, if Branch transferred the land to DC, DC’s basis in the land would be equal to Branch’s basis (€100) translated at the spot rate on the date of the distribution. Therefore, the pretransition translation rate on December 31, year 3, is equal to the spot rate on December 31, year 3.

Consequently, the owner functional currency net value adjustment is zero.

(C) *Determination of unrecognized section 987 gain or loss in year 4.* For purposes of determining unrecognized section 987 gain or loss in year 4 under § 1.987–4(d), the owner functional currency net value of Branch on the last day of year 3 is determined by translating the €100 basis of the land at the spot rate on December 31, year 3 (€1 = \$1.40). Therefore, the owner functional currency net value of Branch on the last day of year 3 is \$140.

(4) *Example 4: Owner did not apply section 987(3)*—(i) *Facts.* The facts and exchange rates are the same as in paragraph (l)(1) of this section (*Example 1*), except that DC did not apply section 987(3) with respect to Branch and did not recognize section 987 gain or loss with respect to Branch before the transition date.

(ii) *Analysis*—(A) *DC's method is not an eligible pretransition method.* Because DC did not apply section 987(3) with respect to Branch before the transition date, DC did not apply an eligible pretransition method under paragraph (e)(4) of this section. Therefore, DC determines pretransition gain or loss under paragraph (e)(3) of this section.

(B) *Pretransition gain or loss.* Under paragraph (e)(3) of this section, DC's pretransition gain or loss with respect to Branch is equal to the annual unrecognized section 987 gain or loss with respect to Branch for all taxable years ending before the transition date in which DC was the owner of Branch (that is, years 1 through 3), reduced by section 987 gain or loss recognized by DC before the transition date. As explained in paragraphs (l)(4)(ii)(C) through (E) of this section (*Example 4*), DC's annual unrecognized section 987 gain for year 1 is \$7.50, DC's annual unrecognized section 987 gain for year 2 is \$16.25, and DC's annual unrecognized section 987 gain for year 3 is \$23.75. DC did not recognize any section 987 gain or loss with respect to Branch before the transition date. Therefore, DC has \$47.50 of pretransition gain with respect to Branch. Under paragraph (e)(5)(i)(A) of this section, the pretransition gain is treated as Branch's net accumulated unrecognized section 987 gain. However, if DC elects to recognize its pretransition gain ratably over the transition period under paragraph (e)(5)(ii) of this section, the pretransition gain is not treated as net accumulated unrecognized section 987 gain. Instead, DC recognizes \$4.75 (one tenth of its pretransition gain) for each of the ten

taxable years from year 4 through year 13.

(C) *Annual unrecognized section 987 gain or loss for year 1.* Under paragraph (e)(3)(iii) of this section, annual unrecognized section 987 gain or loss with respect to a section 987 QBU is determined under the rules of § 1.987–4(d), applied as though a current rate election was in effect for all relevant taxable years (such that all items are treated as marked items), but modified so that only §§ 1.987–4(d)(1) (change in owner functional currency net value) and 1.987–4(d)(10) (adjustment for residual increase or decrease to net assets) are applied. As explained in paragraphs (l)(4)(ii)(C)(1) and (2) of this section (*Example 4*), in year 1, the change in owner functional currency net value under § 1.987–4(d)(1) is an increase of \$165, and there is a negative adjustment of \$157.50 under § 1.987–4(d)(10). Therefore, DC's annual unrecognized section 987 gain for year 1 is \$7.50.

(1) *Change in owner functional currency net value for year 1.* On December 31, year 1, Branch held land with a basis of €100 and €50 cash. Therefore, on the last day of year 1, Branch's owner functional currency net value is \$165 (150 euros translated at the spot rate on December 31, year 1, of €1 = \$1.10). Because Branch was formed in year 1, its owner functional currency net value on the last day of the preceding taxable year is zero. See § 1.987–4(d)(1)(iii). Therefore, the change in owner functional currency net value is an increase of \$165.

(2) *Residual increase to net assets for year 1.* Under § 1.987–4(d)(10), unrecognized section 987 gain or loss for a taxable year is decreased by any residual increase to net assets (and increased by any residual decrease to net assets), translated into the owner's functional currency at the yearly average exchange rate for the taxable year. For this purpose, the residual increase (or decrease) to net assets is equal to the change in net value of the section 987 QBU, determined in the section 987 QBU's functional currency (that is, the QBU net value). See § 1.987–4(d)(10)(ii)(B) and (e)(2)(ii). On December 31, year 1, Branch held land with a basis of €100 euros and €50 cash. Therefore, on the last day of year 1, Branch has a QBU net value of €150. Because Branch was formed in year 1, its QBU net value on the last day of the preceding taxable year is zero. See § 1.987–4(d)(1)(iii). Therefore, the residual increase to net assets is €150. This results in a negative adjustment to annual unrecognized section 987 gain or loss of \$157.50 for year 1 (equal to €150

translated at the yearly average exchange rate for year 1 of €1 = \$1.05).

(D) *Annual unrecognized section 987 gain or loss for year 2.* As explained in paragraphs (l)(4)(ii)(D)(1) and (2) of this section (*Example 4*), in year 2, the change in owner functional currency net value under § 1.987–4(d)(1) is an increase of \$45, and there is a negative adjustment of \$28.75 under § 1.987–4(d)(10). Therefore, DC's annual unrecognized section 987 gain for year 2 is \$16.25.

(1) *Change in owner functional currency net value for year 2.* On December 31, year 2, Branch held land with a basis of €100 and €75 cash. Therefore, on the last day of year 2, Branch's owner functional currency net value is \$210 (175 euros translated at the spot rate on December 31, year 2, of €1 = \$1.20). As explained in paragraph (l)(4)(ii)(C)(1) of this section (*Example 4*), Branch's owner functional currency net value on the last day of year 1 was \$165. Therefore, the change in owner functional currency net value is an increase of \$45.

(2) *Residual increase to net assets for year 2.* On December 31, year 2, Branch held land with a basis of €100 and €75 cash. Therefore, on the last day of year 2, Branch has a QBU net value of €175. As explained in paragraph (l)(4)(ii)(C)(2) of this section (*Example 4*), Branch had a QBU net value of €150 on December 31, year 1. Therefore, the residual increase to net assets is €25. This results in a negative adjustment to annual unrecognized section 987 gain or loss of \$28.75 for year 2 (equal to a reduction of €25, translated at the yearly average exchange rate for year 2 of €1 = \$1.15).

(E) *Annual unrecognized section 987 gain or loss for year 3.* As explained in paragraphs (l)(4)(ii)(E)(1) and (2) of this section (*Example 4*), in year 3, the change in owner functional currency net value under § 1.987–4(d)(1) is a decrease of \$70, and there is a positive adjustment of \$93.75 under § 1.987–4(d)(10). Therefore, DC's annual unrecognized section 987 gain for year 3 is \$23.75.

(1) *Change in owner functional currency net value for year 3.* On December 31, year 3, Branch held land with a basis of €100. Therefore, on the last day of year 3, Branch's owner functional currency net value is \$140 (100 euros translated at the spot rate on December 31, year 3, of €1 = \$1.40). As explained in paragraph (l)(4)(ii)(D)(1) of this section (*Example 4*), Branch's owner functional currency net value on the last day of year 2 was \$210. Therefore, the change in owner functional currency net value is a decrease of \$70.

(2) *Residual decrease to net assets for year 3.* On December 31, year 3, Branch held land with a basis of €100. Therefore, on the last day of year 3, Branch has a QBU net value of €100. As explained in paragraph (l)(4)(ii)(D)(2) of this section (*Example 4*), Branch had a QBU net value of €175 on December 31, year 2. Therefore, the residual decrease to net assets is €75. This results in a positive adjustment to annual unrecognized section 987 gain or loss of \$93.75 for year 3 (equal to €75, translated at the yearly average exchange rate for year 3 of €1 = \$1.25).

(F) *Determination of unrecognized section 987 gain or loss in year 4.* For purposes of determining unrecognized section 987 gain or loss in year 4 under § 1.987-4(d), the owner functional currency net value of Branch on the last day of year 3 is determined by translating the €100 basis of the land at the spot rate on December 31, year 3 (€1 = \$1.40). Therefore, the owner functional currency net value of Branch on the last day of year 3 is \$140.

(5) *Example 5: Error in application of method—(i) Facts.* The facts are the same as described in paragraph (l)(1)(i) of this section (*Example 1*), except that DC inadvertently miscalculated the amount of the June 30, year 3, remittance as being €90 rather than €100. This reduced the amount of section 987 gain recognized by DC in year 3.

(ii) *Analysis.* DC committed an error in its application of the earnings and capital method to Branch. Under paragraph (e)(4)(iv)(A) of this section, DC is nonetheless treated as having applied an eligible pretransition method. However, under paragraph (e)(4)(iv)(B) of this section, DC must determine its pretransition gain or loss as though the error had not been made. Therefore, DC computes its pretransition gain or loss as described in paragraph (l)(1)(ii)(B) of this section (*Example 1*). DC has \$35 of pretransition gain with respect to Branch.

(6) *Example 6: Consistent practice not treated as an error—(i) Facts.* Before the transition date, DC used the earnings and capital method described in the 1991 proposed regulations under section 987 with respect to Branch, as described in paragraph (l)(1)(i) of this section (*Example 1*). In years 1, 2, and 3, Branch made recurring purchases of inventory from Owner, which Branch sold to unrelated customers. In connection with the purchase transactions, Branch transferred cash to Owner, and Owner transferred inventory to Branch. Owner did not take these transfers into account in determining the amount of any

remittance and, accordingly, did not recognize section 987 gain or loss with respect to these transfers. However, Owner consistently adjusted Branch's equity and basis pools in a reasonable manner to reflect all transfers between Owner and Branch; for this purpose, the amount of each transfer made in connection with the purchase transactions was translated using the average rate for the relevant taxable year. Owner also adjusted Branch's equity and basis pools to account for Branch's income from the sale of inventory.

(ii) *Analysis—(A) DC's method is an eligible pretransition method.* Before the transition date, DC followed the earnings and capital method described in the 1991 proposed regulations under section 987 with respect to Branch. This method is an eligible pretransition method under paragraph (e)(4)(i) of this section. Therefore, DC determines its pretransition gain or loss with respect to Branch under paragraph (e)(2) of this section.

(B) *Effect of consistent practice.* Before the transition date, Owner engaged in a consistent practice under which Owner did not account for inventory purchase transactions in determining the amount of a remittance requiring the recognition of gain or loss under section 987(3). However, Owner consistently accounted for the disregarded transfers in a reasonable manner for purposes of computing its equity and basis pools. Under paragraph (e)(4)(v) of this section, this consistent practice is not treated as an error in the application of a pretransition method and does not preclude Owner's method from being treated as an eligible pretransition method. Therefore, Owner must take this consistent practice into account in determining pretransition gain or loss under paragraph (e)(2) of this section. In particular, Owner must use the equity and basis pools computed under its consistent practice (rather than the equity and basis pools it would have computed if it had historically taken the disregarded transfers into account in determining the amount of remittances) to determine the deemed termination amount under paragraph (e)(2)(i)(A) of this section.

§ 1.987-11 Suspended section 987 loss relating to certain elections; loss-to-the-extent-of-gain rule.

(a) *In general.* This section provides rules relating to suspended section 987 loss. Paragraph (b) of this section provides rules for computing the cumulative suspended section 987 loss with respect to a section 987 QBU or successor suspended loss QBU.

Paragraph (c) of this section provides rules that suspend section 987 loss that would otherwise be recognized when a current rate election is in effect. Paragraph (d) of this section provides rules that treat net unrecognized section 987 loss and deferred section 987 loss as suspended section 987 loss when an annual recognition election is made or a current rate election is revoked. Paragraph (e) of this section describes the extent to which suspended section 987 loss is recognized under a loss-to-the-extent-of-gain rule. Paragraph (f) of this section provides rules for determining recognition groupings based on the source and character of section 987 gain or loss. Paragraph (g) of this section provides examples illustrating the rules of this section.

(b) *Cumulative suspended section 987 loss in a recognition grouping—(1) In general.* The cumulative suspended section 987 loss in a recognition grouping with respect to a section 987 QBU or a successor suspended loss QBU for the current taxable year is equal to the cumulative suspended section 987 loss in the recognition grouping for the prior taxable year, decreased by the amount of suspended section 987 loss in the recognition grouping that was recognized with respect to the QBU under paragraph (e) of this section or under § 1.987-13(b) through (d) in the prior taxable year, and increased by the amount that becomes suspended section 987 loss in the recognition grouping with respect to the QBU in the current taxable year (including under § 1.987-10(e)(5)(i)(B)(1)). If the taxable year is the first taxable year of the section 987 QBU (or the first taxable year in which the section 987 regulations apply), the cumulative suspended section 987 loss for the prior taxable year is zero. An owner's (or original suspended loss QBU owner's) total cumulative suspended section 987 loss in a recognition grouping is equal to the sum of its cumulative suspended section 987 gain or loss with respect to each section 987 QBU and successor suspended loss QBU.

(2) *Combined QBU.* For purposes of paragraph (b)(1) of this section, in the taxable year of a combination, the cumulative suspended section 987 loss in a recognition grouping with respect to a combined QBU for the prior taxable year is equal to the sum of the cumulative suspended section 987 loss in the recognition grouping with respect to each combining QBU for the prior taxable year; the suspended section 987 loss in a recognition grouping with respect to a combined QBU that was recognized in the prior taxable year is equal to sum of the suspended section

987 loss in the recognition grouping with respect to each combining QBU that was recognized in the prior taxable year.

(3) *Separated QBU.* For purposes of paragraph (b)(1) of this section, in the taxable year of a separation, the cumulative suspended section 987 loss in a recognition grouping with respect to a separated QBU for the prior taxable year is equal to the cumulative suspended section 987 loss in the recognition grouping with respect to the separating QBU for the prior taxable year multiplied by the separation fraction; the suspended section 987 loss in a recognition grouping with respect to a separated QBU that was recognized in the prior taxable year is equal to the suspended section 987 loss in the recognition grouping with respect to the separating QBU that was recognized in the prior taxable year multiplied by the separation fraction.

(c) *Suspension of section 987 loss for taxable years in which a current rate election is in effect and an annual recognition election is not in effect—(1) In general.* Except as provided in paragraph (c)(2) of this section, in a taxable year in which a current rate election is in effect and an annual recognition election is not in effect, to the extent that an owner's net unrecognized section 987 loss with respect to a section 987 QBU would otherwise be recognized under § 1.987–5 (including pursuant to § 1.987–12(b)), or its deferred section 987 loss would otherwise be recognized under § 1.987–12(c), the net unrecognized section 987 loss or deferred section 987 loss is not recognized by the owner and instead becomes suspended section 987 loss. See paragraph (g)(1) of this section (*Example 1*) for an illustration of this rule.

(2) *De minimis rule.* Paragraph (c)(1) of this section does not apply in a taxable year of an owner in which the total amount of net unrecognized section 987 loss or deferred section 987 loss of the owner and all members of the owner's controlled group that would (but for the application of this paragraph (c)(2) and § 1.987–7(d)(2)(iii)) become suspended section 987 loss under paragraph (c)(1) of this section or § 1.987–7(d) does not exceed the lesser of—

- (i) \$3 million; or
- (ii) Two percent of the total amount of gross income of the owner and all members of the owner's controlled group for the taxable year.

(3) *Taxable year of controlled group members—(i) In general.* Except as provided in paragraph (c)(3)(ii) of this section, for purposes of applying

paragraph (c)(2) of this section with respect to an owner, suspended section 987 loss and gross income of a member of the owner's controlled group is determined by reference to the member's suspended section 987 loss and gross income for its taxable year ending with or within the owner's taxable year.

(ii) *Owner is a CFC.* For purposes of applying paragraph (c)(2) of this section with respect to an owner that is a CFC, suspended section 987 loss and gross income of a member of the owner's controlled group is determined by reference to the member's suspended section 987 loss and gross income for its taxable year ending with or within the owner's required year described in section 898(c)(1), without regard to section 898(c)(2).

(d) *Suspension of net unrecognized section 987 loss upon making or revoking certain elections—(1) Making an annual recognition election.* At the beginning of the first taxable year for which an annual recognition election is in effect, an owner's net accumulated unrecognized section 987 loss and deferred section 987 loss are converted into suspended section 987 loss if either—

(i) A current rate election was in effect for the immediately preceding taxable year; or

(ii) A current rate election was not in effect for the immediately preceding taxable year and, as of the beginning of the taxable year, the sum of the owner's net accumulated unrecognized section 987 loss and deferred section 987 loss exceeds the sum of the owner's net accumulated unrecognized section 987 gain and deferred section 987 gain by more than \$5 million.

(2) *Revoking a current rate election.* At the beginning of the first taxable year in which a current rate election ceases to be in effect, an owner's net accumulated unrecognized section 987 loss and deferred section 987 loss are converted into suspended section 987 loss. See paragraph (g)(3) of this section (*Example 3*) for an illustration of this rule.

(e) *Loss-to-the-extent-of-gain rule—(1) In general.* An owner of a section 987 QBU (or an original suspended loss QBU owner) only recognizes suspended section 987 loss to the extent described in this paragraph (e) (the *loss-to-the-extent-of-gain rule*). See § 1.987–13(b) through (d) for rules requiring the recognition of additional suspended section 987 loss (after the application of the loss-to-the-extent-of-gain rule) in connection with certain transactions.

(2) *Separate determination for each recognition grouping.* The amount of

suspended section 987 loss recognized is determined separately for the suspended section 987 loss in each recognition grouping. Because the recognition groupings generally are determined on the basis of the initial assignment of section 987 gain or loss under § 1.987–6(b)(2)(i), the loss-to-the-extent-of-gain rule generally is applied on the basis of the initial assignment of section 987 gain or loss.

(3) *Amount of suspended section 987 loss recognized.* Except as provided in paragraph (e)(5) or (6) of this section, the amount of suspended section 987 loss in each recognition grouping that an owner recognizes in a taxable year is equal to the sum (if positive) of the current year gain amount described in paragraph (e)(3)(i) of this section and the lookback gain amount described in paragraph (e)(3)(ii) of this section, but may not exceed the owner's total cumulative suspended section 987 loss in the recognition grouping. If the sum of the current year gain amount and the lookback gain amount is negative, then the amount of suspended section 987 loss recognized under this paragraph (e) is zero. See paragraphs (g)(1) and (2) of this section (*Examples 1 and 2*) for an illustration of this rule.

(i) *Current year gain amount.* The current year gain amount described in this paragraph (e)(3)(i) is equal to the section 987 gain in the recognition grouping that is recognized by the owner in the taxable year, reduced (including below zero) by section 987 loss (other than suspended section 987 loss) in the recognition grouping that is recognized by the owner in the taxable year.

(ii) *Lookback gain amount.* The lookback gain amount described in this paragraph (e)(3)(ii) is equal to the section 987 gain in the recognition grouping that was recognized by the owner in the lookback period, reduced (including below zero) by section 987 loss (other than suspended section 987 loss described in paragraph (e)(3)(iii) of this section) in the recognition grouping that was recognized by the owner in the lookback period. The total amount of suspended section 987 loss recognized by reason of the recognition of an amount of section 987 gain cannot, in any event, exceed the amount of section 987 gain recognized.

(iii) *Suspended section 987 loss not taken into account—(A) In general.* For purposes of applying paragraph (e)(3)(ii) of this section in a taxable year (the *current taxable year*), suspended section 987 loss recognized during the lookback period is not taken into account if it was recognized under this paragraph (e) by reason of the recognition of section 987

gain that was recognized before the lookback period for the current taxable year.

(B) *Ordering rule.* For purposes of this paragraph (e)(3)(iii), suspended section 987 loss is treated as recognized by reason of the most recently recognized section 987 gain in the same recognition grouping. See paragraph (g)(2) of this section (*Example 2*) for an illustration of this rule.

(iv) *Lookback period*—(A) *In general.* Except as provided in paragraph (e)(3)(iv)(B) of this section, the lookback period with respect to a taxable year of an owner means the three preceding taxable years of the owner (or, if the owner was not in existence for three preceding taxable years, each taxable year in which the owner existed), but it does not include any taxable year beginning before the transition date described in § 1.987–10(c)(1).

(B) *Taxable years in which both a current rate election and an annual recognition election are in effect.* In a taxable year of an owner in which both a current rate election and an annual recognition election are in effect, the lookback period includes all prior taxable years of the owner in which both a current rate election and an annual recognition election were continuously in effect.

(v) *Anti-abuse rule.* If an owner recognizes section 987 gain with a principal purpose of reducing the Federal income tax liability of the owner (or its U.S. shareholders or partners, as applicable), including over multiple taxable years, the section 987 gain is disregarded for purposes of this paragraph (e)(3). For example, this paragraph (e)(3)(v) may apply if an owner that is a CFC recognizes section 987 gain that is offset by a tax attribute of one of the CFC's U.S. shareholders that would not otherwise be used (such as excess foreign tax credits with respect to section 951A category income, or a tested loss). In determining whether a principal purpose described in this paragraph (e)(3)(v) exists, all relevant facts and circumstances are considered, including the extent to which the transaction giving rise to the recognition of section 987 gain resulted in a sustained economic contraction of the section 987 QBU over a period of at least twelve months.

(4) *Suspended section 987 loss recognized with respect to each section 987 QBU and suspended section 987 loss QBU.* The amount of suspended section 987 loss in a recognition grouping that is recognized by an owner in a taxable year is treated as attributable to each section 987 QBU or successor suspended loss QBU in

proportion to the QBU's suspended section 987 loss in that recognition grouping.

(5) *Section 381(a) transactions*—(i) *In general.* Except as provided in paragraph (e)(5)(ii) of this section (or to the extent that other limitations apply), if one corporation (acquiring corporation) acquires the assets of another corporation (transferor corporation) in a transaction described in section 381(a), section 987 gain or loss recognized by the transferor corporation during the lookback period is taken into account in determining the lookback gain amount of the acquiring corporation in taxable years ending after the transaction under paragraph (e)(3)(ii) of this section. If the lookback period for a taxable year of the acquiring corporation is determined under paragraph (e)(3)(iv)(A) of this section, the lookback period includes each taxable year of the transferor corporation ending with or within the current taxable year of the acquiring corporation or during the acquiring corporation's lookback period. If the lookback period for a taxable year of the acquiring corporation is determined under paragraph (e)(3)(iv)(B) of this section, the lookback period includes only taxable years of the transferor corporation in which both an annual recognition election and a current rate election were continuously in effect before the transaction (and only if both elections were continuously in effect from the date of the transaction through the current taxable year).

(ii) *Limitation for inbound nonrecognition transactions.* If a foreign corporation ceases to exist in a transaction described in § 1.987–8(c)(1)(ii) (inbound section 332 liquidation) or § 1.987–8(c)(2)(ii) (inbound reorganization), section 987 gain recognized by the foreign corporation before the transaction is disregarded for purposes of applying paragraph (e)(3) of this section in taxable years ending after the transaction.

(6) *Consolidated group members*—(i) *In general.* All members of a consolidated group are treated as a single owner for purposes of applying this paragraph (e).

(ii) *Suspended section 987 losses arising in separate return limitation years.* This paragraph (e)(6)(ii) applies to suspended section 987 losses arising in a separate return limitation year (SRLY, as defined in § 1.1502–1(f)) or treated as arising in a SRLY under the principles of § 1.1502–21(c) (*SRLY section 987 losses*). The aggregate of a member's SRLY section 987 losses that are included in the determination of

consolidated taxable income for all consolidated return years of the group may not exceed the aggregate consolidated net income for all consolidated return years of the group determined by reference to only the member's items of section 987 gain or loss, including the member's section 987 losses actually absorbed by the group in the taxable year (whether or not absorbed by the member). For purposes of applying this paragraph (e)(6)(ii), the principles of § 1.1502–21(c) (including the SRLY subgroup principles of § 1.1502–21(c)(2)) apply with appropriate adjustments.

(f) *Recognition groupings.* The term *recognition grouping* means the section 987 gain or loss (including section 987 gain or loss that is recognized under § 1.987–5, deferred section 987 gain or loss, suspended section 987 loss, or pretransition gain or loss that is recognized under § 1.987–10(e)(5)(ii)) described in paragraph (f)(1) or (2) of this section, as applicable. If an owner has suspended section 987 loss with respect to a terminating QBU in a taxable year ending before the transition date described in § 1.987–10(c)(1), section 987 gain or loss of the owner (other than section 987 gain or loss with respect to the terminating QBU) is assigned to a recognition grouping based on the method that is used to determine the source and character of section 987 gain or loss for that taxable year.

(1) *Sourcing and section 904 category.* Except as provided in paragraph (f)(2) of this section, a recognition grouping includes only section 987 gain or loss that is initially assigned to one of the following statutory and residual groupings—

- (i) U.S. source income; or
- (ii) Foreign source income in a single section 904 category.

(2) *Statutory and residual groupings for CFC owners.* In the case of an owner that is a controlled foreign corporation, a recognition grouping includes only section 987 gain or loss that is initially assigned to one of the statutory and residual groupings described in paragraph (f)(1) of this section and that is also initially assigned to one of the following statutory and residual groupings—

- (i) Tentative tested income;
- (ii) Each separate subpart F income group (as defined in § 1.960–1(d)(2)(ii)(B));
- (iii) Income described in section 952(b) (ECI that is excluded from subpart F income); or
- (iv) Income not described in paragraphs (f)(2)(i) through (iii) of this section.

(g) *Examples.* The following examples illustrate the application of this section.

(1) *Example 1: Suspension of section 987 loss and recognition of suspended section 987 loss—(i) Facts.* CFC is a controlled foreign corporation that has the U.S. dollar as its functional currency. CFC owns three section 987 QBUs, QBU1, QBU2, and QBU3. QBU1 has the euro as its functional currency, QBU2 has the pound as its functional currency, and QBU3 has the yen as its functional currency. CFC is subject to a current rate election but not an annual recognition election. CFC is also subject to an election under § 1.987–6(b)(2)(i)(C) (treating section 987 gain or loss relating to passive foreign personal holding company income as attributable to section 988 transactions). An election has not been made under § 1.951A–2(c)(7)(viii) (GILTI high-tax exclusion) with respect to CFC. In year 1, CFC did not have cumulative suspended section 987 loss with respect to any of its QBUs and did not have outstanding deferred section 987 gain or loss. In the three years before year 2, CFC did not recognize any section 987 gain or loss. In year 2, CFC has net unrecognized section 987 loss of \$200 with respect to QBU1, net unrecognized section 987 loss of \$1,000 with respect to QBU2, and net unrecognized section 987 gain of \$1,000 with respect to QBU3. In year 2, each QBU makes a remittance, and CFC's remittance proportion (determined under § 1.987–5(b)(1)) is 25% with respect to QBU1, 15% with respect to QBU2, and 10% with respect to QBU3. For purposes of § 1.987–6(b)(2)(i), all of QBU1's assets generate foreign source passive category income that corresponds to one or more subpart F income groups described in § 1.960–1(d)(2)(ii)(B)(2)(i) through (v), and all of QBU2's and QBU3's assets generate foreign source general category tested income. Another member of CFC's controlled group owns a section 987 QBU with respect to which \$10 million of net unrecognized section 987 loss becomes suspended section 987 loss under paragraph (c)(1) of this section in year 2.

(ii) *Analysis—(A) Application of §§ 1.987–5 and 1.987–6 and paragraph (c) of this section.* In year 2, CFC recognizes \$100 of section 987 gain with respect to QBU3 (10% of \$1,000) under § 1.987–5(a). Under § 1.987–6(b)(2)(i)(A), (B), and (D), the section 987 gain is initially characterized as foreign source general category tentative tested income. If a current rate election was not in effect, in year 2 CFC would recognize \$50 of section 987 loss with respect to QBU1 (25% of \$200) and \$150 of section 987 loss with respect to

QBU2 (15% of \$1,000). However, under paragraph (c) of this section, these amounts instead become suspended section 987 loss. The de minimis rule under paragraph (c)(2) of this section does not apply because a member of CFC's controlled group has more than \$3 million of section 987 loss that is suspended in year 2 under paragraph (c)(1) of this section. Under § 1.987–6(b)(2)(i)(A) and (B), the \$50 of suspended section 987 loss with respect to QBU1 is initially characterized as foreign source passive category income assigned to a subpart F income group described in § 1.960–1(d)(2)(ii)(B)(2)(i) through (v), and is treated as foreign currency loss of the CFC attributable to section 988 transactions not directly related to the business needs of the CFC because an election under § 1.987–6(b)(2)(i)(C) is in effect. Under § 1.987–6(b)(2)(i)(A), (B), and (D), the \$150 of suspended section 987 loss with respect to QBU2 is initially characterized as foreign source general category tentative tested income.

(B) *Cumulative suspended section 987 loss.* Under paragraph (b) of this section, in year 2, CFC's cumulative suspended section 987 loss in the recognition grouping of foreign source passive category income in a separate subpart F income group for foreign currency gains of CFC with respect to QBU1 is \$50, the amount that became suspended section 987 loss in the recognition grouping in year 2. In addition, CFC's total cumulative suspended section 987 loss in that recognition grouping is \$50. Similarly, CFC's cumulative suspended section 987 loss in the recognition grouping of foreign source general category tentative tested income with respect to QBU2 is \$150, the amount that became suspended section 987 loss in the recognition grouping in year 2. In addition, CFC's total cumulative suspended section 987 loss in that recognition grouping is \$150.

(C) *Current year gain amount and lookback gain amount.* Under paragraph (e)(3) of this section, in year 2, CFC recognizes suspended section 987 loss in a recognition grouping to the extent of the sum of the current year gain amount described in paragraph (e)(3)(i) of this section and the lookback gain amount described in paragraph (e)(3)(ii) of this section. In the recognition grouping of foreign source general category tentative tested income, the current year gain amount described in paragraph (e)(3)(i) of this section is equal to the section 987 gain of \$100 recognized by CFC in year 2 with respect to QBU3. The current year gain amount for all other recognition groupings is zero. During the lookback

period (the three years before year 2), CFC did not recognize any section 987 gain or loss. Therefore, the lookback gain amount described in paragraph (e)(3)(ii) of this section is zero for all recognition groupings.

(D) *Recognition of suspended section 987 loss.* In year 2, CFC has \$50 of total cumulative suspended section 987 loss in the recognition grouping of foreign source passive category income in a separate subpart F income group for foreign currency gains of CFC and \$150 of total cumulative suspended section 987 loss in the recognition grouping of foreign source general category tentative tested income. In the recognition grouping of foreign source general category tentative tested income, CFC has a current year gain amount of \$100 and a lookback gain amount of zero (\$100 in total). Therefore, CFC recognizes \$100 of suspended section 987 loss in that recognition grouping. Under paragraph (e)(4) of this section, the cumulative suspended section 987 loss that is recognized by CFC is attributable to QBU2, because QBU2 is CFC's only QBU with cumulative suspended section 987 loss in the recognition grouping of foreign source general category tentative tested income. Because no election under § 1.951A–2(c)(7) applies in year 2, both the \$100 of recognized section 987 gain and the \$100 of recognized section 987 loss are allocated to foreign source general category tested income. See § 1.987–6(b)(2)(ii). The amounts of suspended section 987 loss not recognized (that is, \$50 of suspended section 987 loss assigned to foreign source passive category income in the subpart F income group for foreign currency gains of CFC with respect to QBU1 and \$50 of suspended section 987 loss assigned to foreign source general category tentative tested income with respect to QBU2) remain suspended.

(2) *Example 2: Recognition of suspended section 987 loss by reason of gain recognized during the lookback period—(i) Facts.* CFC is a controlled foreign corporation that has the U.S. dollar as its functional currency. CFC owns QBU1, a section 987 QBU with the euro as its functional currency, and CFC has no other QBUs. Assume that all section 987 gain or loss (including suspended section 987 loss) is assigned to the same recognition grouping. CFC is subject to a current rate election but not an annual recognition election. Before year 1, QBU1 does not have cumulative suspended section 987 loss. In year 1, CFC recognizes section 987 gain of \$10 million with respect to QBU1. In year 3, CFC recognizes section 987 gain of \$15 million with respect to

QBU1. In year 4, QBU1 has net unrecognized section 987 loss, and \$10 million of the net unrecognized section 987 loss becomes suspended section 987 loss under paragraph (c) of this section. In year 6, an additional \$10 million of net unrecognized section 987 loss with respect to QBU1 becomes suspended section 987 loss under paragraph (c) of this section.

(ii) *Analysis*—(A) *Recognition of suspended section 987 loss in year 4.* In year 4, CFC's total cumulative suspended section 987 loss is \$10 million (that is, the loss that becomes suspended in year 4). The current year gain amount under paragraph (e)(3)(i) of this section is zero, because CFC does not recognize section 987 gain in year 4. The lookback period under paragraph (e)(3)(iv)(A) of this section is three years (years 1 through 3). The lookback gain amount under paragraph (e)(3)(ii) of this section is \$25 million (the sum of the \$10 million of section 987 gain recognized in year 1 and the \$15 million of section 987 gain recognized in year 3). Therefore, under paragraph (e)(3) of this section, CFC recognizes suspended section 987 loss of \$10 million. Under paragraph (e)(3)(iii)(B) of this section, the suspended section 987 loss is considered to be recognized by reason of the section 987 gain recognized in year 3, which is the most recent taxable year in which section 987 gain was recognized.

(B) *Recognition of suspended section 987 loss in year 6.* In year 6, CFC's total cumulative suspended section 987 loss is \$10 million (that is, the loss that becomes suspended in year 6). The current year gain amount under paragraph (e)(3)(i) of this section is zero, because CFC does not recognize section 987 gain in year 6. The lookback period under paragraph (e)(3)(iv)(A) of this section is three years (years 3 through 5). The lookback gain amount under paragraph (e)(3)(ii) of this section is \$5 million (the sum of the section 987 gain of \$15 million recognized in year 3 and the suspended section 987 loss of \$10 million recognized in year 4 by reason of the section 987 gain recognized in year 3). Therefore, under paragraph (e)(3) of this section, CFC recognizes \$5 million of suspended section 987 loss in year 6.

(iii) *Alternative facts.* Assume the facts are the same as described in paragraph (g)(2)(i) of this section, with the following modifications. In year 1, CFC recognizes section 987 gain of \$10 million with respect to QBU1. CFC does not recognize section 987 gain in year 3. In year 4, \$10 million of net unrecognized section 987 loss with respect to QBU1 becomes suspended

section 987 loss under paragraph (c) of this section. In year 5, CFC recognizes section 987 gain of \$15 million with respect to QBU1. In year 6, \$10 million of net unrecognized section 987 loss with respect to QBU1 becomes suspended section 987 loss under paragraph (c) of this section.

(iv) *Analysis of alternative facts*—(A) *Recognition of suspended section 987 loss in year 4.* In year 4, CFC's total cumulative suspended section 987 loss is \$10 million (that is, the loss that becomes suspended in year 4). The current year gain amount under paragraph (e)(3)(i) of this section is zero, because CFC does not recognize section 987 gain in year 4. The lookback period under paragraph (e)(3)(iv)(A) of this section is three years (years 1 through 3). The lookback gain amount under paragraph (e)(3)(ii) of this section is \$10 million (equal to the \$10 million of section 987 gain recognized in year 1). Therefore, under paragraph (e)(3) of this section, CFC recognizes suspended section 987 loss of \$10 million in year 4. Under paragraph (e)(3)(iii)(B) of this section, the suspended section 987 loss is considered to be recognized by reason of the section 987 gain recognized in year 1, which is the most recent taxable year in which section 987 gain was recognized.

(B) *Recognition of suspended section 987 loss in year 6.* In year 6, CFC's total cumulative suspended section 987 loss is \$10 million (that is, the loss that becomes suspended in year 6). The current year gain amount under paragraph (e)(3)(i) of this section is zero because CFC does not recognize section 987 gain in year 6. The lookback period under paragraph (e)(3)(iv)(A) of this section is three years (years 3 through 5). The lookback gain amount under paragraph (e)(3)(ii) of this section is \$15 million (equal to the section 987 gain of \$15 million recognized in year 5). Under paragraph (e)(3)(iii)(A) of this section, the suspended section 987 loss recognized in year 4 is not taken into account in determining the lookback gain amount, because it was recognized by reason of the section 987 gain recognized in year 1 (before the beginning of the lookback period for year 6). Therefore, under paragraph (e)(3) of this section, CFC recognizes \$10 million of suspended section 987 loss in year 6.

(3) *Example 3: Suspension of section 987 loss when a current rate election is revoked*—(i) *Facts.* U.S. Corp is a domestic corporation that owns all of the interests in DE1. DE1 owns Business A, which is a section 987 QBU of U.S. Corp. In year 1, U.S. Corp made a current rate election but not an annual

recognition election. In year 9, U.S. Corp has net unrecognized section 987 loss of \$2 million with respect to Business A, which is not recognized or suspended in year 9. U.S. Corp revokes its current rate election effective for year 10. In year 10, before the application of this section, U.S. Corp has net accumulated unrecognized section 987 loss of \$2 million.

(ii) *Analysis.* Under paragraph (d)(2) of this section, U.S. Corp's net accumulated unrecognized section 987 loss of \$2 million with respect to Business A is converted into suspended section 987 loss at the beginning of year 10, the first taxable year in which the current rate election ceases to be in effect.

§ 1.987–12 Deferral of section 987 gain or loss.

(a) *Overview*—(1) *Scope.* This section provides rules that defer the recognition of section 987 gain or loss and rules for recognizing (or suspending) deferred section 987 gain or loss. This paragraph (a) provides an overview of this section and certain instances when this section does not apply. Paragraph (b) of this section describes the extent to which net unrecognized section 987 gain or loss is recognized under § 1.987–5 (or in certain cases, suspended) or becomes deferred section 987 gain or loss in connection with a deferral event. Paragraph (c) of this section describes the extent to which deferred section 987 gain or loss is recognized (or in certain cases, suspended) upon the occurrence of subsequent events. Paragraph (d) of this section provides a rule relating to the treatment of a successor deferral QBU when deferred section 987 loss becomes suspended section 987 loss. Paragraph (e) of this section provides an anti-abuse rule. Paragraph (f) of this section provides rules for determining the deferred section 987 gain or loss of combined and separated QBUs. Paragraph (g) of this section provides definitions. Paragraph (h) of this section provides examples illustrating the rules of this section.

(2) *Exceptions*—(i) *Annual recognition election.* This section does not apply to a termination of a section 987 QBU in a taxable year in which an annual recognition election is in effect.

(ii) *De minimis rule.* This section does not apply in a taxable year if the aggregate amount of net unrecognized section 987 gain or loss of the owner with respect to all of its section 987 QBUs that would become deferred section 987 gain or loss under this section does not exceed \$5 million.

(b) *Treatment of section 987 gain and loss in connection with a deferral event.*

Notwithstanding § 1.987–5 (general rule requiring recognition of section 987 gain or loss in the taxable year of a remittance), the owner of a section 987 QBU with respect to which a deferral event occurs (an *original deferral QBU*) includes in taxable income section 987 gain or loss in connection with the deferral event only to the extent provided in this paragraph (b).

(1) *Gain or loss recognized (or suspended) in the taxable year of a deferral event.* In the taxable year of a deferral event with respect to an original deferral QBU, the owner of the original deferral QBU recognizes section 987 gain or loss under § 1.987–5, except that, solely for purposes of applying § 1.987–5, all assets and liabilities of the original deferral QBU that, immediately after the deferral event, are reflected on the books and records of a successor deferral QBU are treated as not having been transferred and therefore as remaining on the books and records of the original deferral QBU notwithstanding the deferral event. Notwithstanding the prior sentence, any section 987 loss that would otherwise be recognized under this paragraph (b)(1) and § 1.987–5 may instead become suspended loss under § 1.987–11(c) if a current rate election is in effect, or under § 1.987–13(h) if the deferral event also constitutes an outbound loss event.

(2) *Deferred section 987 gain or loss—*(i) *In general.* In the taxable year of a deferral event with respect to an original deferral QBU, any net unrecognized section 987 gain or loss that is not recognized or suspended in the taxable year of the deferral event becomes deferred section 987 gain or loss of the original deferral QBU owner. Suspended section 987 loss does not become deferred section 987 loss under this paragraph (b)(2).

(ii) *Deferred section 987 gain or loss attributable to a successor deferral QBU.* A portion of the deferred section 987 gain or loss described in paragraph (b)(2)(i) of this section becomes deferred section 987 gain or loss with respect to each successor deferral QBU. Such portion is equal to the deferred section 987 gain or loss multiplied by a fraction, the numerator of which is the aggregate adjusted basis of the gross assets transferred to the successor deferral QBU in connection with the deferral event and the denominator of which is the aggregate adjusted basis of the gross assets transferred to all successor deferral QBUs in connection with the deferral event.

(c) *Recognition (or suspension) of deferred section 987 gain or loss following a deferral event.* An original deferral QBU owner recognizes deferred

section 987 gain or loss with respect to a successor deferral QBU in the taxable year of the deferral event and in subsequent taxable years as provided in this paragraph (c).

(1) *Recognition upon a subsequent remittance—*(i) *In general.* Except as provided in paragraph (c)(2) of this section, an original deferral QBU owner recognizes deferred section 987 gain or loss in the taxable year of the deferral event, and in subsequent taxable years, upon a remittance from a successor deferral QBU to the owner of the successor deferral QBU (*successor deferral QBU owner*) in the amount described in paragraph (c)(1)(ii) of this section. Notwithstanding the prior sentence, any deferred section 987 loss that would otherwise be recognized under this paragraph (c)(1) may instead become suspended section 987 loss under § 1.987–11(c) (if a current rate election is in effect with respect to the original deferral QBU owner) or under § 1.987–7(d)(1)(ii) (in the case of a partnership).

(ii) *Amount.* The amount of deferred section 987 gain or loss that is recognized (or suspended) pursuant to this paragraph (c)(1) in a taxable year of the original deferral QBU owner is the original deferral QBU owner's outstanding deferred section 987 gain or loss (that is, the amount of deferred section 987 gain or loss not previously recognized or suspended) with respect to the successor deferral QBU multiplied by the remittance proportion of the successor deferral QBU owner with respect to the successor deferral QBU for the taxable year ending with or within the taxable year of the original deferral QBU owner, as determined under § 1.987–5(b) without regard to any annual recognition election of the successor deferral QBU owner. See paragraph (h)(4) of this section (*Example 4*) for an illustration of this rule.

(iii) *Deemed remittance by a successor deferral QBU.* For purposes of this paragraph (c)(1), in a taxable year of the original deferral QBU owner in which a successor deferral QBU ceases to be owned by a member of the controlled group that includes the original deferral QBU owner, the successor deferral QBU is treated as having a remittance proportion of one. Accordingly, if a successor deferral QBU ceases to be owned by a member of the controlled group that includes the original deferral QBU owner, the original deferral QBU owner's outstanding deferred section 987 gain or loss with respect to that successor deferral QBU will be recognized (or suspended). For purposes of this

paragraph (c)(1), if the original deferral QBU owner goes out of existence and there is no qualified successor, in the last taxable year of the original deferral QBU owner, each successor deferral QBU is treated as having a remittance proportion of one. This paragraph (c)(1)(iii) does not affect the application of the section 987 regulations to the successor deferral QBU owner with respect to its ownership of the successor deferral QBU.

(2) *Deferral events and outbound loss events with respect to a successor deferral QBU.* Notwithstanding paragraph (c)(1) of this section, if assets of the successor deferral QBU (*transferred assets*) are transferred (or deemed transferred) in a transaction that would constitute a deferral event or an outbound loss event if the original deferral QBU owner owned the successor deferral QBU directly and the original deferral QBU owner had net unrecognized section 987 gain or loss with respect to the successor deferral QBU equal to its outstanding deferred section 987 gain or loss with respect to the successor deferral QBU (the *deemed transaction*), then, in accordance with the rules of this section and § 1.987–13(h)—

(i) The original deferral QBU owner recognizes its outstanding deferred section 987 gain or loss, or suspends its outstanding deferred section 987 loss, to the extent it would have recognized or suspended net unrecognized section 987 gain or loss as a result of the deemed transaction; and

(ii) Each section 987 QBU is a successor deferral QBU to the extent it would have been after the deemed transaction and the original deferral QBU owner has deferred section 987 gain or loss with respect to the successor deferral QBU to the extent it would have after the deemed transaction;

(iii) Each eligible QBU is a successor suspended loss QBU to the extent it would have been after the deemed transaction and the original deferral QBU owner has suspended section 987 loss with respect to the suspended loss QBU to the extent it would have after the deemed transaction.

(d) *Successor deferral QBU becomes a successor suspended loss QBU.* A successor deferral QBU becomes a successor suspended loss QBU, and an original deferral QBU owner becomes an original suspended loss QBU owner, if any of the original deferral QBU owner's deferred section 987 loss with respect to the successor deferral QBU becomes suspended section 987 loss. An eligible QBU may be both a successor deferral QBU and a successor suspended loss

QBU and the original deferral QBU owner may also be an original suspended loss QBU owner.

(e) *Anti-abuse rule.* No section 987 loss is recognized under this section, § 1.987–5 or § 1.987–13 in connection with a transaction or series of transactions that are undertaken with a principal purpose of avoiding the purposes of this section.

(f) *Combinations and separations of successor deferral QBUs.* A combined QBU is a successor deferral QBU if either combining QBU was a successor deferral QBU. A separated QBU is a successor deferral QBU if the separating QBU was a successor deferral QBU.

(1) *Combined QBU.* The outstanding deferred section 987 gain or loss of a combined QBU in each recognition grouping for a taxable year is equal to the sum of the combining QBUs' outstanding deferred section 987 gain or loss in that recognition grouping.

(2) *Separated QBU.* The outstanding deferred section 987 gain or loss of a separated QBU in each recognition grouping for a taxable year is equal to the separating QBU's outstanding deferred section 987 gain or loss in each recognition grouping multiplied by the separation fraction.

(g) *Definitions.* The following definitions apply for purposes of this section.

(1) *Deferral event.* A deferral event with respect to a section 987 QBU means any transaction or series of transactions that satisfy the conditions described in both paragraphs (g)(1)(i) and (ii) of this section.

(i) *Events.* The transaction or series of transactions constitutes:

(A) A termination of the section 987 QBU under § 1.987–8(b)(2) (substantially all the assets transferred to the owner), § 1.987–8(b)(5) (section 987 QBU ceases to be a section 987 QBU), or § 1.987–8(b)(6) (individual or corporation ceases to be a direct owner of a section 987 QBU); or

(B) [Reserved]

(ii) *Assets on books of successor deferral QBU.* Immediately after the transaction or series of transactions, assets of the section 987 QBU are reflected on the books and records of a successor deferral QBU.

(2) *Successor deferral QBU.* A section 987 QBU (*potential successor deferral QBU*) is a successor deferral QBU with respect to a section 987 QBU referred to in paragraph (g)(1)(i) of this section if, immediately after the transaction or series of transactions described in that paragraph, the potential successor deferral QBU satisfies all of the conditions described in paragraphs (g)(2)(i) through (iii) of this section.

(i) The books and records of the potential successor deferral QBU reflect assets that, immediately before the transaction or series of transactions described in paragraph (g)(1)(i) of this section, were reflected on the books and records of the section 987 QBU referred to in paragraph (g)(1)(i) of this section.

(ii) The owner of the potential successor deferral QBU and the owner of the section 987 QBU referred to in paragraph (g)(1)(i) of this section immediately before the transaction or series of transactions described in paragraph (g)(1)(i) of this section are members of the same controlled group.

(iii) If the owner of the section 987 QBU referred to in paragraph (g)(1)(i) of this section immediately before the transaction or series of transactions described in paragraph (g)(1)(i) of this section was a U.S. person, the potential successor deferral QBU is owned by a U.S. person.

(3) *Original deferral QBU owner.* An original deferral QBU owner means, with respect to an original deferral QBU, the owner of the original deferral QBU immediately before the deferral event, or the owner's qualified successor.

(4) *Qualified successor.* A qualified successor with respect to a corporation (*transferor corporation*) means another corporation that acquires the assets of the transferor corporation in a transaction described in section 381(a) (*acquiring corporation*), provided that the acquiring corporation is a domestic corporation and the transferor corporation was a domestic corporation, or the acquiring corporation is a controlled foreign corporation and the transferor corporation was a controlled foreign corporation. A qualified successor of a person includes the qualified successor of a qualified successor.

(h) *Examples.* The following examples illustrate the application of this section. For purposes of the examples, DC1 is a domestic corporation that owns all of the stock of DC2, which is also a domestic corporation, and CFC1, a controlled foreign corporation. In addition, DC1, DC2, and CFC1 are members of a controlled group, and the de minimis rule of paragraph (a)(2)(ii) of this section is not applicable. Finally, except as otherwise provided, Business A is a section 987 QBU with the euro as its functional currency, there are no transfers between Business A and its owner, and Business A's assets are not depreciable or amortizable.

(1) *Example 1: Contribution of a section 987 QBU with net unrecognized section 987 gain to a member of the controlled group—(i) Facts.* DC1 owns Business A. The adjusted balance sheet

of Business A reflects assets with an aggregate adjusted basis of €1,000x and no liabilities. DC1 contributes €900x of Business A's assets to DC2 in exchange for DC2 stock in a transaction to which section 351 applies. Immediately after the contribution, the remaining €100x of Business A's assets are no longer reflected on the books and records of a section 987 QBU (but are instead reflected on the books and records of DC1's home office). DC2, which has the U.S. dollar as its functional currency, uses the Business A assets in a business (*Business B*) that constitutes a section 987 QBU. At the time of the contribution, Business A has net unrecognized section 987 gain of \$100x.

(ii) *Analysis—(A)* Under § 1.987–2(c)(2)(ii), DC1's contribution of €900x of Business A's assets to DC2 is treated as a transfer of all of the assets of Business A to DC1, immediately followed by DC1's contribution of €900x of Business A's assets to DC2. The contribution of Business A's assets is a deferral event within the meaning of paragraph (g)(1) of this section because:

(1) The transfer from Business A to DC1 is a transfer of substantially all of Business A's assets to DC1, resulting in a termination of the Business A QBU under § 1.987–8(b)(2); and

(2) Immediately after the transaction, assets of Business A are reflected on the books and records of Business B, a section 987 QBU owned by a member of DC1's controlled group and a successor deferral QBU within the meaning of paragraph (g)(2) of this section.

Accordingly, Business A is an original deferral QBU within the meaning of paragraph (b) of this section, and DC1 is an original deferral QBU owner of Business A within the meaning of paragraph (g)(3) of this section.

(B) Under paragraph (b)(1) of this section, DC1's taxable income in the taxable year of the deferral event includes DC1's section 987 gain or loss determined with respect to Business A under § 1.987–5, except that, for purposes of applying § 1.987–5, all assets of Business A that are reflected on the books and records of Business B immediately after Business A's termination are treated as not having been transferred and therefore as though they remained on Business A's books and records (notwithstanding the deemed transfer of those assets under § 1.987–8(e)). Accordingly, in the taxable year of the deferral event, Business A is treated as making a remittance of €100x, corresponding to the assets of Business A that are no longer reflected on the books and records of a section 987 QBU, and is treated as having a remittance

proportion with respect to Business A of 0.1, determined by dividing the €100x remittance by the sum of the remittance and the €900x aggregate adjusted basis of the gross assets deemed to remain on Business A's books and records at the end of the taxable year. Thus, DC1 recognizes \$10x of section 987 gain in the taxable year of the deferral event. DC1's deferred section 987 gain equals \$90x, which is the amount of its net unrecognized section 987 gain (which is \$100x) less the amount of section 987 gain recognized by DC1 under § 1.987–5 and this section (which is \$10x).

(2) *Example 2: Contribution of a section 987 QBU with net unrecognized section 987 loss to a member of the controlled group when a current rate election is in effect—(i) Facts.* The facts are the same as in paragraph (h)(1) of this section (*Example 1*) except that a current rate election is in effect for the taxable year (and an annual recognition election is not in effect) and, at the time of the contribution, Business A has net unrecognized section 987 loss of \$100x. Business A is engaged in the business of manufacturing Product X before the contribution, and Business B is engaged in the same business after the contribution. After the contribution, the €100x of assets that are reflected on the books and records of DC1's home office are not used in the business of manufacturing Product X.

(ii) *Analysis—(A)* For the reasons described in paragraph (h)(1) of this section (*Example 1*), the contribution results in a termination of the Business A QBU and a deferral event with respect to the Business A QBU, an original deferral QBU; DC1 is an original deferral QBU owner within the meaning of paragraph (g)(3) of this section; Business B is a successor deferral QBU with respect to Business A; and DC2 is a successor deferral QBU owner.

(B) Under paragraph (b)(1) of this section, for purposes of applying § 1.987–5, all the assets of Business A that are reflected on the books and records of Business B immediately after Business A's termination are treated as not having been transferred and therefore as though they remained on Business A's books and records (notwithstanding the deemed transfer of those assets under § 1.987–8(e)). Accordingly, in the taxable year of the deferral event, Business A is treated as making a remittance of €100x, corresponding to the assets of Business A that are no longer reflected on the books and records of a section 987 QBU, and DC1 is treated as having a remittance proportion with respect to Business A of 0.1, determined by dividing the €100x remittance by the

sum of the remittance and the €900x aggregate adjusted basis of the gross assets deemed to remain on Business A's books and records at the end of the taxable year. Thus, but for the application of § 1.987–11(c), DC1 would recognize \$10x of section 987 loss in the taxable year of the deferral event. Under § 1.987–11(c), because a current rate election is in effect (and an annual recognition election is not in effect), the loss is instead treated as suspended section 987 loss. DC1's deferred section 987 loss equals \$90x, which is the amount of its net unrecognized section 987 loss less the amount of section 987 loss suspended under § 1.987–11(c) (which is \$10x).

(C) Under § 1.987–13(b)(1)(i), Business B is a successor suspended loss QBU because, immediately after the termination of the Business A section 987 QBU, a significant portion of the assets of Business A was reflected on the books and records of Business B (an eligible QBU), Business B continued to carry on the trade or business of Business A, and Business B was owned by DC2, a member of the same controlled group as DC1 (which is the original suspended loss QBU owner under § 1.987–13(l)(1)). Therefore, under § 1.987–13(b)(1)(ii), all of Business A's cumulative suspended section 987 loss (including the suspended section 987 loss resulting from the termination of Business A) becomes suspended section 987 loss with respect to Business B. After the transaction, DC1 may recognize its suspended section 987 loss with respect to Business B under § 1.987–11(e) or § 1.987–13(b) through (d), as applicable.

(3) *Example 3: Election to be classified as a corporation—(i) Facts.* DC1 owns all of the interests in Entity A, a DE. Entity A conducts Business A, which has net unrecognized section 987 gain of \$500x. Entity A elects to be classified as a corporation under § 301.7701–3(c) of this chapter. As a result of the election and pursuant to § 301.7701–3(g)(1)(iv) of this chapter, DC1 is treated as contributing all of the assets and liabilities of Business A to newly-formed CFC1, which has the euro as its functional currency. Immediately after the contribution, the assets and liabilities of Business A are reflected on CFC1's books and records.

(ii) *Analysis.* Under § 1.987–2(c)(2)(ii), DC1's deemed contribution of all of the assets and liabilities of Business A to CFC1 is treated as a transfer of all of the assets and liabilities of Business A to DC1, followed immediately by DC1's contribution of those assets and liabilities to CFC1. Because the deemed transfer from Business A to DC1 is a

transfer of substantially all of Business A's assets to DC1, the Business A QBU terminates under § 1.987–8(b)(2). The contribution of Business A's assets is not a deferral event within the meaning of paragraph (b) of this section because, immediately after the transaction, no assets of Business A are reflected on the books and records of a successor deferral QBU within the meaning of paragraph (g)(2) of this section due to the fact that the assets of Business A are not reflected on the books and records of a section 987 QBU immediately after the termination. In addition, the requirement of paragraph (g)(2)(iii) of this section is not met because Business A was owned by a U.S. person and the potential successor deferral QBU, which is owned by CFC1, is not owned by a U.S. person. Accordingly, DC1 recognizes section 987 gain of \$500x with respect to Business A under § 1.987–5 without regard to this section. Because the requirement of paragraph (g)(2)(iii) of this section is not met, the result would be the same even if the assets of Business A were transferred in a section 351 exchange to an existing foreign corporation that had a different functional currency than Business A.

(4) *Example 4: Partial recognition of deferred gain or loss—(i) Facts.* DC1 owns all of the interests in Entity A, a DE that conducts Business A in Country X. During year 1, DC1 contributes all of its interests in Entity A to DC2 in an exchange to which section 351 applies. At the time of the contribution, Business A has net unrecognized section 987 gain of \$100x and cumulative suspended section 987 loss of \$50x. After the contribution, Entity A continues to conduct the same trade or business in Country X (*Business B*). In year 3, as a result of a net transfer of property from Business B to DC2, DC2's remittance proportion with respect to Business B, as determined under § 1.987–5, is 0.25.

(ii) *Analysis—(A)* For the reasons described in paragraph (h)(1) of this section (*Example 1*), the contribution of all the interests in Entity A by DC1 to DC2 results in a termination of the Business A QBU and a deferral event with respect to the Business A QBU, an original deferral QBU; DC1 is an original deferral QBU owner within the meaning of paragraph (g)(3) of this section; Business B is a successor deferral QBU with respect to Business A; DC2 is a successor deferral QBU owner; and the \$100x of net unrecognized section 987 gain with respect to Business A becomes deferred section 987 gain as a result of the deferral event.

(B) Under § 1.987–13(b)(1)(i), Business B is a successor suspended loss QBU because, immediately after the

termination of the Business A section 987 QBU, a significant portion of the assets of Business A was reflected on the books and records of Business B (an eligible QBU), Business B continued to carry on the trade or business of Business A, and Business B was owned by DC2, a member of the same controlled group as DC1 (which is the original suspended loss QBU owner under § 1.987–13(l)(1)). Therefore, under § 1.987–13(b)(1)(ii), all of DC1's cumulative suspended section 987 loss with respect to Business A becomes suspended section 987 loss of DC1 with respect to Business B.

(C) Under paragraph (c)(1)(i) of this section, DC1 recognizes deferred section 987 gain in year 3 as a result of the remittance from Business B to DC2. Under paragraph (c)(1)(ii) of this section, the amount of deferred section 987 gain that DC1 recognizes is \$25x, which is DC1's outstanding deferred section 987 gain of \$100x with respect to Business A multiplied by the remittance proportion of 0.25 of DC2 with respect to Business B for the taxable year as determined under § 1.987–5(b). In addition, under § 1.987–11(e), DC1 recognizes its cumulative suspended section 987 loss to the extent of the deferred section 987 gain recognized in the same recognition grouping.

§ 1.987–13 Suspended section 987 loss upon terminations.

(a) *Overview*—(1) *In general*. This section provides rules relating to suspended section 987 loss of an owner with respect to a section 987 QBU or successor suspended loss QBU that terminates. Paragraph (b) of this section provides rules treating suspended section 987 loss as recognized or attributable to a successor when a section 987 QBU terminates. Paragraph (c) of this section provides rules treating suspended section 987 loss as recognized or attributable to a subsequent successor when a successor suspended loss QBU terminates. Paragraph (d) of this section provides rules regarding the recognition of suspended section 987 loss when interests in a successor suspended loss QBU owner are transferred. Paragraph (e) of this section provides rules that apply when interests in an original suspended loss QBU owner are transferred. Paragraph (f) of this section provides rules that apply when an original suspended loss QBU owner ceases to exist. Paragraph (g) of this section provides rules preventing the carryover of suspended section 987 loss in connection with certain inbound transactions. Paragraph (h) of this

section provides rules that suspend section 987 loss in connection with certain outbound transactions. Paragraph (i) of this section is reserved. Paragraph (j) of this section provides rules relating to the termination of a successor suspended loss QBU. Paragraph (k) of this section provides an anti-abuse rule. Paragraph (l) of this section provides definitions that apply for purposes of this section. Paragraph (m) of this section provides examples illustrating the rules of this section.

(2) *Ordering rule*. Paragraphs (b) through (d) of this section are applied after the application of § 1.987–11(e) (loss-to-the-extent-of-gain rule).

(b) *Termination of a section 987 QBU with suspended loss*. If a section 987 QBU terminates, and at the time of termination, the owner has suspended section 987 loss with respect to the section 987 QBU (including because the termination was an outbound loss event or because net unrecognized section 987 loss became suspended section 987 loss upon termination as a result of a current rate election), then either paragraph (b)(1) or (2) of this section applies. However, this paragraph (b) does not apply to a termination that occurs in connection with a transaction described in paragraph (f) or (g) of this section.

(1) *Suspended section 987 loss becomes suspended section 987 loss with respect to a successor suspended loss QBU*—(i) *Successor suspended loss QBU*. If, immediately after the termination, a significant portion of the assets of the terminating section 987 QBU are reflected on the books and records of an eligible QBU that carries on a trade or business of the section 987 QBU and is owned by the owner of the section 987 QBU or a member of its controlled group (determined immediately after the transaction), then the eligible QBU is a successor suspended loss QBU and the rules provided in paragraph (b)(1)(ii) of this section apply.

(ii) *Attribution of suspended section 987 loss to successor suspended loss QBU*. A portion of the cumulative suspended section 987 loss with respect to the terminating section 987 QBU that is not recognized in the taxable year of the termination under § 1.987–11(e) becomes suspended section 987 loss with respect to each successor suspended loss QBU. Such portion is equal to the suspended section 987 loss described in the preceding sentence, multiplied by a fraction, the numerator of which is the aggregate adjusted basis of the gross assets transferred to the successor suspended loss QBU in connection with the termination, and the denominator of which is the

aggregate adjusted basis of the gross assets transferred to all successor suspended loss QBUs in connection with the termination.

(2) *Recognition of suspended section 987 loss*. If, immediately after the termination of the section 987 QBU, there is no successor suspended loss QBU under paragraph (b)(1) of this section, then the owner recognizes the cumulative suspended section 987 loss with respect to the section 987 QBU that is not recognized in the taxable year of the termination under § 1.987–11(e).

(c) *Termination of a successor suspended loss QBU*. If a successor suspended loss QBU terminates (as described in paragraph (j) of this section), then either paragraph (c)(1) or (2) of this section applies. However, this paragraph (c) does not apply to a termination that occurs in connection with a transaction described in paragraph (e), (f), or (g) of this section.

(1) *Successor to the successor suspended loss QBU*—(i) *Successor suspended loss QBU*. If, immediately after the termination, a significant portion of the assets of the terminating successor suspended loss QBU (*initial successor*) are reflected on the books and records of an eligible QBU (*subsequent successor*) that carries on a trade or business of the initial successor and is owned by the original suspended loss QBU owner or a member of its controlled group (determined immediately after the transaction), then the subsequent successor is a successor suspended loss QBU and the rules provided in paragraph (c)(1)(ii) of this section apply.

(ii) *Attribution of suspended section 987 loss to successor suspended loss QBU*. A portion of the cumulative suspended section 987 loss with respect to the initial successor that is not recognized in the taxable year of the termination under § 1.987–11(e) becomes suspended section 987 loss with respect to each subsequent successor. Such portion is equal to the suspended section 987 loss described in the preceding sentence, multiplied by a fraction, the numerator of which is the aggregate adjusted basis of the gross assets transferred to the subsequent successor in connection with the termination, and the denominator of which is the aggregate adjusted basis of the gross assets transferred to all subsequent successors in connection with the termination.

(2) *Recognition of suspended section 987 loss*. If, immediately after the termination of the initial successor, there is no subsequent successor that is a successor suspended loss QBU under paragraph (c)(1) of this section, then the

original suspended loss QBU owner recognizes the cumulative suspended section 987 loss with respect to the initial successor that is not recognized in the taxable year of the termination under § 1.987–11(e).

(d) *Transfer of successor suspended loss QBU owner.* If a successor suspended loss QBU ceases to be owned by a member of the original suspended loss QBU owner's controlled group as a result of a direct or indirect transfer, or an issuance or redemption, of an ownership interest in the successor suspended loss QBU owner, then the original suspended loss QBU owner recognizes the cumulative suspended section 987 loss with respect to the successor suspended loss QBU that is not recognized in the taxable year under § 1.987–11(e).

(e) *Transfer of original suspended loss QBU owner.* If an original suspended loss QBU owner ceases to be a member of the successor suspended loss QBU owner's controlled group as a result of a direct or indirect transfer, or an issuance or redemption, of an ownership interest in the original suspended loss QBU owner, the original suspended loss QBU owner's suspended section 987 loss ceases to be attributable to any successor suspended loss QBU (but it continues to be suspended section 987 loss of the original suspended loss QBU owner). As a result, the suspended section 987 loss can be recognized by the original suspended loss QBU owner under § 1.987–11(e) but cannot be recognized under paragraph (b)(2), (c)(2), or (d) of this section.

(f) *Owner ceases to exist.* If the owner of a section 987 QBU with suspended section 987 loss or an original suspended loss QBU owner ceases to exist and there is no successor under paragraph (l)(1)(ii) of this section (for example, as a result of a section 331 liquidation), then any suspended section 987 loss of the owner that is not recognized after application of the loss-to-the-extent-of-gain rule in § 1.987–11(e) is eliminated and cannot be recognized.

(g) *Inbound nonrecognition transactions—no carryover of suspended section 987 loss.* If an owner of a section 987 QBU with suspended section 987 loss, or an original suspended loss QBU owner, ceases to exist in a transaction described in § 1.987–8(c)(1)(ii) (inbound section 332 liquidation) or § 1.987–8(c)(2)(ii) (inbound reorganization), then any suspended section 987 loss of the owner or original suspended loss QBU owner that is not recognized after application of the loss-to-the-extent-of-gain rule in

§ 1.987–11(e) is eliminated and cannot be recognized. As a result, the distributee or acquiring corporation does not succeed to or take into account any suspended section 987 loss of the owner or original suspended loss QBU owner under section 381.

(h) *Outbound transactions—recognition or suspension of net unrecognized section 987 loss.* This paragraph (h) applies to taxable years in which neither a current rate election nor an annual recognition election is in effect.

(1) *In general.* Notwithstanding § 1.987–5, if an outbound loss event occurs with respect to a section 987 QBU (an *outbound loss QBU*), the original owner of the section 987 QBU includes in taxable income in the taxable year of the outbound loss event section 987 loss with respect to the outbound loss QBU only to the extent provided in paragraph (h)(3) of this section.

(2) *Outbound loss event.* An outbound loss event means, with respect to a section 987 QBU:

(i) Any termination of the section 987 QBU as a result of a transfer by a U.S. person of assets of the section 987 QBU to a foreign person that is a member of the same controlled group as the U.S. person immediately before the transaction or, if the transferee did not exist immediately before the transaction, immediately after the transaction (*related foreign person*), provided that the termination would result in the recognition of section 987 loss with respect to the section 987 QBU under § 1.987–5 but for this paragraph (h); or

(ii) [Reserved]

(3) *Loss recognition upon an outbound loss event.* In the taxable year of an outbound loss event with respect to an outbound loss QBU, the owner of the outbound loss QBU recognizes section 987 loss as determined under §§ 1.987–5 and 1.987–12(b), except that, solely for purposes of applying § 1.987–5, assets and liabilities of the outbound loss QBU that, immediately after the outbound loss event, are reflected on the books and records of an eligible QBU owned by the related foreign person described in paragraph (h)(2) of this section are treated as not having been transferred and therefore as remaining on the books and records of the outbound loss QBU notwithstanding the outbound loss event.

(4) *Loss suspension upon outbound loss event.* Net unrecognized section 987 loss or deferred section 987 loss that, as a result of this paragraph (h), is not recognized in the taxable year of the outbound loss event (*outbound section*

987 loss) under § 1.987–5 becomes suspended section 987 loss.

(i) [Reserved]

(j) *Termination of a successor suspended loss QBU.* For purposes of applying paragraph (c) of this section, a successor suspended loss QBU terminates if it ceases to be an eligible QBU of its owner.

(k) *Anti-abuse.* No section 987 loss is recognized under this section, § 1.987–5, or § 1.987–12 in connection with a transaction or series of transactions that are undertaken with a principal purpose of avoiding the purposes of this section.

(l) *Definitions.* The following definitions apply for purposes of this section.

(1) *Original suspended loss QBU owner—*(i) *In general.* An *original suspended loss QBU owner* is the person that was the owner of a section 987 QBU before its termination in a transaction to which paragraph (b)(1) of this section applies.

(ii) *Successors.* If an original suspended loss QBU owner is a corporation (*transferor corporation*) and another corporation acquires the assets of the transferor corporation in a transaction described in section 381(a), then the acquiring corporation becomes the original suspended loss QBU owner.

(2) *Successor suspended loss QBU.* See paragraphs (b)(1) and (c)(1) of this section and § 1.987–12(d) for rules regarding when an eligible QBU is a successor suspended loss QBU.

(3) *Successor suspended loss QBU owner.* A *successor suspended loss QBU owner* is the owner of the assets and liabilities of a successor suspended loss QBU.

(4) *Ownership interests.* The term *ownership interests* means stock in a corporation and partnership interests in a partnership.

(5) *Significant portion.* With respect to the assets of an eligible QBU, the term *significant portion* means a significant portion of the operating assets, determined based on all the facts and circumstances, provided that more than 30 percent of the operating assets will constitute a significant portion in all cases and less than 10 percent of the operating assets will not constitute a significant portion in all cases.

(m) *Examples.* The following examples illustrate the application of this section. For purposes of the examples, DC1 is a domestic corporation that owns all of the interests in Entity A, a DE. Entity A conducts Business A, a section 987 QBU that is engaged in the business of selling Product X. Business A has the euro as its functional currency.

(1) *Example 1: Trade or business of a section 987 QBU ceases*—(i) *Facts*. Entity A's trade or business of selling Product X ceases, resulting in a termination of the Business A section 987 QBU under § 1.987–8(b)(1). After the trade or business is wound up, the remaining assets are transferred to DC1 and are not used in the trade or business of selling Product X immediately following the termination. Business A has cumulative suspended section 987 loss under § 1.987–11(b) of \$500x.

(ii) *Analysis*. Immediately after the termination of the Business A section 987 QBU, a significant portion of Business A's assets is not reflected on the books and records of an eligible QBU that carries on a trade or business of Business A and is owned by DC1 or a member of its controlled group. Therefore, Business A has no successor suspended loss QBU under paragraph (b)(1) of this section. Consequently, DC1 recognizes the cumulative suspended section 987 loss with respect to the Business A section 987 QBU under paragraph (b)(2) of this section.

(2) *Example 2: Trade or business of a section 987 QBU is sold to a third party*—(i) *Facts*. DC1 sells all the interests in Entity A to a third party for cash. Business A has cumulative suspended section 987 loss under § 1.987–11(b) of \$500x.

(ii) *Analysis*. Under § 1.987–2(c)(2)(ii), the sale of the Business A assets and liabilities for cash that is reflected on the books of DC1 is treated as a transfer of all of the assets and liabilities of Business A to DC1, followed immediately by DC1's sale of those assets and liabilities. Because the deemed transfer from Business A to DC1 is a transfer of substantially all of Business A's assets to DC1, the Business A section 987 QBU terminates under § 1.987–8(b)(2). Immediately after the termination of the Business A section 987 QBU, a significant portion of Business A's assets is not reflected on the books and records of an eligible QBU that carries on a trade or business of Business A and is owned by DC1 or a member of its controlled group. Therefore, Business A has no successor suspended loss QBU under paragraph (b)(1) of this section. Consequently, DC1 recognizes the cumulative suspended section 987 loss with respect to the Business A section 987 QBU under paragraph (b)(2) of this section.

(3) *Example 3: Outbound loss event*—(i) *Facts*. Entity A elects to be classified as a corporation under § 301.7701–3(c) of this chapter. As a result of the election and pursuant to § 301.7701–3(g)(1)(iv) of this chapter, DC1 is treated as contributing all of the assets and

liabilities of Business A to newly formed CFC1, which has the euro as its functional currency. Immediately after the contribution, the assets and liabilities of Business A are reflected on CFC1's books and records (which are the only books and records maintained by CFC1). CFC1 continues to use those assets in the same trade or business after the contribution (*Business B*). Neither a current rate election nor an annual recognition election is in effect. Business A has net unrecognized section 987 loss of \$500x.

(ii) *Analysis*—(A) Under § 1.987–2(c)(2)(ii), DC1's contribution of all of the assets and liabilities of Business A to CFC1 is treated as a transfer of all of the assets and liabilities of Business A to DC1, followed immediately by DC1's contribution of those assets and liabilities to CFC1. Because the deemed transfer from Business A to DC1 is a transfer of substantially all of Business A's assets to DC1, the Business A section 987 QBU terminates under § 1.987–8(b)(2). The contribution of Business A's assets to CFC1 is not a deferral event within the meaning of § 1.987–12(g)(1) because, immediately after the transaction, no assets of Business A are reflected on the books and records of a successor deferral QBU within the meaning of § 1.987–12(g)(2) due to the fact that the assets of Business A are not reflected on the books and records of a section 987 QBU immediately after the termination, as well as the fact that the requirement of § 1.987–12(g)(2)(iii) is not met because Business A was owned by a U.S. person and the potential successor deferral QBU (*Business B*) is not owned by a U.S. person. The termination of the Business A section 987 QBU as a result of the transfer of the assets of Business A by a U.S. person (DC1) to a foreign person (CFC1) that is a member of DC1's controlled group is an outbound loss event described in paragraph (h)(2) of this section.

(B) Under paragraphs (h)(1) and (3) of this section, in the taxable year of the outbound loss event, DC1 includes in taxable income section 987 loss recognized with respect to Business A as determined under § 1.987–5, except that, for purposes of applying § 1.987–5, all assets and liabilities of Business A that are reflected on the books and records of CFC1, a related foreign person described in paragraph (h)(2) of this section, are treated as not having been transferred. Accordingly, DC1's remittance proportion with respect to Business A is 0, and DC1 recognizes no section 987 loss with respect to Business A. DC1's outbound section 987 loss is \$500x, which is the amount of

section 987 loss that DC1 would have recognized under § 1.987–5 without regard to paragraph (h) of this section (\$500x), less the amount of section 987 loss recognized by DC1 under paragraph (h)(3) of this section (\$0). Under paragraph (h)(4) of this section, the \$500x of outbound section 987 loss becomes suspended section 987 loss.

(C) Under paragraph (b)(1)(i) of this section, Business B is a successor suspended loss QBU because, immediately after the termination of the Business A section 987 QBU, the Business A assets are reflected on the books and records of Business B (which is the only set of books and records maintained by CFC1). Business B was an eligible QBU that continued to carry on the same trade or business as Business A did before the contribution, and Business B was owned by CFC1, a member of the same controlled group as DC (which is the original suspended loss QBU owner under paragraph (l)(1) of this section). See § 1.987–1(b)(4)(ii) (providing that, if a corporation is solely engaged in activities that constitute a trade or business, and the corporation maintains only one set of books and records, the activities (but not the corporation) are a qualified business unit). Therefore, under paragraph (b)(1)(ii) of this section, all of Business A's suspended section 987 loss (including the suspended section 987 loss resulting from the termination of Business A) is treated as suspended section 987 loss of DC1 with respect to Business B.

§ 1.987–14 Section 987 hedging transactions.

(a) *Overview*. This section provides rules relating to section 987 hedging transactions. Paragraph (b) of this section provides the definition of a section 987 hedging transaction. Paragraph (c) of this section provides identification requirements for section 987 hedging transactions. Paragraph (d) of this section provides rules relating to the taxation of section 987 hedging transactions. Paragraph (e) of this section provides examples illustrating the rules of this section.

(b) *Section 987 hedging transaction*—(1) *In general*. A section 987 hedging transaction is a financial instrument or a combination or series of financial instruments (a *hedge*), that is entered into by the owner of a section 987 QBU as part of the normal course of the owner's trade or business for the purpose of managing exchange rate risk with respect to all or part of the owner's net investment in the section 987 QBU (the *hedged QBU*), provided that the requirements of paragraph (b)(2) of this

section are met. If only part of a financial instrument (or combination or series of financial instruments) is described in the preceding sentence, that part is treated as a section 987 hedging transaction for purposes of this section.

(2) *Requirements.* A transaction is a section 987 hedging transaction described in paragraph (b)(1) of this section for a taxable year only if the following requirements are met.

(i) *Identification.* The hedge must be identified as a section 987 hedging transaction with respect to the hedged QBU under paragraph (c) of this section. The financial instrument or instruments that comprise the hedge must not be identified as a section 987 hedging transaction with respect to any other section 987 QBU. If only part of a financial instrument (or combination or series of financial instruments) is a section 987 hedging transaction, that part must be clearly identified.

(ii) *Current rate election.* A current rate election must be in effect for the taxable year.

(iii) *Mark-to-market method of accounting.* Section 988 gain or loss of the owner with respect to the hedge must be accounted for under a mark-to-market method of accounting (for example, under section 1256). In addition, if a member of the owner's controlled group is a party to the hedge, any section 988 gain or loss of the controlled group member with respect to the hedge must be accounted for under a mark-to-market method of accounting.

(iv) *Treatment under U.S. generally accepted accounting principles.* Foreign currency gain or loss on the hedge must be properly accounted for under generally accepted accounting principles as a cumulative foreign currency translation adjustment to shareholders' equity.

(v) *Hedge entered into by owner of the hedged QBU.* The hedge must be entered into by the owner of the hedged QBU (and not by a section 987 QBU of the owner). In the case of a hedged QBU that is owned by a member of a consolidated group, the hedge must be entered into by the member that owns the hedged QBU.

(3) *Anti-abuse rule.* If a taxpayer enters into a hedge or a related transaction with a principal purpose of effectively converting section 987 gain or loss into section 988 gain or loss (or another type of income or loss) of the owner or a related party, the hedge is not treated as a section 987 hedging transaction.

(4) *Partial termination of a section 987 hedging transaction.* If only part of

a financial instrument is a section 987 hedging transaction, and a part of the financial instrument is terminated or disposed of, a proportionate part of the section 987 hedging transaction is treated as terminated or disposed of.

(c) *Identification requirements—(1) In general.* The owner of a hedged QBU must clearly identify the hedge as a section 987 hedging transaction with respect to the hedged QBU in its books and records on or before the close of the day on which the owner entered into the hedge. The identification must meet the requirements of § 1.1221–2(f)(4) and must include the following information—

(i) The date on which the hedge is entered into by the owner of the hedged QBU and the date on which the hedge is identified as a section 987 hedging transaction;

(ii) A description of the hedge; and

(iii) Identification of the hedged QBU.

(2) *Inadvertent error.* If a hedge is not identified under paragraph (c)(1) of this section, but the hedge would otherwise qualify as a section 987 hedging transaction with respect to a hedged QBU within the meaning of paragraph (b) of this section and the taxpayer can demonstrate to the satisfaction of the Commissioner that its failure to identify the hedge was due to inadvertent error, the taxpayer may treat the hedge as a section 987 hedging transaction if all of the owner's hedges described in paragraph (b) of this section in all open years are being treated on either original or, if necessary, amended returns as section 987 hedging transactions subject to the rules of paragraph (d) of this section.

(d) *Taxation of section 987 hedging transactions—(1) Hedging gain or loss with respect to a hedged QBU.* If the owner of a section 987 QBU has entered into a section 987 hedging transaction with respect to the section 987 QBU, the owner's hedging gain or loss with respect to the hedged QBU for a taxable year is equal to the gain or loss that the owner would (but for the application of this paragraph (d)) recognize under section 988 with respect to the section 987 hedging transaction in the taxable year under the mark-to-market method of accounting described in paragraph (b)(2)(iii) of this section (including gain or loss that would be recognized in connection with a complete or partial disposition or termination of the section 987 hedging transaction). If only part of a financial instrument is a section 987 hedging transaction, a proportionate part of the gain or loss that would (but for the application of this paragraph (d)) be recognized under section 988 with respect to the financial instrument in

the taxable year is treated as hedging gain or loss with respect to the hedged QBU. See paragraph (d)(3) of this section for rules relating to the determination of hedging gain or loss in the taxable year in which the hedged QBU terminates.

(2) *Adjustment to unrecognized section 987 gain or loss for the taxable year—(i) Hedging loss.* In a taxable year in which an owner has hedging loss with respect to a hedged QBU and has unrecognized section 987 gain for the taxable year with respect to the hedged QBU (as determined under § 1.987–4(d), without regard to this paragraph (d)), the unrecognized section 987 gain for the taxable year is reduced (but not below zero) by the amount of the hedging loss. The amount of hedging loss that reduces unrecognized section 987 gain under this paragraph (d)(2)(i) is not recognized under section 988. Any hedging loss that does not reduce unrecognized section 987 gain under this paragraph (d)(2)(i) is recognized under section 988.

(ii) *Hedging gain.* In a taxable year in which an owner has hedging gain with respect to a hedged QBU and has unrecognized section 987 loss for the taxable year with respect to the hedged QBU (as determined under § 1.987–4(d), without regard to this paragraph (d)), the unrecognized section 987 loss for the taxable year is reduced (but not below zero) by the amount of the hedging gain. The amount of hedging gain that reduces unrecognized section 987 loss under this paragraph (d)(2)(ii) is not recognized under section 988. Any hedging gain that does not reduce unrecognized section 987 loss under this paragraph (d)(2)(ii) is recognized under section 988.

(3) *Termination of a hedged QBU.* If the owner of a section 987 QBU has entered into a section 987 hedging transaction with respect to the section 987 QBU and the hedged QBU terminates, the owner's hedging gain or loss with respect to the hedged QBU for the taxable year is equal to the hedging gain or loss that the owner would (but for the application of this paragraph (d)) recognize with respect to the section 987 hedging transaction under the mark-to-market method of accounting described in paragraph (b)(2)(iii) of this section if the taxable year ended on the termination date. Appropriate adjustments must be made to prevent the section 988 gain or loss from being taken into account again after it is applied to reduce unrecognized section 987 gain or loss under this paragraph (d).

(e) *Examples.* The following examples illustrate the application of this section.

For purposes of the examples, DC1 is a domestic corporation that owns Business A, a section 987 QBU that has the euro as its functional currency. A current rate election is in effect for years 1 and 2, but no other elections are in effect. In year 1, DC1 had net unrecognized section 987 loss (determined under § 1.987–4(b)) of \$1,000x with respect to Business A, and Business A did not make a remittance in year 1. As a result, in year 2, DC1's net accumulated unrecognized section 987 loss from prior taxable years (determined under § 1.987–4(c)) was \$1,000x. In year 2, DC1 had unrecognized section 987 loss for the taxable year (determined under § 1.987–4(d) before the application of paragraph (d) of this section) of \$500x.

(1) *Example 1: Section 987 hedging transaction*—(i) *Facts*. In year 2, DC1 entered into a six-month foreign currency forward contract with an unrelated bank in the normal course of DC1's trade or business for the purpose of managing exchange rate risk with respect to DC1's net investment in Business A. On the same day, DC1 identified the forward contract as a section 987 hedging transaction with respect to Business A under paragraph (c) of this section. Under generally accepted accounting principles, currency gain or loss from the forward contract is accounted for as a cumulative translation adjustment to shareholder's equity. For Federal income tax purposes, DC1 accounts for section 988 gain or loss with respect to the forward contract under a mark-to-market method of accounting. But for the application of paragraph (d) of this section, DC1 would recognize \$400x of section 988 gain with respect to the forward contract.

(ii) *Analysis*—(A) *Qualification of the hedge as a section 987 hedging transaction*. The forward contract qualifies as a section 987 hedging transaction under paragraph (b) of this section because it is a financial instrument that manages DC1's exchange rate risk with respect to Business A (the hedged QBU) as part of the normal course of DC1's trade or business, and the hedge meets the requirements of paragraph (b)(2) of this section.

(B) *Treatment of the section 987 hedging transaction*. But for the application of paragraph (d) of this section, DC1 would recognize \$400x of section 988 gain with respect to the forward contract in year 2. Therefore, DC1 has \$400x of hedging gain in year 2. In year 2, DC1 had unrecognized section 987 loss of \$500x for the taxable year (determined under § 1.987–4(d)

before the application of paragraph (d) of this section). Therefore, under paragraph (d)(2)(ii) of this section, DC1's unrecognized section 987 loss for the taxable year of \$500x is reduced by the \$400x of hedging gain. Accordingly, DC1 has unrecognized section 987 loss of \$100x for the taxable year with respect to Business A. Under § 1.987–4(b), DC1 has \$1,100x of net unrecognized section 987 loss in year 2 (equal to the sum of its net accumulated section 987 loss of \$1,000x from prior taxable years and its unrecognized section 987 loss for the taxable year of \$100x). DC1 does not recognize its hedging gain under section 988 because all of the hedging gain reduces unrecognized section 987 loss for the taxable year.

(2) *Example 2: Excess hedging gain from a section 987 hedging transaction*—(i) *Facts*. The facts are the same as in paragraph (e)(1) of this section (*Example 1*) except that, but for the application of paragraph (d) of this section, DC1 would recognize \$600x of section 988 gain with respect to the forward contract.

(ii) *Analysis*. Under paragraph (d)(2)(ii) of this section, DC1's unrecognized section 987 loss for the taxable year of \$500x is reduced by the hedging gain, but not below zero. Accordingly, \$500x of the hedging gain is applied to reduce DC1's unrecognized section 987 loss for the taxable year to zero. DC1 has \$1,000x of net unrecognized section 987 loss in year 2 under § 1.987–4(b) (equal to its net accumulated section 987 loss of \$1,000x from prior taxable years). The \$500x hedging gain that reduces unrecognized section 987 loss for the taxable year is not recognized under section 988. The excess amount of hedging gain (\$100x) is recognized by DC1 under section 988.

§ 1.987–15 Applicability date.

(a) *Applicability date of the section 987 regulations*—(1) *In general*. Except as provided in this section, the section 987 regulations apply to taxable years beginning after December 31, 2024.

(2) *Applicability date for a terminating QBU*. The section 987 regulations apply to the owner of a terminating QBU immediately before the section 987 QBU terminates, but only with respect to the section 987 QBU, any successor deferral QBUs or successor suspended loss QBUs (in their capacity as such), and any net unrecognized section 987 gain or loss, deferred section 987 gain or loss, or suspended section 987 loss with respect thereto. See § 1.987–1(h) for the definition of a terminating QBU.

(b) *Application of the section 987 regulations to taxable years beginning on or before December 31, 2024, and ending after November 9, 2023*. A taxpayer (including a taxpayer that has applied the 2016 and 2019 section 987 regulations to a prior taxable year under paragraph (c) of this section) may choose to apply the section 987 regulations to a taxable year beginning on or before December 31, 2024, and ending after November 9, 2023, provided the taxpayer and each member of its consolidated group and section 987 electing group:

(1) Consistently apply the section 987 regulations in their entirety to the taxable year and all subsequent taxable years beginning on or before December 31, 2024; and

(2) Apply the section 987 regulations on their original timely filed (including extensions) returns for the first taxable year to which the taxpayer chooses to apply the section 987 regulations.

(c) *Application of the 2016 and 2019 section 987 regulations*—(1) *In general*. A taxpayer may choose to apply the 2016 and 2019 section 987 regulations to a taxable year beginning after December 7, 2016, and beginning on or before December 31, 2024, provided the taxpayer and each member of its consolidated group and section 987 electing group:

(i) First apply the 2016 and 2019 section 987 regulations to a taxable year ending before November 9, 2023;

(ii) Consistently apply the 2016 and 2019 section 987 regulations in their entirety to all section 987 QBUs (within the meaning of prior § 1.987–1(b)(2)) directly or indirectly owned (within the meaning of prior § 1.987–1(b)(4)) by the taxpayer and each member of its consolidated group and section 987 electing group on the transition date for that taxable year and all subsequent taxable years before the taxable year in which the taxpayer and each member of its consolidated group and section 987 electing group apply the section 987 regulations pursuant to paragraph (a) or (b) of this section; and

(iii) Either—

(A) First applied the 2016 and 2019 section 987 regulations on their returns filed before November 9, 2023; or

(B) First apply the 2016 and 2019 section 987 regulations on their returns filed on or after November 9, 2023 and apply § 1.987–10 in lieu of prior § 1.987–10.

(2) *Application to section 987 QBUs not owned on the transition date*. For any taxable year in which a taxpayer applies the 2016 and 2019 section 987 regulations pursuant to paragraph (c)(1) of this section, the taxpayer may choose

to apply the 2016 and 2019 section 987 regulations to any section 987 QBU (within the meaning of prior § 1.987–1(b)(2)) that the taxpayer did not directly or indirectly own (within the meaning of prior § 1.987–1(b)(4)) on the transition date, provided the taxpayer applies the 2016 and 2019 section 987 regulations consistently to that QBU for that taxable year and all subsequent taxable years before the taxable year in which the taxpayer applies the section 987 regulations pursuant to paragraph (a) or (b) of this section and the taxpayer either—

(i) First applied the 2016 and 2019 section 987 regulations to the section 987 QBU on its return filed before November 9, 2023; or

(ii) First applies the 2016 and 2019 section 987 regulations to the section 987 QBU on its return filed on or after November 9, 2023, and applies § 1.987–10 in lieu of prior § 1.987–10.

(3) *Modifications of defined terms for purposes of this paragraph (c).* Solely for purposes of this paragraph (c)—

(i) *Application of § 1.987–10 in lieu of prior § 1.987–10.* For any taxpayer to which paragraph (c)(1)(iii)(B) or (c)(2)(ii) of this section applies, the term *2016 and 2019 section 987 regulations* includes § 1.987–10 and not prior § 1.987–10.

(ii) *Partnerships not included in section 987 electing group.* The term *section 987 electing group* does not include foreign partnerships.

(iii) *Transition date.* The term *transition date* has the meaning provided in prior § 1.987–10.

(d) *Prior § 1.987–12.* For the applicability dates of prior § 1.987–12, see prior § 1.987–12(j). Prior § 1.987–12 applies through the end of the taxable year immediately preceding the first taxable year in which a taxpayer applies § 1.987–12 pursuant to paragraph (a) or (b) of this section.

■ **Par. 9.** Section 1.988–1 is amended by:

■ a. Removing and reserving paragraph (a)(4);

■ b. Revising paragraph (a)(10)(i);

■ c. Removing the language “1988” in the fourth sentence of paragraph (a)(1)(iii) and adding the language “2025” in its place; and

■ d. Revising paragraph (i).

The revisions read as follows:

§ 1.988–1 Certain definitions and special rules.

(a) * * *

(10) * * *

(i) *In general.* Except as provided in paragraph (a)(10)(ii) of this section, disregarded transactions between or among the taxpayer and/or qualified

business units of that taxpayer (“intra-taxpayer transactions”) are not section 988 transactions. See section 987 and the regulations thereunder.

* * * * *

(i) *Applicability date—(1) In general.* Except as otherwise provided in this section, this section applies to taxable years beginning after December 31, 1986. Thus, except as otherwise provided in this section, any payments made or received with respect to a section 988 transaction in taxable years beginning after December 31, 1986, are subject to this section.

(2) *Paragraph (a)(10)(ii).* Generally, paragraph (a)(10)(ii) of this section applies to taxable years beginning after December 31, 2024. However, if pursuant to § 1.987–15(b), a taxpayer chooses to apply §§ 1.987–1 through 1.987–15 to a taxable year before the first taxable year described in § 1.987–15(a)(1), then paragraph (a)(10)(ii) of this section applies to that taxable year. See § 1.988–1(i), as contained in 26 CFR in part 1 in effect on April 1, 2024, for a prior applicability date for paragraph (a)(10)(ii) of this section.

■ **Par. 10.** Section 1.988–4 is amended by revising paragraph (b)(2) to read as follows:

§ 1.988–4 Source of gain or loss realized on a section 988 transfer.

* * * * *

(b) * * *

(2) *Proper reflection on the books of the taxpayer or qualified business unit—(i) In general.* For purposes of paragraph (b)(1) of this section, the principles of § 1.987–2(b) apply in determining whether an asset, liability, or item of income, gain, deduction, or loss is reflected on the books and records of a qualified business unit.

(ii) *Applicability date.* Generally, paragraph (b)(2)(i) of this section applies to taxable years beginning after December 31, 2024. However, if pursuant to § 1.987–15(b), a taxpayer chooses to apply §§ 1.987–1 through 1.987–15 to a taxable year before the first taxable year described in § 1.987–15(a)(1), then paragraph (b)(2)(i) of this section applies to that taxable year.

* * * * *

■ **Par. 11.** Section 1.989(a)–1 is amended by:

■ a. Removing and reserving paragraph (b)(2)(i)(C).

■ b. Revising paragraphs (b)(4), (d)(3) and (4).

The revisions read as follows:

§ 1.989(a)–1 Definition of a qualified business unit.

* * * * *

(b) * * *

(4) *Applicability date.* Generally, paragraph (b)(2)(i) of this section applies to taxable years beginning after December 31, 2024. However, if pursuant to § 1.987–15(b), a taxpayer chooses to apply §§ 1.987–1 through 1.987–15 to a taxable year before the first taxable year described in § 1.987–15(a)(1), then paragraph (b)(2)(i) of this section applies to that taxable year. See § 1.989(a)–1(b)(4), as contained in 26 CFR in part 1 in effect on April 1, 2024, for a prior applicability date for paragraph (b)(2)(i) of this section.

* * * * *

(d) * * *

(3) *Proper reflection on the books of the taxpayer or qualified business unit.* The principles of § 1.987–2(b) apply in determining whether an asset, liability, or item of income, gain, deduction, or loss is reflected on the books of a qualified business unit (and therefore is attributable to such unit).

(4) *Applicability date.* Generally, paragraph (d)(3) of this section applies to taxable years beginning after December 31, 2024. However, if pursuant to § 1.987–15(b), a taxpayer applies §§ 1.987–1 through 1.987–15 to a taxable year before the first taxable year described in § 1.987–15(a)(1), then paragraph (d)(3) of this section applies to that taxable year. See § 1.989(a)–1(d)(4), as contained in 26 CFR in part 1 in effect on April 1, 2024, for a prior applicability date for paragraph (d)(3) of this section.

* * * * *

■ **Par. 12.** Section 1.1502–13 is amended by revising paragraph (j)(9) and adding paragraphs (j)(10) and (l)(7) to read as follows:

§ 1.1502–13 Intercompany transactions.

* * * * *

(j) * * *

(9) *Section 987 QBUs.* No intercompany transaction is attributable to a section 987 QBU (within the meaning of § 1.987–2(b)). That is, in order to produce single entity treatment, an intercompany transaction that otherwise would involve the section 987 QBU(s) of one or more members is treated instead as occurring directly between the members (without the involvement of any section 987 QBUs), and transfers are deemed to take place between each section 987 QBU and its owner (see § 1.987–2(c)(2)(ii)). For example, if a member (M1) lends money to the section 987 QBU of another member (M2), this intercompany transaction is treated as a loan from M1 to M2 and a contribution from M2 to its section 987 QBU.

(10) *Examples.* The operating rules of this paragraph (j) are illustrated generally throughout this section, and by the following examples.

(i) *Example 1. Intercompany sale followed by section 351 transfer to member—(A) Facts.* S holds land for investment with a basis of \$70. On January 1 of Year 1, S sells the land to M for \$100. M also holds the land for investment. On July 1 of Year 3, M transfers the land to B in exchange for all of B's stock in a transaction to which section 351 applies. Under section 358, M's basis in the B stock is \$100. B holds the land for sale to customers in the ordinary course of business and, under section 362(b), B's basis in the land is \$100. On December 1 of Year 5, M sells 20% of the B stock to X for \$22. In an unrelated transaction on July 1 of Year 8, B sells 20% of the land for \$22.

(B) *Definitions.* Under paragraph (b)(1) of this section, S's sale of the land to M and M's transfer of the land to B are both intercompany transactions. S is the selling member and M is the buying member in the first intercompany transaction, and M is the selling member and B is the buying member in the second intercompany transaction. M has no intercompany items under paragraph (b)(2) of this section. Because B acquired the land in an intercompany transaction, B's items from the land are corresponding items to be taken into account under this section. Under the successor asset rule of paragraph (j)(1) of this section, references to the land include references to M's B stock. Under the successor person rule of paragraph (j)(2) of this section, references to M include references to B with respect to the land.

(C) *Timing and attributes resulting from the stock sale.* Under paragraph (c)(3) of this section, M is treated as owning and selling B's stock for purposes of the matching rule even though, as divisions, M could not own and sell stock in B. Under paragraph (j)(3) of this section, both M's B stock and B's land can cause S's intercompany gain to be taken into account under the matching rule. Thus, S takes \$6 of its gain into account in Year 5 to reflect the \$6 difference between M's \$2 gain taken into account from its sale of B stock and the \$8 recomputed gain. Under paragraph (j)(4) of this section, the attributes of this gain are determined by treating S, M, and B as divisions of a single corporation. Under paragraph (c)(1) of this section, S's \$6 gain and M's \$2 gain are treated as long-term capital gain. The gain would be capital on a separate entity basis (assuming that section 341 does not apply), and this treatment is not

inconsistent with treating S, M, and B as divisions of a single corporation because the stock sale and subsequent land sale are unrelated transactions and B remains a member following the sale.

(D) *Timing and attributes resulting from the land sale.* Under paragraph (j)(3) of this section, S takes \$6 of its gain into account in Year 8 under the matching rule to reflect the \$6 difference between B's \$2 gain taken into account from its sale of an interest in the land and the \$8 recomputed gain. Under paragraph (j)(4) of this section, the attributes of this gain are determined by treating S, M, and B as divisions of a single corporation and taking into account the activities of S, M, and B with respect to the land. Thus, both S's gain and B's gain might be ordinary income as a result of B's activities. (If B subsequently sells the balance of the land, S's gain taken into account is limited to its remaining \$18 of intercompany gain.)

(E) *Sale of successor stock resulting in deconsolidation.* The facts are the same as in paragraph (j)(10)(i)(A) of this section (*Example 1*), except that M sells 60% of the B stock to X for \$66 on December 1 of Year 5 and B becomes a nonmember. Under the matching rule, M's sale of B stock results in \$18 of S's gain being taken into account (to reflect the difference between M's \$6 gain taken into account and the \$24 recomputed gain). Under the acceleration rule, however, the entire \$30 gain is taken into account (to reflect B becoming a nonmember, because its basis in the land reflects M's \$100 cost basis from the prior intercompany transaction). Under paragraph (j)(4) of this section, the attributes of S's gain are determined by treating S, M, and B as divisions of a single corporation. Because M's cost basis in the land will be reflected by B as a nonmember, all of S's gain is treated as from the land (rather than a portion being from B's stock), and B's activities with respect to the land might therefore result in S's gain being ordinary income.

(ii) *Example 2. Intercompany sale of member stock followed by recapitalization—(A) Facts.* Before becoming a member of the P group, S owns P stock with a basis of \$70. On January 1 of Year 1, P buys all of S's stock. On July 1 of Year 3, S sells the P stock to M for \$100. On December 1 of Year 5, P acquires M's original P stock in exchange for new P stock in a recapitalization described in section 368(a)(1)(E).

(B) *Timing and attributes.* Although P's basis in the stock acquired from M is eliminated under paragraph (f)(4) of this section, the new P stock received by

M is exchanged basis property (within the meaning of section 7701(a)(44)) having a basis under section 358 equal to M's basis in the original P stock. Under the successor asset rule of paragraph (j)(1) of this section, references to M's original P stock include references to M's new P stock. Because it is still possible to take S's intercompany item into account under the matching rule with respect to the successor asset, S's gain is not taken into account under the acceleration rule as a result of the basis elimination under paragraph (f)(4) of this section. Instead, the gain is taken into account based on subsequent events with respect to M's new P stock (for example, a subsequent distribution or redemption of the new stock).

(iii) *Example 3. Back-to-back intercompany transactions—matching—(A) Facts.* S holds land for investment with a basis of \$70. On January 1 of Year 1, S sells the land to M for \$90. M also holds the land for investment. On July 1 of Year 3, M sells the land for \$100 to B, and B holds the land for sale to customers in the ordinary course of business. During Year 5, B sells all of the land to customers for \$105.

(B) *Timing.* Under paragraph (b)(1) of this section, S's sale of the land to M and M's sale of the land to B are both intercompany transactions. S is the selling member and M is the buying member in the first intercompany transaction, and M is the selling member and B is the buying member in the second intercompany transaction. Under paragraph (j)(4) of this section, S, M and B are treated as divisions of a single corporation for purposes of determining the timing of their items from the intercompany transactions. See also paragraph (j)(2) of this section (B is treated as a successor to M for purposes of taking S's intercompany gain into account). Thus, S's \$20 gain and M's \$10 gain are both taken into account in Year 5 to reflect the difference between B's \$5 gain taken into account with respect to the land and the \$35 recomputed gain (the gain that B would have taken into account if the intercompany sales had been transfers between divisions of a single corporation, and B succeeded to S's \$70 basis).

(C) *Attributes.* Under paragraph (j)(4) of this section, the attributes of the intercompany items and corresponding items of S, M, and B are also determined by treating S, M, and B as divisions of a single corporation. For example, the attributes of S's and M's intercompany items are determined by taking B's activities into account.

(iv) *Example 4. Back-to-back intercompany transactions—acceleration*—(A) *Facts*. During Year 1, S performs services for M in exchange for \$10 from M. S incurs \$8 of employee expenses. M capitalizes the \$10 cost of S's services under section 263 as part of M's cost to acquire real property from X. Under its separate entity method of accounting, S would take its income and expenses into account in Year 1. M holds the real property for investment and, on July 1 of Year 5, M sells it to B at a gain. B also holds the real property for investment. On December 1 of Year 8, while B still owns the real property, P sells all of M's stock to X and M becomes a nonmember.

(B) *M's items*. M takes its gain into account immediately before it becomes a nonmember. Because the real property stays in the group, the acceleration rule redetermines the attributes of M's gain under the principles of the matching rule as if B sold the real property to an affiliated corporation that is not a member of the group for a cash payment equal to B's adjusted basis in the real property, and S, M, and B were divisions of a single corporation. Thus, M's gain is capital gain.

(C) *S's items*. Under paragraph (b)(2)(ii) of this section, S includes the \$8 of expenses in determining its \$2 intercompany income. In Year 1, S takes into account \$8 of income and \$8 of expenses. Under paragraph (j)(4) of this section, appropriate adjustments must be made to treat both S's performance of services for M and M's sale to B as occurring between divisions of a single corporation. Thus, S's \$2 of intercompany income is not taken into account as a result of M becoming a nonmember, but instead will be taken into account based on subsequent events (e.g., under the matching rule based on B's sale of the real property to a nonmember, or under the acceleration rule based on P's sale of the stock of S or B to a nonmember). See the successor person rules of paragraph (j)(2) of this section (B is treated as a successor to M for purposes of taking S's intercompany income into account).

(D) *Sale of S's stock*. The facts are the same as in paragraph (j)(9)(iv)(A) of this section (*Example 4*), except that P sells all of S's stock (rather than M's stock) and S becomes a nonmember on July 1 of Year 5. S's remaining \$2 of intercompany income is taken into account immediately before S becomes a nonmember. Because S's intercompany income is not from an intercompany sale, exchange, or distribution of property, the attributes of the intercompany income are determined on a separate entity basis.

Thus, S's \$2 of intercompany income is ordinary income. M does not take any of its intercompany gain into account as a result of S becoming a nonmember.

(E) *Intercompany income followed by intercompany loss*. The facts are the same as in paragraph (j)(9)(iv)(A) of this section (*Example 4*), except that M sells the real property to B at a \$1 loss (rather than a gain). M takes its \$1 loss into account under the acceleration rule immediately before M becomes a nonmember. But see § 1.267(f)-1 (which might further defer M's loss if M and B remain in a controlled group relationship after M becomes a nonmember). Under paragraph (j)(4) of this section appropriate adjustments must be made to treat the group as if both intercompany transactions occurred between divisions of a single corporation. Accordingly, P's sale of M stock also results in S taking into account \$1 of intercompany income as capital gain to offset M's \$1 of corresponding capital loss. The remaining \$1 of S's intercompany income is taken into account based on subsequent events.

(v) *Example 5. Successor group*—(A) *Facts*. On January 1 of Year 1, B borrows \$100 from S in return for B's note providing for \$10 of interest annually at the end of each year, and repayment of \$100 at the end of Year 20. As of January 1 of Year 3, B has paid the interest accruing under the note. On that date, X acquires all of P's stock and the former P group members become members of the X consolidated group.

(B) *Successor*. Under paragraph (j)(5) of this section, although B's note ceases to be an intercompany obligation of the P group, the note is not treated as satisfied and reissued under paragraph (g) of this section as a result of X's acquisition of P stock. Instead, the X consolidated group succeeds to the treatment of the P group for purposes of paragraph (g) of this section, and B's note is treated as an intercompany obligation of the X consolidated group.

(vi) *Example 6. Liquidation—80% distributee*—(A) *Facts*. X has had preferred stock described in section 1504(a)(4) outstanding for several years. On January 1 of Year 1, S buys all of X's common stock for \$60, and B buys all of X's preferred stock for \$40. X's assets have a \$0 basis and \$100 value. On July 1 of Year 3, X distributes all of its assets to S and B in a complete liquidation. Under § 1.1502-34, section 332 applies to both S and B. Under section 337, X has no gain or loss from its liquidating distribution to S. Under sections 336 and 337(c), X has a \$40 gain from its liquidating distribution to B. B has a \$40 basis under section 334(a) in the assets

received from X, and S has a \$0 basis under section 334(b) in the assets received from X.

(B) *Intercompany items from the liquidation*. Under the matching rule, X's \$40 gain from its liquidating distribution to B is not taken into account under this section as a result of the liquidation (and therefore is not yet reflected under §§ 1.1502-32 and 1.1502-33). Under the successor person rule of paragraph (j)(2)(i) of this section, S and B are both successors to X. Under section 337(c), X recognizes gain or loss only with respect to the assets distributed to B. Under paragraph (j)(2)(ii) of this section, to be consistent with the purposes of this section, S succeeds to X's \$40 intercompany gain. The gain will be taken into account by S under the matching and acceleration rules of this section based on subsequent events. (The allocation of the intercompany gain to S does not govern the allocation of any other attributes.)

(vi) *Example 7. Liquidation—no 80% distributee*—(A) *Facts*. X has only common stock outstanding. On January 1 of Year 1, S buys 60% of X's stock for \$60, and B buys 40% of X's stock for \$40. X's assets have a \$0 basis and \$100 value. On July 1 of Year 3, X distributes all of its assets to S and B in a complete liquidation. Under § 1.1502-34, section 332 applies to both S and B. Under sections 336 and 337(c), X has a \$100 gain from its liquidating distributions to S and B. Under section 334(b), S has a \$60 basis in the assets received from X and B has a \$40 basis in the assets received from X.

(B) *Intercompany items from the liquidation*. Under the matching rule, X's \$100 intercompany gain from its liquidating distributions to S and B is not taken into account under this section as a result of the liquidation (and therefore is not yet reflected under §§ 1.1502-32 and 1.1502-33). Under the successor person rule of paragraph (j)(2)(i) of this section, S and B are both successors to X. Under paragraph (j)(2)(ii) of this section, to be consistent with the purposes of this section, S succeeds to X's \$40 intercompany gain with respect to the assets distributed to B, and B succeeds to X's \$60 intercompany gain with respect to the assets distributed to S. The gain will be taken into account by S and B under the matching and acceleration rules of this section based on subsequent events. (The allocation of the intercompany gain does not govern the allocation of any other attributes.)

(viii) *Example 8: Loan by section 987 QBU*—(A) *Facts*. S owns all the interests in DE1, a disregarded entity operating a

business that is a section 987 QBU (S QBU) whose functional currency is the euro. S has net unrecognized section 987 gain with respect to S QBU. In year 1, S QBU lends €100 to B with interest due annually. B makes interest payments on the loan to S QBU in years 1 through 3. In year 3, B repays the loan and recognizes section 988 loss of \$12 on the loan repayment. All payments are made in euros, and B recognizes no section 988 gain or loss on the euros it uses to pay the interest and principal. B is never insolvent within the meaning of section 108(d)(3). Other than with respect to the loan, there are no transfers between S and S QBU during years 1 through 3, and neither S nor B had any other foreign currency gain or loss. Neither S nor B has made an election under section 988 or the section 988 regulations.

(B) *Analysis—(1) Loan.* Under paragraph (j)(9) of this section, the loan is treated as a transfer from S QBU to S and a loan directly between S and B. Specifically, S is treated as receiving a transfer of €100 from S QBU in year 1; S is then treated as lending €100 directly to B. For purposes of § 1.987–2, the loan is attributable to S, not to S QBU. As an intercompany loan, S's loan to B is subject to the rules of this section. Because there is a remittance from S QBU to S in year 1, S recognizes section 987 gain under § 1.987–5.

(2) *Interest payments.* While the loan is outstanding, each of B's interest payments to S QBU is treated as an interest payment from B to S, followed by a transfer from S to S QBU. Under the matching rule in paragraph (c) of this section, S's intercompany interest income offsets B's corresponding interest expense. See paragraph (g)(7)(ii)(A)(2) of this section (*Example 1*). Since the functional currency of both S and B is the dollar, if B recognizes any section 988 gain or loss on the interest payments, S will recognize an offsetting amount of section 988 loss or gain. Because the only transfer between S and S QBU in year 2 is from S to S QBU, there is no remittance from S QBU to S and S does not recognize section 987 gain under § 1.987–5.

(3) *Repayment.* Upon the year 3 repayment of the loan, B is treated as repaying €100 to S, and S is treated as transferring €100 to S QBU. Since the functional currency of both S and B is the dollar, and B recognizes section 988 loss of \$12 on the loan repayment, S will recognize an offsetting section 988 gain of \$12. Because the only transfers between S and S QBU in year 3 are from S to S QBU, there is no remittance from

S QBU to S and S does not recognize section 987 gain under § 1.987–5.

(4) *Summary.* Overall, the group's taxable income includes S's section 987 gain in year 1 (the section 988 inclusions offset). This result is consistent with the treatment of a single corporation that borrows from its section 987 QBU.

(C) *Loan sold to non-member.* The facts are the same as in paragraph (j)(10)(viii)(A) of this section, except that, in year 3, S QBU sells the loan to unrelated X for €90, reflecting an increase in prevailing market interest rates. Up until the sale, the analysis is the same as in paragraphs (j)(10)(viii)(B)(1) and (2) of this section. Because the loan is attributable to S (see paragraphs (j)(9) and (j)(10)(viii)(B)(1) of this section), the sale is treated as a sale by S. Under paragraph (g)(3) of this section, immediately before the sale, B is deemed to satisfy and reissue the loan for its fair market value of €90. As a result, B takes into account cancellation of indebtedness income, and S takes into account an offsetting amount of ordinary loss. See paragraph (g)(7)(ii) (*Example 2*) of this section. If there is currency gain or loss, S and B take into account offsetting amounts of gain and loss under section 988 (subject to the limitation of § 1.988–2(b)(8)). Because S has a basis of €90 in the new loan, S recognizes no gain or loss on the sale to X. S is then treated as transferring the €90 to S QBU.

(D) *Party becomes a nonmember.* The facts are the same as in paragraph (j)(10)(viii)(A) of this section, except that, in year 3, B becomes a nonmember. Up until B leaves the group, the analysis is the same as in paragraphs (j)(10)(viii)(B)(1) and (2) of this section. Immediately before B becomes a nonmember, B is deemed to satisfy and reissue the loan for its fair market value under paragraph (g)(3) of this section, with the same consequences as described in paragraph (j)(10)(viii)(C) of this section. When B becomes a nonmember, the loan (which is no longer an intercompany obligation) ceases to be subject to paragraph (j)(9) of this section. If the loan is attributable to S QBU under § 1.987–2, S is treated as transferring the loan to S QBU.

(ix) *Example 9: Sale of property by section 987 QBU—(A) Facts.* M1 owns all the interests in DE1, a disregarded entity operating a business that is a section 987 QBU (M1 QBU) whose functional currency is the euro. M1 has net unrecognized section 987 gain with respect to M1 QBU. M1 QBU sells property to M2 for €100 in year 1.

(B) *Analysis—(1) In general.* Under paragraph (j)(9) of this section, the sale of property is treated as a transfer of the property from M1 QBU to M1, followed by an exchange of the property for €100 directly between M1 and M2, and a transfer of the €100 from M1 to M1 QBU.

(2) *Distribution.* M1 QBU is treated as transferring the property to M1.

(3) *Exchange.* M1 is then treated as selling the property to M2 for €100. M1 takes into account its intercompany gain or loss on the property under the rules of this section. M2 recognizes intercompany section 988 gain or loss on its exchange of €100 for the property. See paragraph (b)(1)(iii) of this section for property exchanges between members.

(4) *Contribution.* Finally, M1 is treated as transferring the €100 to M1 QBU. Because M1's basis in the €100 equals its fair market value, M1 has a corresponding section 988 gain or loss of zero upon the contribution. See § 1.988–1(a)(10). Both the transfer of the property from M1 QBU to M1 and the transfer of the €100 from M1 to M1 QBU are taken into account in determining whether there is a remittance from M1 QBU to M1 in year 1 and whether M1 recognizes section 987 gain under § 1.987–5.

(5) *Summary.* Overall, in year 1, M1 may take into account section 987 gain if the transfers between M1 and M1 QBU result in a remittance, and M2 takes into account section 988 gain or loss on the €100. This result is consistent with the treatment of a single corporation that purchases property from its section 987 QBU.

(I) * * *

(7) *Applicability date.* Generally, paragraph (j)(9) of this section applies to taxable years beginning after December 31, 2024, for which the original Federal income tax return is due (without extensions) after December 11, 2024. However, if pursuant to § 1.987–15(b), a taxpayer chooses to apply §§ 1.987–1 through 1.987–15 to a taxable year before the first taxable year described in § 1.987–15(a)(1), then paragraph (j)(9) of this section applies to that taxable year and subsequent years.

Douglas W. O'Donnell,
Deputy Commissioner.

Approved: November 20, 2024

Aviva R. Aron-Dine,
Deputy Assistant Secretary of the Treasury
(Tax Policy).

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Department of the Interior

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25 CFR Part 1000

Self-Governance PROGRESS Act Regulations; Final Rule

DEPARTMENT OF THE INTERIOR**Bureau of Indian Affairs****25 CFR Part 1000**

[Docket No. BIA–2024–0001; 256A2100DD/AAK001030/A0A501010.999900]

RIN 1076–AF62

Self-Governance PROGRESS Act Regulations

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final rule.

SUMMARY: The U.S. Department of the Interior (Department), Office of the Assistant Secretary for Indian Affairs, is issuing revisions to the regulations that implement Tribal Self-Governance, as authorized by title IV of the Indian Self Determination and Education Assistance Act. This final rule has been negotiated among representatives of Self-Governance and non-Self Governance Tribes and the Department. **DATES:** This final rule is effective on January 10, 2025.

- **Information Collection**

Requirements: If you wish to comment on the information collection requirements in this final 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 final rule between 30 and 60 days after publication in the **Federal Register**. Therefore, comments should be submitted to OMB (see “Information Collection Requirements” section below under **ADDRESSES**) by January 10, 2025.

ADDRESSES: The Department has established a docket for the information collection action associated with this rule available at <https://www.regulations.gov> and by searching for Docket No. “BIA–2024–0001” or RIN “1076–AF62.”

- **Information Collection**

Requirements: Written comments and recommendations for the information collection request (ICR) should be sent within 30 days of publication of this notice to the OMB through https://www.reginfo.gov/public/do/PRA/ICRPublicCommentRequest?ref_nbr=202410-1076-001 or by visiting <https://www.reginfo.gov/public/do/PRAMain> and selecting “Currently under Review—Open for Public Comments” and then scrolling down to the “Department of the Interior.” Please provide a copy of your comments to the Department by email to consultation@bia.gov with “OMB Control Number 1076–0143” in the email’s subject line.

FOR FURTHER INFORMATION CONTACT:

Oliver Whaley, Director, Office of Regulatory Affairs and Collaborative Action (RACA), Office of the Assistant Secretary—Indian Affairs, Department of the Interior, telephone (202) 738–6065, RACA@bia.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.

SUPPLEMENTARY INFORMATION: This final rule is published in exercise of authority delegated by the Secretary of the Interior (Secretary) to the Assistant Secretary—Indian Affairs (Assistant Secretary; AS–IA) by 209 Department Manual 8 (209 DM 8).

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M. Clarity of This Regulation

I. Background**A. Statutory Authority**

On October 21, 2020, the Practical Reforms & Other Goals to Reinforce the Effectiveness of Self Governance & Self Determination for Indian Tribes Act (PROGRESS Act) was signed into law. See, Public Law 116–180. The PROGRESS Act amends subchapter I of the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. 5301, which addresses Indian Self-Determination, and subchapter IV of the ISDEAA, which addresses the Department’s Tribal Self-Governance Program.

Section 413 of Public Law 116–180, 25 U.S.C. 5363 directs the Secretary to promulgate regulations using the negotiated rulemaking process to carry out subchapter IV of the ISDEAA, the Department’s Tribal Self-Governance Program. Section 413(a)(3) of Public Law 116–180 establishes expiration of authority for the promulgation of such regulations. The Self-Governance PROGRESS Act Negotiated Rulemaking Committee (“Committee”) was established and commenced with the negotiated rulemaking process for this final rule. On April 20, 2023, the Committee’s authority to promulgate regulations to meet the directive of the PROGRESS Act expired under section 413(a)(3) of the same statute, thus leaving the Committee with no authority to continue the negotiated rulemaking for this rule. Congress, however, on September 30, 2023, extended the Committee’s authority until December 21, 2024. Public Law 118–15 at section 2102.

B. Executive Summary

This final rule updates the regulations implementing Tribal Self-Governance at the Department. While the final rule does incorporate terms and processes that may be common to self-governance at the Department of Health and Human Services (HHS) authorized by title V of the ISDEAA, and the Department of Transportation (DOT) authorized by 23 U.S.C. 207, it is not the intent of this final rule to define or regulate any term or process that is applicable to HHS or DOT, even where such terms or processes are common between the agencies. The final rule should not be construed to bind HHS or DOT to any particular interpretation of a term or process.

Since the Department promulgated its title IV regulations in 2000, and Indian

Health Service (IHS) promulgated its title V regulations in 2005, the agencies implement their ISDEAA self-governance programs differently due to the unique nature of the Programs, Services, Functions, and Activities (PSFA) they manage, the needs of their beneficiaries, and intentional policy choices. In many instances, this rule maintains those implementations and procedural differences because the Department is honoring the Committee's preference for maintaining past procedures, even where those procedures may differ from other agencies. Although the ISDEAA provides such discretion to the Secretary, given the longevity of these practices, the Committee's preference to maintain them, and the Department's desire not to unsettle expectations, the final rule continues some procedures that may differ from IHS.

This final rule has been negotiated by representatives of Self-Governance and non-Self-Governance Tribes, and the Department (the "Committee"). The effect of the final rule is to transfer to participating Tribes control of, funding for, and decision making concerning certain Federal programs, consistent with updates contained in the PROGRESS Act. This final rule will have a negligible cost burden for Tribes currently participating in Self-Governance, some startup costs for Tribes not currently participating in Self-Governance, and some negligible new costs to the Federal Government.

C. Negotiated Rulemaking Process

The PROGRESS Act directed the Secretary to adapt negotiated rulemaking procedures regarding the unique context of self-governance and the government-to-government relationship between the United States and Indian Tribes. The PROGRESS Act also called for a negotiated rulemaking Committee to be established under 5 U.S.C. 565, with membership comprised only of representatives of Federal agencies and Tribal governments, with the Office of Self-Governance (OSG) serving as the lead agency for the Department. The Secretary charged the Committee with developing proposed regulations for the Secretary's implementation of the PROGRESS Act's provisions regarding the Department's Self-Governance Program.

The Department published a **Federal Register** notice on February 1, 2021, 86 FR 7656, announcing the intent to establish a committee and soliciting nominations for membership on the Committee. The Department published a **Federal Register** notice on May 18, 2022, 87 FR 30256, announcing the

formation of the Committee and identifying 14 Tribal representatives, and 12 Federal representatives.

To fulfill the requirements for negotiated rulemaking and the Federal Advisory Committee Act, representatives reflect those currently participating in the Tribal Self-Governance Program and those that are not currently participating in, but are interested in, the Tribal Self-Governance Program. Additionally, Tribal representatives reflect a balance in terms of geographical location and size of the Tribe. Membership consists only of representatives of Federal and Tribal governments, with OSG serving as the lead agency.

The Committee met fifteen times to negotiate the proposed regulations, resulting in the proposed rule that was published on July 15, 2024, 89 FR 57524. The Committee members and technical advisors organized themselves into two subcommittees and used the scheduled subcommittee meetings to develop draft materials and exchange information. The Committee's meeting minutes, and any materials approved by the full Committee, were made a part of the official record.

After the proposed rule was published on July 15, 2024, 89 FR 57524, the Committee received written and verbal comments through consultation, which are summarized below. After consultation was completed, the Drafting Subcommittee of the Committee, met on multiple occasions to review comments received, discuss options to address interagency feedback, and attempt to reach consensus on recommendations to the Committee. The Committee met an additional two times (for a total of 17 meetings) and reached consensus in response to many of the issues as outlined in Section III, "Summary of Comments Received."

II. Public Engagement and Consultation

The Department hosted three in-person consultation sessions on July 15, 17, and 19, and one virtual Tribal consultation session on July 22, on its proposed rule implementing the PROGRESS Act. Each session lasted approximately 2 hours. The Department received 492 individualized comments¹ from 27 Tribes; 8 national and inter-Tribal organizations and Tribal entities;

¹ An individualized comment is a comment on a discrete issue or concern, raised by a commentator in response to the proposed rule, whether in writing or orally. For example, a written comment letter could have addressed several different issues or concerns. Also, during the consultations and listening session, a commentator could have orally discussed several different issues or concerns in their address.

and national law firms representing multiple Tribes and Tribal consortia exercising Tribal self-governance for their respective communities. Both the verbal and written comments support the Tribal positions on the non-consensus issues, detailed in the Committee Report dated April 12, 2024 (Committee Report). The main themes addressed in the comments were:

- The PROGRESS Act's rules of construction;
- What contents compacts and funding agreements should include;
- How inherent federal functions ("IFFs") should be negotiated and determined;
- Tribal authority to make final determinations under the Nation Environmental Policy Act ("NEPA"), the National Historic Preservation Act ("NHPA"), and other related laws;
- How contract support costs ("CSCs") are calculated for non-BIA programs;
- What types of appeals are available to Indian Tribes participating in self-governance under title IV;
- Suggested language and deletions to the proposed rule; and
- Other comments more general in nature or relating to other areas of the proposed rule.

III. Summary of Comments Received

A. General Comments

Many of these comments are general in nature: describing the unique histories of the commenting Tribes and their relationship to the Tribal self-governance program; asking the Department to reconsider its position on the non-consensus issues; comments thanking the Department for its work; and expressing appreciation for considering Tribal comments.

Comments on Inherent Federal Function

The Department will decide what functions are inherently Federal on a uniform case-by-case basis after consultation with the Office of the Solicitor. For current guidance on IFF determinations, please see Solicitor's memorandum dated May 17, 1996. The memorandum is available from the Office of Self-Governance upon request. The Department shall provide information on why specific functions have been determined inherently Federal to Tribes and Consortia in accordance with this part.

The Department recognizes that title V of the ISDEAA delegates to Indian Tribes authority for final environmental determinations for construction projects. In negotiating with a Tribe/Consortium to include a construction

project under this part, and how a Tribe/Consortium may assume some Federal responsibilities under 25 U.S.C. 5367(b), the Department will address the differences between title V (25 U.S.C. 5389(a)) and title IV (25 U.S.C. 5367(b)) of the ISDEAA through discussions with the Office of the Solicitor and in accordance with section 5(f) of Executive Order No. 14112, and the PROGRESS Act's rules of construction and interpretation.

Many comments expressed concerns regarding what criteria the Department must consider when determining what are IFFs under title IV, as amended by the PROGRESS Act, and whether the issue of what is an "IFF" is a proper topic of negotiation between the Department and a Tribe/Consortium participating in self-governance. The Department acknowledges these comments.

Several Tribes described past experiences negotiating with federal officials about IFFs, and noted their belief that the Department, in negotiation of self-governance agreements, often takes an overly expansive interpretation regarding what functions are inherently Federal and, therefore, not eligible for inclusion in a funding agreement. These commenters state that this approach comes at the expense of Tribal autonomy and self-governance objectives of the PROGRESS Act. Many commenters urged the Department to incorporate language from the long-standing Department Solicitor guidance to clarify all determinations of IFFs. The Department addressed the issue of which functions may be considered "inherently Federal" for purposes of 25 U.S.C. 5363(k) as one of the four issues of disagreement between the Department and Tribes/Consortia in the final rule.

Many commenters requested that the Department establish criteria for determining when a function is inherently federal and referenced suggested provisions that incorporate long-standing agency guidance from the 1996 Solicitor memorandum ("Leshy Memorandum"), IFFs under the Tribal Self-Governance Act, at 12 (May 17, 1996) ("The more a delegated function relates to tribal sovereignty over members and territory, the more likely it is that the inherently Federal exception of section 403(k) does not apply."). Tribal commenters argue consistent and transparent criteria must be implemented on how IFF determinations will be made under title IV. Without such criteria, they suggest, the Department may fail to liberally construe each provision of title IV and each provision of a compact and

funding agreement for the benefit of the Indian Tribe participating in self-governance, with any ambiguity to be resolved in favor of the Indian Tribe, and could instead assert inherent federal characteristics over many types of functions that the relevant bureau simply may not want to compact or contract. In these instances, the Tribal commentors assert that threshold criteria would help ensure consistent determinations across all relevant bureaus and offices within the Department.

As the Tribal narrative articulates, the Department issued guidance in the Leshy Memorandum stating that any determination about the "inherently federal restriction can only be applied on a case-by-case basis." The Department re-affirmed this position in a November 2022 Report on authorities that can support Tribal stewardship and co-stewardship. The federal position is that the Leshy Memorandum provides a framework for bureaus and offices of the Department to utilize when making a determination. The federal position is that particular phrases of that framework should not be codified in regulation in isolation but instead within the full context of the document.

The Department expressed caution in creating a regulatory process that could, in practice, ask the Department to take a position on whether a "delegated PSFA relates to Tribal sovereignty." As a matter of administrative law, this process could create unintended consequences or roadblocks to Tribes exercising their sovereignty by subjecting that potential exercise to a federal determination. The Department does not wish to create an administrative process that might result in an outcome detrimental to Tribal sovereignty. The Department, in establishing the final rule took significant actions to define a consistent and transparent procedure that it will follow when identifying IFFs and then calculating eligible tribal shares in turn. The Department feels that these portions of the final rule address the core concerns of many commenters and will better ensure consistency and transparency in determining eligible funds and that activities captured as inherently federal will be based on valid legal authority.

Comments on Executive Order 13175, Executive Order 14112, and Secretarial Order 3403

Executive Order 13175 (E.O. 13175), also known as "Consultation and Coordination with Indian Tribal Governments," establishes policies and principles for how the federal

government should interact with Indian Tribal governments. Executive Order 14112 (E.O. 14112), also known as "Reforming Federal Funding and Support for Tribal Nations to Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self Determination," directs agencies to reform their programs so that Tribal Nations have greater autonomy over how Tribal Nations invest federal funding, and to make federal funding less burdensome and more accessible for Tribal Nations. E.O. 14112 states that Tribal governments must be treated as permanent, equal, and vital parts of America's overlapping system of governments. Secretarial Order 3403 (S.O. 3403), also known as "Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters," ensures that the U.S. Department of Agriculture (USDA) and the Department and their component Bureaus and Offices are managing Federal lands and waters in a manner that seeks to protect the treaty, religious, subsistence, and cultural interests of federally recognized Indian Tribes; that such management is consistent with the nation-to-nation relationship between the United States and federally recognized Indian Tribes; and, that such management fulfills the United States' unique trust obligation to federally recognized Indian Tribes and their citizens.

Throughout many of the comments, commentors reminded the Department of its trust and treaty obligations under the Constitution of the United States, E.O. 13175, E.O. 14112, and S.O. 3403. Many commentors reminded the Department that as it completes the rulemaking process that the Department implement E.O. 13175 and E.O. 14112, and the Presidential Memorandum dated January 26, 2023, which represent the Administration's respect for sovereignty, and commitment to ushering in the next era of Tribal self-determination by ensuring that Tribal Nations have greater autonomy in all aspects of self-governance. One commentor stated that these policies will have no meaning without accompanying meaningful and respectful actions, including in the PROGRESS Act rulemaking that requires the Department to act in good faith and fully uphold the right of Tribes/Consortia to self-govern.

One Commentor noted that recognition of the importance of Indigenous Knowledge by Federal agencies is an express requirement of E.O. 14112. One commentor stated that the Department's position concerning

IFFs is untenable given the goals and objectives outlined in E.O. 14112 and S.O. 3403, noting that in the commentor's experience, negotiating transferrable programs and activities is the lengthiest portion of the process due to the fact that agencies are often unwilling to acknowledge or accept Tribal or consortia capacity and traditional ecological knowledge. Another commentor stated that Tribal traditional ecological knowledge has been left out of the regulations.

Many commentors noted that the PROGRESS Act was the direct result of Congress acknowledging that there needed to be an overhaul of title IV to correct bureaucratic processes and procedures that the Department imposed that either discouraged or hindered negotiations between Tribes and the Department. Many commentors asserted that the Indian canons of construction should be applied during Tribal consultation activities, and any ambiguities in law or policy should be interpreted in favor of Tribes in accordance with E.O. 13175, Sec. 6, and E.O. 14112, section 5. Commentors urged the Department to take these directives into account when developing the final rule. One commentor noted that Department negotiators often take an expansive interpretation of what functions are Inherently Federal with the objective to preserve work and jobs for Federal employees at the expense of Tribal autonomy and self-governance objectives. Another commentor noted that E.O. 14112 aims to increase flexibility by reducing administrative burdens and facilitating access to federal funding and resources.

Many commentors stated that the Tribal representatives' position that the PROGRESS Act permits Tribes/Consortium to make final determinations under NEPA and related environmental laws are firmly grounded in E.O. 14112. A commentor stated that the Tribal position concerning environmental determinations under NEPA is consistent with CEQ's revised regulations, 40 CFR part 1500 *et seq.*, that went into effect on July 1, 2024. A commentor noted that the Department's position is a step back for self-governance and fundamentally at odds with the most basic tenets of Tribal self-governance policy. A commentor stated that sound policy considerations by the Department, including adherence to E.O. 14112, can lead the Department to issue a final rule that decreases litigation risk and the attendant ramifications.

Throughout the comments, there were repeated instances where Tribes

suggested improvements to the language of the proposed rule that would further implement the intent of E.O. 13175, E.O. 14112, and S.O. 3403. The Committee considered all the comments and implemented many of the suggestions. The Committee made changes to the final rule to define when and how Indigenous Knowledge can be used (§ 1000.20 and § 1000.1390), significant updates to the appeals process to give Tribes more options subpart R (Appeals), updates to how Public Law 102–477 is referenced, and changes to subpart G (Funding Agreements for Non-BIA Programs) related to clarifying CSCs.

There were also areas where commentors made suggestions to change the proposed rule, citing E.O. 14112, but after review by the Committee those changes were not implemented. This includes proposed changes related to clarifying whether IFFs can be negotiated (§ 1000.695) and requests to add additional sections to subpart K (Construction). The Department acknowledges these comments and further explains below why the changes were not implemented.

The Department is committed to upholding the federal government's trust and treaty obligations as reiterated in E.O. 13175, E.O. 14112, and S.O. 3403. The Department is dedicated to ensuring that Tribes are able to exercise sovereignty through self-governance and self-determination by ensuring that Federal programs, to the maximum extent possible and practicable under Federal law, provide Tribal Nations with the flexibility to improve economic growth, address the specific needs of their communities, and realize their vision for their future.

The Department is appreciative of the work of the Tribal members on the negotiated rulemaking committee as well as all of the Tribal engagement throughout the rulemaking process. This final rule reflects the good faith collaboration between the federal government and Tribal governments.

Comments on the Rules of Construction

Many Tribal commentors underscored the rules of construction within the PROGRESS Act, at sections 406 and 409. Tribal commenters read those sections to require liberal interpretation of the language in the statute, and therefore the contents of its regulations. Specifically, they note that ambiguities should be resolved in favor of the compacting Tribes/Consortiums and that the PROGRESS Act must be implemented in a manner that facilitates inclusion of programs in the Tribal Self-Governance program.

The liberal interpretation comments are intended to be overarching and suggest that, with respect to the non-consensus issues, the Department should bend towards the Tribal positions where there is ambiguity. According to the Tribal commenters, Congress said so in the PROGRESS Act, as evidenced in sections 406 and 409.

The comments further noted concern that the Department was ignoring the clear directives from Congress in the PROGRESS Act and cherry-picked statutory provisions to undermine the Tribal efforts to resolve differences. The comments asked the Department to reconsider the Department's position on non-consensus issues as negotiations continued to consider the long-standing Indian canons of construction.

The Department acknowledges these comments, using the comments and feedback to inform the final rule.

Comment on Clean Energy Promotion

One comment requested a focus on clean energy through biomass, woody byproducts, or cogeneration.

The Committee acknowledges the comment. The Department agrees that the use of clean energy can be an important component of projects implemented under this rule.

Comment on Co-Management

One comment requested that co-management be included in the final rule in response to including Indigenous Knowledge. The example provided is to assist Tribal communities who deal with forest fires and working with the U.S. Forest Service to coordinate and create an economic plan to develop restoration projects and allowing Tribal communities to implement traditional ecological knowledge into the plan as part of co-management.

The Committee acknowledges the comment to allow Tribes and Tribal Consortia the maximum flexibility and discretion necessary to meet the needs of their communities consistent with their diverse demographic, geographic, economic, cultural, health, social, religious, and institutional needs. This includes recognition of and support for Indigenous Knowledge to be included into the final rule. This rule does not apply to the U. S. Forest Service.

Comment on Committee Consensus

One comment indicated support for the regulations developed in consensus with the Committee.

The Department acknowledges the comment.

Comment on the Federal Regulations

One comment suggested revisiting federal regulations to allow Tribes the ability to develop infrastructure within their lands, which has aged and needs replacement with modernized equipment to meet future demands and avoid potential impact on the Tribe's public safety and health.

The Committee acknowledges the comment. Under subpart K (Construction), this final rule provides that the Secretary may accept funds from other departments for construction projects or programs, subject to an interagency agreement, between the Secretaries, with Tribal concurrence.

Comments in General

Numerous commentors thanked the Committee for their work in coming to consensus on most of the areas at issue in the PROGRESS Act. However, they noted a desire for the Department to lean towards the Tribal positions on areas of non-consensus to advance Tribal self-governance and comply with the intent of the PROGRESS Act.

The Department acknowledges these comments as federal members committed themselves to participate in good faith during all negotiations and discussions.

Comments on the Publication of Final Rule

Numerous comments asked the Department to ensure that the rule be published before the sunset date of December 21, 2024.

The Department is committed to publishing the final rule before this deadline.

Comments on the Department's Handling of Trust Responsibility

A few comments noted that the Department does not always handle well the conflicts of interest that exist between its bureaus and its trust responsibility to Tribes and their members. Despite the PROGRESS Act's clear mandate that the Secretary does not waive, modify, or diminish, in any way, the trust responsibility to Tribes and individual Indians, and its obligation to empower Tribes, too often the interest of non-BIA bureaus take precedence over the ever-growing needs of Indigenous peoples.

The Department acknowledges these comments. The Department is committed to ensuring that the trust and treaty responsibilities owed to Tribes is met. The effect of this final rule is to transfer to participating Tribes control of, funding for, and decision making concerning certain Federal programs,

consistent with updates contained in the PROGRESS Act.

B. Subpart Comments

Subpart A—General Provisions

Comments on § 1000.10—What is the purpose and scope of this part?

A few comments were received that these provisions of title IV do not govern any other program of self-governance other than under title IV and do not bind any other cabinet Secretary or agency other than the Secretary of the Interior.

While the rule does incorporate terms and processes that may be common to self-governance at HHS authorized by title V of the ISDEAA, and DOT authorized by 23 U.S.C. 207, it is not the intent of this rule to define or regulate any term or process that is applicable to HHS or DOT, even where such terms or processes are common between the agencies. The rule should not be construed to bind HHS or DOT to any particular interpretation of a term or process.

Comments on § 1000.15—What is the congressional policy statement of this part?

The Committee received comments concerning the congressional policy statement. After deliberations by the Committee, it was the consensus of the Committee to revise § 1000.15(c)(2) to replace the phrase “create consistency and administrative efficiencies between title IV and title V of Public Law 93–638” with the phrase “create similarities and administrative efficiencies between title IV and title V of Public Law 93–638” to more accurately reflect the content of the final rule.

Comments on § 1000.20—What is the Secretarial policy of this part?

Several comments were received that the final rule at § 1000.20 should fully implement the rules of construction required by the PROGRESS Act. While § 1000.20 incorporates elements of these provisions, section 406(i), of the PROGRESS Act, 25 U.S.C. 5366(i), directs that, subject to section 101(a) of the PROGRESS Act, 25 U.S.C. 5361(a) note, “each provision of this subchapter [title IV] and each provision of a compact or funding agreement shall be liberally construed [by the Secretary] for the benefit of the Indian Tribe participating in self-governance, and any ambiguity shall be resolved in favor of the Indian Tribe.” This interpretation is not set out with clarity in § 1000.20.

The Committee agreed with the comments and accepted most of the language offered in the final rule. This

will support the Department in its efforts to maximize implementation of the Self-Governance Policy and carry out title IV.

Comments on § 1000.35—What happens if a court holds any provisions of these regulations in this part invalid?

The Department added a new section § 1000.35 on severability. While this rule is intended to create streamlined and consistent processes for Self-Governance under title IV, if a court holds any provision of one part of this rule as finalized invalid, it should not impact the other parts of the rule, which would remain in force. The intent of this rule is to implement the Department's Self-Governance program, but the rule is not an interdependent whole—other provisions of the rule would implement that intent even if a court declared certain provisions invalid.

Subpart B—Selection of Additional Tribes for Participation in Tribal Self-Governance

Comment on § 1000.178—[Section Does Not Exist in the Proposed Rule]

See comment on subpart H (Negotiation Process)—§ 1000.1075—When does the funding agreement become effective?

Subpart C—Planning and Negotiation Grants for BIA Programs

Comments on § 1000.301—[Section Does Not Exist in the Proposed Rule]

See comment on subpart K (Construction)—§ 1000.1301—What key construction terms do I need to know?

Subpart D—Financial Assistance for Planning and Negotiation Activities for Non-BIA Bureau Programs

The Committee did not receive comments related to this subpart.

Subpart E—Compacts

Comments on § 1000.510—What is included in a self-governance compact? And § 1000.515—What provisions must be included in either a compact or funding agreement?

The Committee did not come to agreement on § 1000.510(e) and § 1000.515. The central focus of the concerns regarded satisfying the requirements of 25 U.S.C. 5365(a), which provides that “[a]n Indian Tribe and the Secretary shall include in any compact or funding agreement provisions that reflect the requirements of this title,” *i.e.*, title IV of the ISDEAA, addressing Tribal Self-Governance. The view of the Tribal team and many Tribal comments is that simplified Tribal

assurances included in a compact and/or funding agreement that provide that the Tribe/Consortium will comply with the requirements of title IV is sufficient to satisfy the statutory requirement in 25 U.S.C. 5365(a). Many Tribal comments stated that the Department's interpretation of 25 U.S.C. 5365 undermines compact negotiations and is contrary to the PROGRESS Act and the intent of Congress in the PROGRESS Act to streamline regulations and the content of compacts and funding agreements.

The Tribal view is that the requirements of title IV can be better reflected through regulatory language that states that the Tribe/Consortium, in either their compact or funding agreement, will attest to compliance with title IV, or otherwise state that they will carry out the compact or funding agreement "in accordance with the requirements of title IV." The Tribal view is that § 1000.510(e) and § 1000.515 are excessive and not properly tailored to reflect the requirements of title IV.

Several Tribal comments objected to § 1000.510(e) and § 1000.515, and recommended those provisions be deleted. These comments considered detailed compliance provisions in a compact or funding agreement to be overburdensome, unnecessary, excessive, unproductive to the good-faith negotiation process, and likely to cause delays. These comments similarly noted the potential of these provisions to lead to dispute resolution or litigation. Instead, the Tribal comments recommended that compacts or funding agreements contain an attestation affirming compliance in accordance with the requirements of the PROGRESS Act. The Tribal comments recommended such attestation to streamline negotiation and administrative processes and to comply with the PROGRESS Act's rules of construction and liberal interpretation, and with the Paperwork Reduction Act.

The Department view is that relevant provisions of the PROGRESS Act indicate certain provisions or language must be included in a funding agreement or a compact. For example, 25 U.S.C. 5366(b)(1) directs that "[a] compact or funding agreement shall include provisions for the Secretary to reassume a program and associated funding if there is specific finding relating to that program. . . ." As another example, 25 U.S.C. 5363(e)(2) authorizes the parties to specify an effective date for retrocession to ". . . become effective on the date specified by the parties in the compact or funding agreement."

The Department view is informed by experience when encountering a problem in the execution of a compact or funding agreement. In such situation, a primary question involves clarifying the agreed upon terms of the compact or funding agreement as to a particular outcome. For example, in a dispute about retrocession, the first area reviewed is what does the compact or funding agreement say about retrocession. Also, non-parties with an interest to the compact or funding agreement, such as auditors, inspectors, courts of jurisdiction, other federal agencies, etc., would benefit from clearly stated provisions rather than from a general attestation. The Department believes that clearly specifying terms in a compact and funding agreement best addresses the expectations and interests of both parties. The Department does not anticipate that the requirements in § 1000.510(e) and § 1000.515 will require new edits to most existing compacts or funding agreements. The Federal team expects that most existing compacts and funding agreements satisfy the requirements in § 1000.510(e) and § 1000.515 if those compacts or funding agreements restate applicable statutory requirements for the specified topics referenced in § 1000.515. The Committee did not reach consensus on the language in § 1000.510(e) and § 1000.515 because the Tribal committee members did not agree with the Department's underlying interpretation of 25 U.S.C. 5365(a). The final rule reflects the Federal view on this matter.

Subpart F—Funding Agreements for BIA Programs

Comments on § 1000.610—What must be included in a funding agreement?

See the comments, discussion, and response above in subpart E (Compacts). The Committee did not agree on this matter and the final rule reflects the Federal view at § 1000.610(b).

Comments on § 1000.690—How does BIA determine the funding amount to carry out inherent Federal functions?

Commentors stated their support for the proposed language in § 1000.690(f)(1), reiterated the importance of consistency and uniformity within BIA Regions, and referenced previous situations in which Tribes feel that BIA took an expansive interpretation of IFFs and the associated programs funds to fulfill them and thus reduced the amount of contractable or compactable funds available to Tribes/Consortium.

The Committee acknowledges these comments as the language in proposed rule addresses this concern by requiring "uniformity and consistency in the identification of inherent Federal functions."

Comments on § 1000.695—Is the amount of funds withheld by the Secretary to cover the cost of inherent Federal functions subject to negotiation?

Several commentors supported the views and regulatory text articulated in the Committee's Report on proposed § 1000.695, further requesting changes to the proposed rule, to state generally that IFFs are a permissible topic of discussion during the negotiation process.

The Committee acknowledges these comments and declines to make the requested changes. The Department believes that the breadth of negotiation topics is adequately set out in the final rule.

Subpart G—Funding Agreements for Non-BIA Programs

Comments on § 1000.845—Are there any non-BIA programs that may not be included in a funding agreement?

Tribal comments urged the Department to revise proposed § 1000.845 to include a core principle of the Leshy Memorandum. Many commentors agreed and asserted that providing transparent guidance would aid negotiators of non-BIA agreements and reflect compliance with the Supreme Court opinion in *U.S. v Mazurie*, 419 U.S. 544 (1975). Commentors asserted that inclusion in the regulations of this basic principle would help provide parity between Tribal and Federal representatives when negotiating agreements and would advance fundamental Self-Governance objectives.

The Department acknowledges the comments and did not accept the recommendation to revise § 1000.845. The Department will apply the principles of the Leshy Memorandum on a case-by-case basis when determining whether a function requested for inclusion in the funding agreement by a participating Tribe/Consortium is an IFF. The section references the PROGRESS Act's definition of IFF, 25 U.S.C. 5361(6), and the requirement in 25 U.S.C. 5363(k) that directs how the Department evaluates such issues.

Some Tribal commentors expressed previous difficulties in negotiating IFFs with particular agencies. Another Tribal comment disagreed with the federal assessment that formal adoption of the

Leshy Memorandum would result in additional administrative process.

The Committee acknowledges these comments as § 1000.845 addresses what may not be included in a funding agreement.

Two comments on specific agency decisions on IFF positions do not go to the regulation. These comments were forwarded to the relevant agency to consider.

Comments on § 1000.885—What funds are included in a non-BIA funding agreement?

Many commentors urged the Department to revise proposed § 1000.885(b)(iii) to ensure that Tribes/Consortia receive full CSCs under section 106(a) of the PROGRESS Act, 25 U.S.C. 5325, including direct CSCs. Commentors requested the Department to insert the citation in the proposed section and strike the reference to congressional appropriations. The Department acknowledges the comments. As concerns section 403(c) programs, 25 U.S.C. 5363(c), eligible for inclusion in a funding agreement under the PROGRESS Act, the proposed section stated that the funding agreement will include the following: (i) amounts equal to the direct program or project costs the bureau would have incurred were it to operate that program at the level of work mutually agreed to in the funding agreement; (ii) allowable indirect costs; and (iii) such amounts as the Tribe/Consortium and the Secretary may negotiate for pre-award, start-up, and direct contract support costs, or upon appropriations by Congress.

Many commentors took issue with the phrase “or upon appropriations of such funds by Congress” reflected in proposed § 1000.885(b)(1)(iii). Commentors believed that the reference to Congressional appropriations will deprive Tribes/Consortia of their full CSC funds, place a financial burden on Tribes/Consortia, and serve as a deterrent to their negotiating the inclusion of such programs in compacts and funding agreements.

After review of the comments and further deliberations by the Committee, the Department accepts the recommendation. The final rule § 1000.885(b)(1)(iii) states that non-BIA bureaus determine the amount of funding to be included in the funding agreement using the following principles: (iii) Such amounts as the Tribe/Consortium and the Secretary may negotiate for pre-award, start-up, and direct CSCs.

Comment on § 1000.895—How does the Secretary determine the amount of indirect costs?

A comment was received asking the Committee to clarify this question by adding non-BIA funding to the question and initial part of the response and by adding “and making other adjustments required by the PROGRESS Act” to the end of § 1000.895(a).

The Committee agreed with this comment and implemented the proposed change into the final rule.

Subpart H—Negotiation Process

Comment on § 1000.1075—When does the funding agreement become effective?

One comment referenced § 1000.178. This comment addressed eliminating the 2001 prior rule for self-governance at § 1000.178 that required once a funding agreement is signed, the effective date would be 90 days after it is submitted to the House Subcommittee on Native Americans and Insular Affairs and the Senate Committee on Indian Affairs. This requirement to submit the funding agreement to the Congressional committees was eliminated in the PROGRESS Act and therefore not addressed in this rule. The final rule at § 1000.1075 makes a funding agreement effective on the date it is executed or otherwise begins according to the agreement terms.

The Committee acknowledges the comment with no further changes to this subpart.

Subpart I—Final Offer

The Committee did not receive comments related to this subpart.

Subpart J—Waiver of Regulations

Comments on § 1000.1240—When must the Secretary make a decision on a waiver request?

Two commentors pointed out that the Department has two statutory provisions that authorize Tribes to request waivers using a set timeline for the Secretary’s consideration of the waiver, 25 U.S.C. 5363(i)(2)(A) (provides 60-day review period) and 25 U.S.C. 5369(b) (provides 120-day review period). The comment pointed out that the proposed regulations do not reference either statutory provision, and the process calls for a 120-day review period, which tracks with the language at 25 U.S.C. 5369(b).

The final rule describes the timeline for the Secretary to make a waiver decision for Tribes in § 1000.1240 as the 120-day decision review period. The Committee determined to select the 120-day timeline to follow, as it was most

closely applicable to title IV. The Committee assumed that the conflict in the statutory provisions was a drafting mistake that occurred when the PROGRESS Act was developed. The Committee believes this issue can be addressed at a later date through a technical correction or an amendment that affirms the correct statutory provision is 25 U.S.C. 5369(b)(2).

Subpart K—Construction

Several comments expressed the view that making final determinations under NEPA is not an inherently federal function and should be contractable by Tribes/Consortia that comply with 25 U.S.C. 5367(b). These views referred to section 5367(b) that, subject to an agreement with the Secretary as limited by 25 U.S.C. 5367(c), requires a Tribe/Consortium electing to assume some Federal responsibilities under NEPA, the NHPA and related provisions of other laws and regulations to designate a certifying Tribal officer to represent the Tribe/Consortium and “to assume the status of a responsible Federal official under those Acts, laws, or regulations.” Under the statute, the Tribe/Consortium must also “accept the jurisdiction of the United States courts for the purpose of enforcing the responsibilities of the certifying Tribal officer assuming the status of a responsible Federal official under those Acts, laws, or regulations.”

The comments stated that when these provisions are combined with the Department’s definition of a “responsible official” (43 CFR 46.30) as the individual designated “to make and implement a decision on a proposed action and is responsible for ensuring compliance with NEPA,” the Council on Environmental Quality’s (CEQ) revised NEPA regulations at 40 CFR part 1508 (May 1, 2024), that define the term “Federal agency” to include States, units of general local government, and “Tribal governments assuming NEPA responsibilities from a Federal agency pursuant to statute,” and the PROGRESS Act’s “rules of construction” at 25 U.S.C. 5366(i) directing that each provision of the PROGRESS Act “be liberally construed for the benefit of the Indian tribes and any ambiguity shall be resolved in favor of the Indian tribe,” there is compelling support for the Tribes’ position.

The comments further noted that the Department should give full expression to all the terms of the PROGRESS Act and Congressional intent to further empower Tribes to make final determinations under NEPA, the NHPA, and related environmental laws, citing to 25 U.S.C. 5369(a) providing that “the

Secretary shall interpret each Federal law and regulation in a manner that facilitates the inclusion of programs in funding agreements and the implementation of funding agreements.” The comments stated that this lends further support for a favorable interpretation of CEQ and Department NEPA regulations to delegate the authority for making a final determination and cited that the PROGRESS Act revised the definition of the term “construction program; construction project” to mean a “Tribal undertaking” that includes “environmental determination.” 25 U.S.C. 5361(2).

Additional comments noted that the PROGRESS Act was intended to conform title IV of the PROGRESS Act with title V of the ISDEAA that requires Tribes and Tribal Consortia to assume Federal responsibilities for all NEPA functions, including final determinations, as a condition for assuming a construction program. Commentors stated that “some” means something different than “all,” but the Department’s insistence that “some” must therefore mean “not final determinations” ignores the plain language of the word “some,” which simply means “at least one.” *See, e.g. “some”* (www.merriam-webster.com/dictionary/some).

The Department acknowledges the comments and notes as a threshold matter that while title V of the ISDEAA at 25 U.S.C. 5389(a) mandates that Tribes take responsibility for “all Federal responsibilities” for NEPA functions as a condition of assuming a construction program or project, the PROGRESS Act does not impose the same requirement and uses different terminology at 25 U.S.C. 5367(b), providing for a “Tribal Option to Carry Out Certain Federal Environmental Activities,” including “some Federal responsibilities” involving NEPA and related functions, under an “agreement by the Secretary,” as limited by 25 U.S.C. 5367(c).

The Department will decide what functions are inherently Federal on a case-by-case basis after consultation with the Office of the Solicitor. For current guidance on inherently Federal functions (IFF) determinations, please see Solicitor’s memorandum dated May 17, 1996. The Memorandum is available from the Office of Self-Governance upon request. The Department shall provide information on why specific functions have been determined to be inherently Federal to Tribes and Consortia in accordance with this part.

The Department recognizes that title V of the ISDEAA delegates to Indian

Tribes authority for final environmental determinations for construction projects. In negotiating with a Tribe/Consortium to include a construction project under this subpart, and how a Tribe/Consortium may assume some Federal responsibilities under 25 U.S.C. 5367(b), the Department will address the differences between title V (25 U.S.C. 5389(a)) and title IV (25 U.S.C. 5367(b) of the ISDEAA through discussions with the Office of the Solicitor and in accordance with section 5(f) of E.O. 14112, and the PROGRESS Act’s rules of construction and interpretation.

Comment on § 1000.1301—What key construction terms do I need to know?

There were comments received that referenced § 1000.301. However, the comment addresses § 1000.1301 in subpart K (Construction) in the proposed rule that the final rule should include a definition of “Categorical Exclusion” to be defined as the same definition found in the Department of Health and Human Services construction definitions found at 42 CFR 137.280. The Department should consider including in the final rule the definition set out in CEQ’s revised 40 CFR 1508 regulations issued on May 1, 2024.

The Department acknowledges these comments, and the Committee declined to add the definition. First, it is established by another agency and could change over time, potentially resulting in unnecessary confusion. Additionally, the potential scope of projects requiring NEPA compliance under these regulations encompasses multiple bureaus within the Department, as opposed to the limited scope of projects at the Department of Health and Human Services. Finally, each Departmental bureau maintains a list of categorical exclusions relevant to projects it oversees and these change over time, as well. *See* Department of the Interior Manual (at Part 516).

Subpart L—Federal Tort Claims

The Committee did not receive comments related to this subpart.

Subpart M—Reassumption

The Committee did not receive comments related to this subpart.

Subpart N—Retrocession

The Committee did not receive comments related to this subpart.

Subpart O—Trust Evaluation

The Committee did not receive comments related to this subpart.

Subpart P—Reports

The Committee did not receive comments related to this subpart.

Subpart Q—Operational Provisions

The Committee received one comment related to this subpart. In § 1000.2130, the rule sets forth how much time the Federal Government has to make a claim against a Tribe/Consortium related to the disallowance of cost, based on an audit. The comment suggested the audit be particular to a title IV audit. The Committee agreed and title IV was inserted before the word audit to clarify this provision applies to title IV audits.

Subpart R—Appeals

This subpart prescribes the process Tribes/Consortia may use to resolve disputes with the Department arising before or after execution of a funding agreement or compact and certain other disputes related to self-governance.

Three Tribal comments requested greater flexibility in the appeals process generally.

Several Tribal comments offered draft language to the regulatory text that would provide Tribes/Consortia with the option to file an administrative appeal with either the Interior Board of Indian Appeals (IBIA) or an appropriate bureau head or Assistant Secretary of disputes with the Department arising before execution of a funding agreement, amendment to a funding agreement, or compact and certain other disputes related to self-governance. Specifically, comments proposed deleting § 1000.2302 (“What does ‘title-I eligible programs’ mean in this subpart?”) to remove any reference to “title-I eligible programs” within the subpart, and to strike and replace § 1000.2351 (“To Whom May a Tribe/Consortium Appeal a Decision under § 1000.2345?”) with language allowing for Tribes/Consortia to file an eligible appeal under the subpart with either the IBIA or an appropriate bureau head/Assistant Secretary. The comments noted that adopting this position would address current delays under the IBIA system and the negative impacts from such delays. Comments noted that the Department should adopt this change and resolve this issue of non-consensus in the finalized rule to comply with E.O. 14112 and the PROGRESS Act’s rules of construction. Some comments also recommended these revisions to the final rule to build capacity for an administrative appeals process with the bureau head/Assistant Secretary level to promote predictability, reduce uncertainty, and use the least

burdensome tools to achieve regulatory ends as set out in E.O. 12866, as supplemented by E.O. 13563.

The Committee agreed to revise the subpart to provide that Tribes/Consortia may elect to file an appeal of eligible pre-award disputes with an appropriate bureau head or Assistant Secretary through the following revisions to the subpart's current language: (1) deleting § 1000.2302 to remove any references to "title-I eligible programs" within the subpart; (2) revising § 1000.2351(b) to add the term "initial" in the phrase "the bureau head will decide initial appeals relating to these pre-award matters;" and (3) striking the language in § 1000.2351(b)(i), "Programs that are not PSFAs that the Secretary provides for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department within which the PSFAs have been performed."

The Committee added a new § 1000.2357 ("Which official is the appropriate bureau head or Assistant Secretary for purposes of subpart R?"). Section 1000.2357(a) provides a chart indicating the relevant official to whom a Tribe/Consortium may file its initial request for appeal when exercising its appeal rights to the bureau head/Assistant Secretary under § 1000.2351 for any BIA Program. Section 1000.2357(b) states that the Assistant Secretary for Indian Affairs is the appropriate Assistant Secretary for reviewing appeals for BIA Programs in accordance with § 1000.2370. Finally, § 1000.2357(c) identifies the appropriate bureau head/Assistant Secretary for non-BIA Program appeals pursuant to § 1000.2351. In accordance with § 1000.2355, the Department will identify the appropriate bureau head/Assistant Secretary in any required information.

Subpart S—Conflicts of Interest

The Committee did not receive comments related to this subpart.

Subpart T—Tribal Consultation Process

The Committee did not receive comments related to this subpart.

C. Use of Received Feedback

The Committee used all received feedback to inform this final rule and made changes to this final rule based on received feedback.

VI. Summary of Changes by Subpart Into the Final Rule

The following summary describes each subpart of the Department's final regulations to implement the PROGRESS Act. The Department's

amendments incorporated comments on the proposed rule received during Tribal consultation, as discussed above in Section III, "Summary of Comments Received," as well as received during the E.O. 12866 interagency review process. The Department, in negotiation with the Committee makes these changes in the final rule.

A. Subpart A—General Provisions

This subpart contains the authority, purpose and scope of the final rule, and the Congressional and Secretarial policies that will guide the implementation of the ISDEAA, as amended by the PROGRESS Act, by the Secretary and the various bureaus of the Department. The subpart also defines terms used throughout the final rule consistent with the PROGRESS Act.

This subpart further clarifies the effect of 25 CFR part 1000 on existing Tribal rights, including Tribal sovereign immunity from suit, the United States' trust responsibility, a Tribe's choice to participate in self-governance, or the issuance of awards by other departments or agencies to Tribes. Additionally, this subpart identifies the application of any agency circular, policy, manual, guidance, or rule adopted by the Department on self-governance Tribes/Consortia. This subpart identifies when and how to implement Indigenous Knowledge in projects. Finally, this subpart provides that should a court hold any provision of one part of this rule as finalized invalid, it should not impact the other parts of the rule.

Amendments to § 1000.15—What is the congressional policy statement of this part?

The Committee revised the phrase "create consistency and administrative efficiencies between title IV and title V of Pub. L. 93–638" with the phrase "create similarities and administrative efficiencies between title IV and title V of Public Law 93–638" to more accurately reflect the content of the final rule.

Amendments to § 1000.20 What is the Secretarial policy of this part?

The Committee added language to the Secretarial policy of this part to assure that this part be interpreted to facilitate inclusion of programs in funding agreements and the implementation of funding agreements. The proposed edits include language that is added to maximize implementation of the secretarial policy in all bureaus of the Department, and to ensure that where provisions of funding agreements and compacts are ambiguous that the

ambiguity be resolved in favor of the Tribe or Consortium. The Committee also added a provision to include, recognize, and support Indigenous Knowledge to be applied when performing PSFAs. The edits were made to improve clarity and respond to comments received during the government-to-government consultation.

Amendments to add § 1000.35—What happens if a court holds any provisions of these regulations in this part invalid?

The Department added a new section to make explicit its intent that if a court were to hold any provisions of the final rule invalid, that provision would be severable and the remaining provisions of the rule should remain in force. As noted in the Preamble, the intent of this rule is to implement the Department's Self-Governance program, and the several provisions of this rule can continue to effectuate that intent even if one or more of those provisions were declared to be invalid by a court.

B. Subpart B—Selection of Additional Tribes for Participation in Tribal Self-Governance

This subpart describes the steps a Tribe/Consortium must take to participate in Tribal self-governance and the selection process and eligibility criteria that the Secretary will use to decide whether a Tribe/Consortium may participate. Under the PROGRESS Act, a Tribe/Consortium is eligible to participate in self-governance if it submits documentation to OSG demonstrating: (1) successful completion of a planning phase; (2) a request to participate in self-governance by a Tribal resolution and/or final official action; and (3) financial stability and financial management capability through evidence of having no uncorrected significant and material audit exceptions in the required annual audit of its self-determination or self-governance agreements with any Federal agency for the three fiscal years preceding the date on which the Tribe/Consortium requests participation. When a Tribe/Consortium submits documentation to participate in self-governance, this final rule requires the OSG within 45 days to: (1) select and notify the Tribe/Consortium to participate in self-governance; or (2) notify the Tribe/Consortium that the documentation submitted to participate in self-governance is incomplete.

The OSG Director may select up to 50 eligible Tribes or Consortia for negotiation. If there are more Tribes selected to negotiate in any given year, this final rule provides that the first 50

Tribes/Consortia who apply, and are determined to be eligible, will have the option to participate.

This final rule also stipulates that a Tribe/Consortium may be selected to negotiate a funding agreement for non-BIA programs that are otherwise available to Tribes without first negotiating a funding agreement for BIA programs. However, to negotiate for a non-BIA program under 25 U.S.C. 5363(c) for which the Tribe/Consortium has only a geographic, cultural, or historical connection, the ISDEAA requires that the Tribe/Consortium must first have a funding agreement with the BIA under 25 U.S.C. 5363(b)(1) or any non-BIA bureau under 25 U.S.C. 5363(b)(2). The term “programs” as used in this final rule refers to complete or partial PSFAs.

This subpart also describes what happens when a Tribe wishes to withdraw from a Consortium’s funding agreement. In such instances, the withdrawing Tribe must notify the Consortium, appropriate Department bureau, and OSG of its intent to withdraw 180 days before the effective date of the next funding agreement. Unless otherwise agreed to, the effective date of the withdrawal will be the earlier date of one year after the date of submission of the request, or when the current agreement expires.

In completing the withdrawal, the Consortium’s funding agreement must be reduced by that portion of funds attributable to the withdrawing Tribe on the same basis or methodology upon which the funds were included in the Consortium’s funding agreement. If such a basis or methodology does not exist, then the Tribe, the Consortium, appropriate Department bureau, and OSG must negotiate an appropriate amount.

The Committee did not implement changes to subpart B.

C. Subpart C—Planning and Negotiation Grants

This subpart describes the criteria and procedures for awarding various self-governance negotiation and planning grants. These grants are discretionary and will be awarded by the OSG Director. The award amount and number of grants depends upon Congressional appropriations. If funding in any year is insufficient to meet total requests for grants and financial assistance, priority will be given first to negotiation grants and second to planning grants.

Negotiation grants are non-competitive. To receive a negotiation grant, a Tribe/Consortium must first be selected to join self-governance and

then submit a letter affirming its readiness to negotiate and requesting a negotiation grant. This subpart further provides that a Tribe/Consortium may elect to negotiate a self-governance agreement if selected without applying for or receiving a negotiation grant. Planning grants will be awarded to Tribes/Consortia requesting financial assistance to complete the planning phase requirement for joining self-governance.

Amendments to § 1000.335—What are the Secretary’s responsibilities upon a decision not to award a planning or negotiation grant?

The Committee implemented a change in the wording in § 1000.335 to address the Secretary’s decision regarding the denial of a planning or negotiation grant from “declining to award” to “denying” a planning or negotiation grant. This was merely to clarify that provision.

D. Subpart D—Financial Assistance for Planning and Negotiations Activities for Non-BIA Bureau Programs

This subpart describes the additional requirements and criteria applicable to receiving financial assistance to assist Tribes/Consortia with planning and negotiating for funding agreements involving non-BIA programs. This financial assistance is available to any Tribe/Consortium that:

- (a) Applied to participate in self-governance;
- (b) Has been selected to participate in self-governance; or
- (c) Has negotiated and entered into an existing funding agreement.

Subject to the availability of funds, this subpart requires the Secretary to publish a notice in the **Federal Register** that includes the number of available grants, application process, award criteria, and designated point-of-contact for each non-BIA bureau. This financial assistance will support information gathering, analysis, and planning activities that may involve consulting with appropriate non-BIA bureaus, and negotiation activities. This subpart also provides requirements for communicating award decisions to applying Tribes/Consortia.

The Committee did not implement changes to subpart D.

E. Subpart E—Compacts

The prior rule at 25 CFR part 1000 that became effective on January 16, 2001 (“2001 prior rule”), included provisions addressing compacts at §§ 1000.161 through 1000.165. The Committee amends and moves those sections to the new subpart E

(Compacts) and includes additional sections. This new subpart is inserted before the respective subparts for funding agreements because compacts are applicable to funding agreements both for BIA programs and for non-BIA programs.

The 2001 prior rule included a model format for a compact at Appendix A. The Committee decided not to include a model format for a compact and Appendix A in this final rule. The rationale is the model was no longer needed in the rule and a sample could be posted on an OSG website to provide assistance for Tribes joining self-governance and updated as circumstances change.

This subpart also describes self-governance compacts and the minimum content requirements of a self-governance compact. Unlike a funding agreement, parts of a compact apply to all bureaus within the Department rather than a single bureau. Therefore, a Tribe/Consortium needs only to negotiate and execute one self-governance compact to participate in self-governance.

This subpart also establishes a compact’s effective term and addresses how a compact may be amended. Further, this subpart clarifies that a Tribe/Consortium who executed a compact prior to the enactment of the PROGRESS Act has the option to either retain its existing compact, in whole or in part, to the extent that the provisions are not directly contrary to any express provisions of the PROGRESS Act or negotiate a new compact.

The Committee implements this change from the 2001 prior rule in the final rule with additional clarifying edits to improve readability.

F. Subpart F—Funding Agreements for BIA Programs

This subpart describes the components of a funding agreement for BIA programs. The 2001 prior rule includes “Subpart E—Annual Funding Agreements for Bureau of Indian Affairs Programs.” The final rule amends the title of the subpart and moves it within this rule. The title of the subpart is amended to “Funding Agreements for BIA Programs” because title IV now excludes the term “Annual Funding Agreements” and uses in its place, “Funding Agreements.” The acronym “BIA” is proposed in lieu of “Bureau of Indian Affairs” because BIA is now a defined term within subpart A (General Provisions). The final rule relocates the subpart from subpart E of the 2001 prior rule to become subpart F of the final rule because a new subpart E for compacts is inserted.

A funding agreement is a legally binding and mutually enforceable written agreement between a Tribe/Consortium and the Secretary. Funding agreements must include at a minimum, but are not limited to, provisions specifying the programs transferred to the Tribe/Consortium, providing for the Secretary to monitor the performance of trust functions administered by the Tribe/Consortium, providing the funding amount(s), providing a stable base budget, and specifying the funding agreement's effective date.

Parties to a funding agreement can mutually agree to include additional provisions and/or include and incorporate by reference additional documents such as funding tables or construction project agreements. Additionally, Tribes/Consortia may elect to negotiate a funding agreement with a term that exceeds one year, subject to the availability of appropriations.

This subpart also provides that a Tribe/Consortium with a funding agreement executed before the enactment of the PROGRESS Act has the option to either retain that funding agreement, in whole or in part, to the extent that the provisions are not directly contrary to any express provisions of the PROGRESS Act or negotiate a new funding agreement.

This subpart establishes that a funding agreement shall remain in full force and effect following the end of its term until a subsequent funding agreement is executed. When a subsequent funding agreement is executed, its terms will be retroactive to the term of the preceding funding agreement for purposes of calculating the amount of funding for the Tribe/Consortium.

This subpart states that a Tribe/Consortium may include BIA-administered programs in its funding agreement regardless of the BIA agency or office performing the program. The Secretary must provide to the Tribe/Consortium:

(a) Funds equal to what the Tribe/Consortium would have received under contracts and grants under title I of Public Law 93–638 (25 U.S.C. 5321, *et seq.*);

(b) Any funds specifically or functionally related to providing services to the Tribe/Consortium by the Secretary; and

(c) Any funds that are otherwise available to Indian Tribes for which appropriations are made to other agencies other than the Department and transferred to the Department as directed by law, an Interagency Agreement, or other means.

Except for construction programs or projects governed by subpart K (Construction), or where a statute contains specific limitations on the use of funds, a Tribe/Consortium may redesign or consolidate programs and reallocate funds in any manner the Tribe/Consortium deems to be in the best interest of the Indian community being served without the Secretary's approval except for programs described in 25 U.S.C. 5363(b)(2) or (c), or that involve a request to waive a Department regulation. However, a redesign or consolidation may not have the effect of denying eligibility for services to population groups otherwise eligible to be served under applicable Federal law.

In determining the funding amount available to a Tribe/Consortium, this subpart identifies funds that are used to carry out IFFs² that cannot be included in a funding agreement. This subpart also establishes the process for determining the funding amount to carry out IFFs and clarifies that the amount withheld to carry out IFFs can be negotiated between the Secretary and a Tribe/Consortium.

This subpart defines Tribal shares as the amount determined for that Tribe/Consortium that supports any program within the BIA, the Bureau of Indian Education (BIE), the Bureau of Trust Funds Administration (BTFA), or the Office of the Assistant Secretary for Indian Affairs and are not required by the Secretary for the performance of an IFF. Tribal share amounts may be determined by either:

(a) A formula that has a reasonable basis in the function or service performed by the BIA office and is consistently applied to all Tribes served by the area and agency offices; or

(b) On a Tribe-by-Tribe basis, such as competitive grant awards or special project funding.

Funding amounts may be modified during the term of a funding agreement to adjust for certain Congressional actions, correct a mistake, or if there is mutual agreement to do so.

This subpart also defines stable base budgets as the amount of recurring funding to be transferred to the Tribe/Consortium for a period specified in the funding agreement. Stable base budgets are derived from:

(a) A Tribe/Consortium's Public Law 93–638 contract amounts;

² The Department notes that 25 U.S.C. 5363(k) uses the phrase “inherently Federal” while 25 U.S.C. 5367(c) uses the phrase “inherent Federal.” It is unclear why Congress used differing phrases, but the proposed rule generally uses the phrase “inherent Federal,” except where a provision directly follows statutory language. The Department does not view the difference between the two phrases as meaningful.

(b) Negotiated amounts of agency, area, and central office funding;
(c) Other recurring funding;
(d) Special projects, if applicable;
(e) Programmatic shortfall;
(f) Tribal priority allocation increases and decreases;
(g) Pay costs and retirement cost adjustments; and
(h) Any other inflationary cost adjustments.

Stable base budgets do not include any non-recurring program funds, construction and wildland firefighting accounts, Congressional earmarks, or other funds specifically excluded by Congress.

A stable base budget is established at the request of the Tribe/Consortium and will be included in BIA's budget justification for the following year, subject to Congressional appropriation. Once stable base budgets are established, a Tribe/Consortium need not renegotiate these amounts unless it wants to. If the Tribe/Consortium wishes to renegotiate, it also would be required to renegotiate all funding included in the funding agreement on the same basis as all other Tribes and is eligible for funding amounts of new programs or available programs not previously included in the funding agreement on the same basis as other Tribes. Stable base budgets must be adjusted for certain Congressional actions, to correct a mistake, or if there is mutual agreement.

Amendments to § 1000.690—How does BIA determine the funding amount to carry out inherent Federal functions?

The Committee implemented two changes to this section from the proposed rule to the final rule. The first change corrected an unintentional omission of “Consortium” in subsection (d). The final rule is now consistent with other parts of the section to state “Tribes/Consortium.” The second change addresses a situation where funds are properly suballocated to another program to perform a function essential to the program under negotiation. By revising subsection (g), there is reduced potential for disagreement in a situation where funds are appropriately utilized across program lines.

G. Subpart G—Funding Agreements for Non-BIA Programs

This subpart describes program eligibility, funding for, and terms and conditions relating to self-governance funding agreements covering non-BIA programs that can help further Secretarial co-stewardship objectives as

set forth in Joint S.O. 3403. This section was renamed from subpart F.

Funding agreements for non-BIA programs are legally binding and mutually enforceable agreements between a bureau and a Tribe/Consortium participating in self-governance that contain a description of that portion or portions of a bureau program that are to be performed by the Tribe/Consortium; and associated funding, terms and conditions under which the Tribe/Consortium will assume a program, or portion of a program. Funding agreements may include Federal PSFAs administered by the Department other than through the BIA that are otherwise available to Indian Tribes or Indians and may also include other PSFAs, or portions thereof, which are of special geographic, historical, or cultural significance to the participating Indian Tribe requesting a compact. This subpart contains a definition of which functions may be considered “inherently Federal” for purposes of 25 U.S.C. 5363(k) and a provision making non-mandatory CSCs associated with administration of the PSFAs that are transferred in non-BIA agreements.

Amendments to § 1000.885—What funds are included in a non-BIA funding agreement?

Pursuant to changes that urged the Department to revise proposed § 1000.885(b)(iii) to ensure that Tribes/Consortia receive full CSCs under section 106(a) the PROGRESS Act, 25 U.S.C. 5325, including direct CSCs, the Committee accepted the recommendations an amended the proposed rule.

The final rule § 1000.885(b)(1)(iii) states that non-BIA bureaus determine the amount of funding to be included in the funding agreement using the following principles: “(iii) Such amounts as the Tribe/Consortium and the Secretary may negotiate for pre-award, start-up and direct contract support costs.”

Amendments to § 1000.895—How does the Secretary determine the amount of indirect costs?

The Committee clarified § 1000.895 by adding the phrase “non-BIA funding” to the question and initial part of the response and discussed the recommendation of adding “and making other adjustments required by the PROGRESS Act” to the end of (a). The Committee accepted the first edited but rejected the latter suggestion.

H. Subpart H—Negotiation Process

The 2001 prior rule includes “Subpart G—Negotiation Process for Annual Funding Agreements.” The final rule amends the title of this subpart and moves it within this final rule. The subpart title is amended to “Negotiation Process” because the amended subpart addresses the process for negotiating compacts and funding agreements. The location of the subpart within this final rule is to be moved from subpart G of the 2001 prior rule to become subpart H because a new subpart E for compacts is inserted. Items addressed in subpart H of the 2001 prior rule are to be addressed in new subpart Q (Operational Provisions).

Sections 1000.161 through 1000.165 of the 2001 prior rule, addresses the negotiation of compacts and are amended and moved to the new subpart E (Compacts).

This subpart establishes the process and timelines for negotiating a self-governance compact with the Secretary and a funding agreement with any Departmental bureau. Under this subpart, the negotiation process consists of two phases, an information phase and a negotiation phase.

In the information phase, any Tribe/Consortium that has been selected to participate in the self-governance program may submit a written request clearly identified as a “Request to Initiate the Information Phase,” which notifies the Secretary of a Tribe/Consortium’s interest in negotiating for a program(s) and requesting information about the program(s). Although this phase is not mandatory, it is expected to facilitate successful negotiations by providing for a timely exchange of information on the requested programs. This subpart establishes the information a Tribe/Consortium is encouraged to include in its Request to Initiate the Information Phase and the steps a bureau must take after receiving a request.

The negotiation phase establishes detailed timelines and procedures for conducting negotiations with Tribes that have been selected into the self-governance program, including the minimum issues that must be addressed at negotiation meetings. A Tribe/Consortium initiates this phase by submitting a Request to Initiate the Negotiation Phase. This subpart also establishes the required response that the Secretary must provide a Tribe/Consortium after receipt of a Request to Initiate the Negotiation Phase, including identifying the lead Federal negotiator. Further, this subpart establishes the process for finalizing and executing a

compact and/or funding agreement when the parties agree on such terms and conditions following the completion of negotiations.

This subpart also establishes rules for the negotiation process for subsequent funding agreements. A subsequent funding agreement is a funding agreement negotiated with a particular bureau after an existing agreement with that bureau. The process for negotiating a subsequent agreement is the same as the process provided in this subpart for funding agreements. The subsequent funding agreements will build upon the prior funding agreements. As such, most provisions of the funding agreement will carry forward and not require renegotiation. This will result in an expedited and simplified negotiation process.

Amendments to § 1000.1035—What steps does the bureau take after a Request to Initiate the Information Phase is submitted by a Tribe/Consortium?

The Committee clarified this provision by using the term “applicable laws” to capture information requests that implicate the Privacy Act, Freedom of Information Act, Health Insurance Portability and Accountability Act, and other laws that address the release of sensitive information. In addition, the Freedom of Information Act includes a number of items for possible dissemination, and the Committee decided to identify records that would encompass the numerous possible types of information.

I. Subpart I—Final Offer

The final rule inserts this new subpart to implement section 406(c) of title IV, as amended by the PROGRESS Act, 25 U.S.C. 5366(c), that prescribes the process to be followed if the Secretary and the participating Tribe/Consortium are unable to come to agreement, in whole or in part, on the terms of a compact or funding agreement during negotiations. The previous version of title IV included no such provisions, nor does the 2001 prior rule.

The new subpart is inserted at this location to immediately follow the amended subpart H (Negotiation Process). Doing so allows the reader to move sequentially from the negotiation process to determine options for next steps if those negotiation efforts do not result in agreement.

This subpart explains the final offer process provided by the PROGRESS Act for resolving disputes when the Secretary and a Tribe/Consortium are unable to agree, in whole or in part, on the terms of a compact or funding

agreement (including funding levels) during a negotiation. Under this subpart a Tribe/Consortium may submit a final offer to resolve these disputes. A final offer must be emailed to the email address listed in the final rule or mailed to the Director at OSG's headquarters.

A final offer under this subpart must contain a description of the disagreement, the Tribe/Consortium's final proposal to resolve the disagreement (including any proposed terms for a compact, funding agreement, or amendment), and the name and contact information for the Tribe's/Consortium's authorized official.

In accordance with 25 U.S.C. 5366(c)(6), the Secretary may reject all or part of a final offer for one of six specified reasons. If the Secretary does not act on a final offer within 60 days, the final offer is accepted automatically by operation of law for any compact or funding agreement except as to its application to a program described under section 403(c) of title IV. Final offers with respect to any program described under section 403(c) of title IV that the Secretary does not act on within 60 days are rejected automatically by operation of law. This subpart also addresses what happens if the Secretary rejects all or part of a final offer, including provision of technical assistance to overcome a rejection, the ability to appeal a rejection, and the portions of a final offer not in dispute taking effect.

The Committee did not implement changes to subpart I.

J. Subpart J—Waiver of Regulations

This subpart implements 25 U.S.C. 5363(i)(2)(A) that authorizes the Secretary to waive all Department regulations governing programs included in a funding agreement, as identified by the Tribe/Consortium.

This subpart also provides timelines, explains how a Tribe/Consortium applies for a waiver, the basis for granting or denying a waiver request, the documentation requirements for a decision, and establishes a process for resubmittal of a Tribe/Consortium's request in the event of the Secretary's denial of a waiver request.

The basis for the Secretary's denial of a waiver request must be predicated on a prohibition of Federal law.

The Committee did not implement changes to subpart J.

K. Subpart K—Construction

This subpart applies to all construction programs and projects, both BIA and non-BIA. The subpart identifies construction program activities that are subject to subpart K,

such as design, construction management services, actual construction; and those that are not, such as planning services, operation and maintenance activities, and certain construction programs that cost less than \$100,000. All final rule provisions apply to this subpart except where they are inconsistent; in those instances, the provisions of this subpart will govern.

This subpart specifies the roles and responsibilities of the Tribe/Consortium and the Secretary in construction programs, including environmental determinations, performance, changes, monitoring, inspections, and reassumption. This subpart details the process by which a Tribe/Consortium, at its election and with the approval of the Secretary, designates a certifying Tribal officer to represent the Tribe/Consortium and to assume the status of a responsible Federal official under National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), and related provisions of other laws and regulations and accepts the jurisdiction of the United States courts for the purpose of enforcing the responsibilities of the certifying Tribal officer assuming the status of a responsible Federal official under those Acts, laws, or regulations.

Federal Acquisition Regulations provisions are specifically not incorporated into this final rule; however, they may be negotiated by the parties in the funding agreement. Construction project agreements, made part of a funding agreement, must address applicable Federal laws, program statutes, and regulations. In addition to requirements for all funding agreements referenced in subpart F (Funding Agreements for BIA Programs), other provisions are added for construction project agreements and programs and funding agreements that include a construction project or program to implement the requirements of the PROGRESS Act, including health and safety standards, brief progress reports, financial reports, and suspension of work when appropriate. Building codes appropriate for the project must be used and the Federal agency must notify the Tribe when Federal standards are appropriate for any project.

Lastly, this subpart provides that the Secretary may accept funds from other departments for construction projects or programs, subject to an interagency agreement, or "IAA," between the Secretaries, with Tribal concurrence.

Subsequent to the Committee approving its report to the Secretary, including non-consensus issues in this subpart, the Council on Environmental

Quality (CEQ) revised its NEPA implementing regulations, 40 CFR parts 1500 through 1508, which are effective July 1, 2024.³ The Department invited comment on whether to revise the proposed regulatory text in any final rule for consistency with NEPA and the NEPA implementing regulations. For example, (1) updating proposed § 1000.1390 to incorporate text from and for consistency with 42 U.S.C. 4332(2)(E) and 40 CFR 1506.6(a), which direct agencies to make use of "high-quality information, including reliable data and resources;" (2) updating proposed § 1000.1385(a)(2) to incorporate text making clear that NEPA requires agencies to assess "reasonably foreseeable environmental effects" of a proposed agency action, not all potential effects, for consistency with 42 U.S.C. 4332(2)(C)(i) and the definition of "effects" in 40 CFR 1508.1(i); and (3) updating § 1000.1385(a)(5) to state that in applying a categorical exclusion under NEPA, evaluate whether extraordinary circumstances exist, in which a normally excluded project may have a significant effect, and therefore requires preparation of an environmental assessment or environmental impact statement, for consistency with 40 CFR 1501.4.

Amendments to § 1000.1305—What construction projects and programs included in a funding agreement or construction project agreement are subject to this subpart?

The Committee clarified the provision in subsection (b)(5) based on consultation recommendations by clarifying the exemption involving Public Law 102.477 funded projects and deleting "Child Care Development Fund."

Amendments to § 1000.1385—What is the typical environmental review process for construction projects?

The Committee revised text based on recommendations of the Council on Environmental Quality involving documenting assessment of "reasonably foreseeable" environmental effects in § 1000.1385(a)(2) and deleting the term "potential" from the subsection. The Committee also revised the text on § 1000.1385(a)(5) to clarify when applying a categorical exclusion under NEPA and the required preparation of an environmental assessment or environmental impact statement.

³ See Council on Environmental Quality (CEQ), NEPA Implementing Regulations Revisions Phase 2, Final Rule, 88 FR 35442 (May 1, 2024).

Amendments to § 1000.1390—Is the Secretary required to take into account the Indigenous Knowledge of Tribes/Consortia when preparing environmental studies under NEPA, NHPA, and related provisions of other law and regulations?

The Committee added language in the preamble and revised the provision to be consistent with terminology in the recently updated CEQ regulations concerning “reliable data sources.”

Amendments to § 1000.1445—May the Secretary suspend construction activities under the terms of a funding agreement or construction project agreement under title IV of the ISDEAA?

The Committee revised text based on recommendations to distinguish the provisions as applying only to the ISDEAA title IV construction projects in the title, subsection (a) and (b).

Amendments to § 1000.1455—What happens when a Tribe/Consortium, suspended under § 1000.1445 for substantial failure to carry out the terms of a funding agreement that includes a construction project or program or a construction project agreement under title IV of the ISDEAA without good cause, does not correct the failure during the suspension?

The Committee revised text based on recommendations to distinguish the provisions as applying only to the ISDEAA title IV construction projects.

L. Subpart L—Federal Tort Claims

This subpart explains the applicability of the Federal Tort Claims Act.

Amendments to § 1000.1650—What employees are covered by FTCA for claims arising out of a Tribe's/Consortia's performance of a compact or funding agreement?

The Committee reviewed the applicability of Federal tort claim coverage for “permanent and temporary employees” and implemented qualifying language to clarify that these employees would need to be employees of a Tribe/Consortium.

M. Subpart M—Reassumption

Reassumption is the federally initiated action of reassuming control of Federal programs formerly performed by a Tribe/Consortium. This subpart explains the types of reassumptions authorized under title IV, as amended by the PROGRESS Act, including the rights of a Consortium member, the types of circumstances necessitating reassumption, and Secretarial responsibilities including prior notice

requirements and other procedures. The subpart explains what is meant by imminent jeopardy to trust assets, natural resources, and public health and safety that may be grounds for reassumption.

This subpart also describes the hearing rights a Tribe/Consortium has before or after reassumption by the Secretary, the PROGRESS Activities to be performed after reassumption has been completed, and the effect of reassumption on other provisions of a funding agreement.

The Committee did not implement changes to subpart M.

N. Subpart N—Retrocession

Retrocession is the Tribally-initiated voluntary action of returning control of certain programs to the Federal Government. This subpart defines retrocession, including how Tribes/Consortia may retrocede, the effect of retrocession on future funding agreement negotiations, and Tribal/Consortium obligations regarding the return of Federal property to the Secretary after retrocession.

The Committee did not implement changes to subpart N.

O. Subpart O—Trust Evaluation

This subpart establishes a procedural framework for the Secretary's annual trust evaluation mandated by the PROGRESS Act. The purpose of the Secretary's annual trust evaluation is to ensure that trust functions assumed by Tribes/Consortia are performed in a manner that does not place trust assets in imminent jeopardy.

Imminent jeopardy of a physical trust asset or natural resource (or their intended benefits) exists where there is an immediate threat and likelihood of significant devaluation, degradation, or loss to such asset. Imminent jeopardy to public health and safety means an immediate and significant threat of serious harm to human well-being, including conditions that may result in serious injury, or death, caused by Tribal action or inaction or as otherwise provided in a funding agreement.

This subpart requires the Secretary's designated representative to prepare a written report for each funding agreement under which trust functions are performed by a Tribe. This final rule also authorizes a review of Federal performance of residual and nondelegable trust functions affecting trust resources. The name of this subpart has been changed from “Trust Evaluation Review” to “Trust Evaluation.” It was redundant to have both evaluation and review in the title.

The Committee did not implement changes to subpart O.

P. Subpart P—Reports

This subpart describes the report on self-governance that the Secretary prepares annually for transmittal to Congress. It also includes the requirements for the annual report that Tribes/Consortia submit to the Secretary and other data requirements the Secretary may request of Tribes/Consortia. The issue related to the inclusion of BIE in the BIA programs for purposes of the reporting requirements surfaces in this subpart and is addressed in subpart A (General Provisions).

The Committee did not implement changes to subpart P.

Q. Subpart Q—Operational Provisions

The 2001 prior rule includes “Subpart Q—Miscellaneous Provisions.” The final rule amends the title of this subpart to “Operational Provisions” to be more descriptive and instructive to the reader and to bring consistency with regulations promulgated at 42 CFR subchapter M part 137—Tribal Self-Governance under the Indian Health Service as authorized by title V of the ISDEAA, as amended.

The changes to this subpart address many facets of self-governance not covered in the other subparts. Issues covered include the applicability of various laws such as the Freedom of Information Act, the Privacy Act, the Prompt Payment Act, and the Single Agency Audit Act, applicable provisions of OMB circulars, how funds are handled in various situations, including carryover of funds, savings from programs, and the use of funds to meet matching or cost participant requirements under other laws.

Certain provisions of this subpart are amended to comply with the PROGRESS Act, and with applicable regulations promulgated by OMB at 2 CFR part 200. References to outdated OMB circulars within this subpart are updated throughout. New sections within this subpart address new provisions within the PROGRESS Act, as amended, such as § 1000.2130 that addresses claims against a Tribe/Consortium in relation to disallowance of costs, and limitation of costs.

Amendments to § 1000.2130—How much time does the Federal Government have to make a claim against a Tribe/Consortium relating to any disallowance of costs, based on an audit?

The Committee agreed to respond to the comment by adding that the audit

referred to in this section would be an audit under title IV.

R. Subpart R—Appeals

This subpart prescribes the process Tribes/Consortia may use to resolve disputes with the Department arising before or after execution of a funding agreement or compact and certain other disputes related to self-governance.

The Committee revised the subpart to provide that that Tribes/Consortia may elect to file an appeal of eligible pre-award disputes with an appropriate bureau head or Assistant Secretary through the following revisions to the subpart's current language. The Committee institutes these revisions to address comments received requesting that Tribes/Consortia have the option to file an appeal of a pre-award dispute with an appropriate bureau head/Assistant Secretary or the IBIA in order to provide flexibility and predictability for Tribes/Consortia in initiating pre-award appeals under this subpart.

Amendments to § 1000.2302—What does “title-I eligible programs” mean in this subpart?

The Committee deleted this section to remove any references to “title-I eligible programs” within the subpart to eliminate the distinction between title-I eligible programs and non-Title-I eligible programs so that Tribes/Consortia may file an appeal of all pre-award disputes covered under this subpart with an appropriate bureau head/Assistant Secretary or the IBIA.

Amendments to § 1000.2351—To Whom may a Tribe/Consortia appeal a decision made before the funding agreement, amendment to the funding agreement, or compact is signed?

The Committee implemented a change in the wording of § 1000.2351(b) to add the term “initial” in the phrase “the bureau head will decide initial appeals relating to these pre-award matters,” and strike the language in § 1000.2351(b)(i), “Programs that are not PSFAs that the Secretary provides for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department within which the PSFAs have been performed” to revise the subpart so that Tribes/Consortia may file appeals of pre-award disputes with an appropriate bureau head/Assistant Secretary.

Amendments to add § 1000.2357—Which official is the appropriate bureau head or Assistant Secretary for purposes of subpart R?

The Committee added a new section providing a chart indicating the relevant

official to whom a Tribe/Consortium may file its initial request for appeal when exercising its appeal rights to the bureau head/Assistant Secretary under § 1000.2351 for any BIA Program. This section provides that the Assistant Secretary for Indian Affairs is the appropriate Assistant Secretary for reviewing appeals for BIA Programs in accordance with § 1000.2370. Finally, the section identifies the appropriate bureau head/Assistant Secretary for non-BIA Program appeals pursuant to § 1000.2351. The Committee implemented this section to provide clarity regarding the relevant official for any BIA Program to whom a Tribe/Consortia would file an appeal.

S. Subpart S—Conflicts of Interest

This subpart sets out the minimum requirements a Tribe/Consortium must have in place, pursuant to Tribal law and procedures, to address conflicts of interest, including organizational and personal conflicts.

The Committee did not implement changes to subpart S.

T. Subpart T—Tribal Consultation Process

This subpart describes the process for engaging in consultations related to self-governance with Tribes/Consortia. The 2001 prior rule includes “Subpart I—Public Consultation Process.” The final rule removes and renames this subpart to reflect that the subpart applies to Tribal consultation, and to conform to more recent Federal and Department policy on Tribal consultation. Under this subpart, consultations related to self-governance commenced after this rule's effective date will comply with the Tribal consultation process outlined in the revised version of this subpart, and such previous regulations governing public consultation shall be superseded.

This subpart establishes when the Secretary shall consult on matters related to self-governance and identifies that consultation will occur: (1) to determine eligible programs for inclusion in a funding agreement; (2) to establish programmatic targets for the inclusion of non-BIA programs in funding agreements; and (3) on any secretarial action with Tribal implications on matters related to self-governance. This subpart also establishes the applicable process for engaging in Tribal consultations, which is inspired by the President's November 30, 2022, Memorandum on Uniform Standards for Tribal Consultation, and the Department's current Departmental Manuals.

This subpart also establishes guiding principles applicable to Tribal

consultation related to self-governance. Additionally, this subpart requires the Secretary to provide notice of upcoming consultations to Tribes/Consortia, allow written comments, and develop a record reflecting a Tribal consultation. Finally, this subpart establishes how the Secretary will handle confidential or sensitive information provided by a Tribe/Consortium during a consultation.

The Committee agreed to require at least 30 days' notice to Tribes/Consortia prior to any planned consultation sessions. However, the Committee recognizes that situations may occur that require the need for Tribal consultation on an expedited basis to address urgent issues. Therefore, the Committee expects that the Secretary may waive applicable notice requirements at the request of a Tribe/Consortium pursuant to subpart J (Waiver of Regulations) in such urgent situations.

The Committee did not implement changes to subpart T.

V. Procedural Requirements

A. Regulatory Planning and Review (E.O. 12866, 14094 and E.O. 13563)

E.O. 12866, as amended by E.O. 14094, provides that the Office of Information and Regulatory Affairs (OIRA) in OMB will review all significant regulatory actions. OIRA has determined that this rule is a significant regulatory action.

E.O. 14094 amends E.O. 12866 and 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 be 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.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The 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. The Department has developed this final rule in a manner consistent with these requirements.

E.O. 12866 Interagency Feedback Received on Proposed Rule

The Department new regulations will update the manner in which it implements self-governance at the Department. This Notice discussed the rationale for the changes that should have no major impacts on regulations or programs administered by other agencies. Overall, the proposed rule was expected to apply only to those Tribes/Consortia that enter into a self-governance compact with the Department and conclude a funding agreement under that compact.

During OIRA's E.O. 12866 review, the Department received comments expressing concerns about how the Department's proposed rule might intersect with another agency's self-governance regulations and program. The Department sought information to describe the manner, if any, in which its self-governance regulations might affect self-governance compacts and funding agreements between Tribes/Consortia and agencies other than the Department.

Throughout the E.O. 12866 interagency process, the Department worked collaboratively with OMB, OIRA, and the agencies providing comment. Prior to the publication of the proposed rule, 89 FR 57524, the Department communicated regularly with the relevant agencies regarding legal and policy interests that the other agencies had about the proposed rule, 89 FR 57524. These robust discussions continued after the publication of the proposed rule, 89 FR 57524. The Department provided information on the nature of the rulemaking process to the relevant agencies and engaged in a good faith effort to make concessions and compromise where possible. Multiple drafts of proposed language were exchanged. Regular communication between the Committee, the Department leadership, and relevant agency were able to reach consensus and compromise on the language of the final rule.

B. Regulatory Flexibility Act

The Department certifies that this final rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* The Department has evaluated the effects of this final rule on small entities, such as local governments and businesses.

On October 21, 2020, the Practical Reforms & Other Goals to Reinforce the

Effectiveness of Self Governance & Self Determination for Indian Tribes Act (PROGRESS Act) was signed into law. See Public Law 116–180. Section 413 of Public Law 116–180, 25 U.S.C. 5363 directs the Secretary to promulgate regulations using the negotiated rulemaking process to carry out subchapter IV of the ISDEAA, the Tribal Self-Governance Program.

As stated in the Preamble to the Rule, “this rule [will] update regulations implementing Tribal Self-Governance. This final rule has been negotiated by representatives of Self-Governance and non-Self-Governance Tribes, and the Department. The intended effect is to transfer to participating Tribes’ control of, funding for, and decision making concerning certain Federal programs, consistent with updates contained in the PROGRESS Act. The Department anticipates this final rule will have a negligible cost burden for Tribes currently participating in Self-Governance, nominal startup costs for Tribes not currently participating in Self-Governance, and some possible negligible new costs to the Federal government absorbed by internal transfers.”

The scope of the final rule provides regulatory implementation of legislative amendments to title IV of Public Law 93–638, the Tribal Self-Governance Program. The final rule implements the more accommodating selection and eligibility criteria for Indian Tribes and Tribal organizations that wish to join the Tribal Self-Governance Program. The final rule supports the authority for continuing existing funding agreements, reduces effort for subsequent funding agreements, and provides administrative process for final offers when the parties are unable to reach agreement when negotiating a compact or funding agreement. The final rule applies the amended statute’s new standard for the Department’s burden of proof for certain decisions and appeal processes, it allows Tribes to use the prudent investment standard, and it updates the rules for construction programs and projects awarded through self-governance funding agreements. Rather than by executive order, the final rule introduces in regulation a regulatory process for consultation with self-governance Tribes on self-governance matters within the Department.

Based on the evaluation, the Department anticipates that this action will not have a significant economic impact on small entities. The Department only foresees this final rule having an impact on the Federal Government and Indian Tribes, which

are not considered to be small entities for purposes of this Act.

C. Congressional Review Act (CRA)

This final rule does not meet the criteria in 5 U.S.C. 804(2). Specifically, it:

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

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

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

D. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement analyzing and estimating anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and Tribal Governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. See 2 U.S.C. 1532. The PROGRESS Act further requires that the agency publish a summary of such a statement with the agency’s proposed and final rules.

This final rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than \$100 million per year. The final rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector because this final rule affects only individual Indians and Tribal governments that petition the Department to take land into trust for their benefit. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

E. Takings (E.O. 12630)

This final rule does not affect a taking of private property or otherwise have taking implications under E.O. 12630. A takings implication assessment is not required.

F. Federalism (E.O. 13132)

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

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

This final rule complies with the requirements of E.O. 12988.

Specifically, this final rule:

- (a) meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and
- (b) meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

H. Reforming Federal Funding and Support for Tribal Nations (E.O. 14112)

E.O. 14112 restates that it is the policy of the United States to design and administer Federal funding and support programs for Tribal Nations, consistent with applicable law and to the extent practicable, in a manner that better recognizes and supports Tribal sovereignty and self-determination. This policy is in keeping with the government's trust and treaty obligations to Tribal Nations, and the commitment to advancing Tribal sovereignty.

E.O. 14112(5) requires agencies to take steps "to increase the accessibility, equity, flexibility, and utility of Federal funding and support programs for Tribal Nations, while increasing the transparency and efficiency of Federal funding processes to better live up to the Federal Government's trust responsibilities and support Tribal self-determination," by "increase[ing] the accessibility, equity, flexibility, and utility of Federal funding and support programs for Tribal Nations, while increasing the transparency and efficiency of Federal funding processes to better live up to the Federal Government's trust responsibilities and support Tribal self-determination." Further, "implementation efforts shall appropriately maintain or enhance protections afforded under existing Federal law and policy, including those related to treaty rights and trust obligations, Tribal sovereignty and jurisdiction, civil rights, civil liberties, privacy, confidentiality, Indigenous Knowledge, and information access and security."

Throughout the negotiated rulemaking process, the Department remained committed to the obligations required under E.O. 14112, trust and treaty obligations to Tribes, and advancing self-governance and Tribal sovereignty.

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

The Department 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. The Department evaluated this final rule under its consultation policy and under the criteria in E.O. 13175 and has hosted consultation with federally recognized Indian Tribes in preparation of this final rule, including through a Dear Tribal Leader letter delivered to every federally recognized Tribe in the country, and through four consultation sessions held on July 15, 17, 19, and 22, 2024. Following the consultation sessions, the Department accepted written comments until August 14, 2024.

The Department developed this rule through a negotiated rulemaking process, with both Tribal and Federal representatives, which the Department asserts fulfills its obligations to consult on the text of this final rule. The Tribal and Federal representatives reached consensus on the final rule text, except for the few areas of disagreement discussed above.

J. Paperwork Reduction Act

This final rule contains a revision to a collection of information which is currently approved under the Office of Management and Budget (OMB) Control Number 1076–0143 through February 29, 2026. The revisions have been submitted to OMB for review and 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 OMB control number.

Abstract: The Self-Governance program is authorized by the Tribal Self-Governance Act of 1994, 25 U.S.C. 5301, Public Law 103–413, as amended. Tribes interested in entering into Self-Governance must submit certain information as required by the PROGRESS Act. In addition, those Tribes and Consortia that have entered into Self-Governance funding agreements will be requested to submit certain information as described in this final rule.

For this ICR Reference No. 202410–1076–001, associated with final rule, the Department modified burden estimates within five (5) ICRs and added seven (7) ICRs to the information collection. There were ten (10) ICRs within this information collection that remained unchanged. The following revision to the existing information collections require approval by OMB.

- *Summary of Requested Revision:* Projected increase in respondent

participation and total number of annual respondents. Estimates have been increased to accurately reflect the amount of work associated with the total annual reporting and recordkeeping burden. This information will be used to justify a budget request submission on their behalf and to comport with section 405 of the PROGRESS Act that calls for the Secretary to submit an annual report to the Congress. For this ICR Reference No. 202410–1076–001, associated with Final Rule, RIN 1076–AF62, OSG made modifications to the burden estimates within six (6) ICRs. In addition, OSG added seven (7) ICRs to this information collection. Finally, there were nine (9) ICRs within this information collection that remained unchanged.

- *Modified ICRs:*

- Subpart B: Planning report
- Subpart C: Planning and Negotiation Grants
- Subpart D: Financial Assistance for Planning and Negotiations
- Subpart E: Compacts
- Subpart K: Construction
- Subparts M and N: Notice to retrocede; and Reassumption

- *New ICRs:*

- Subpart F: Funding Agreements for BIA Programs
- Subpart G: Funding Agreements for Non-BIA Programs
- Subpart L: Federal Tort Claims
- Subpart O: Trust Evaluation
- Subpart Q: Operational Provisions
- Subpart R: Appeals
- Subpart T: Tribal Consultation Process
- *Unchanged ICRs:*
- Subpart B: Admission to applicant pool
- Subpart B: Withdrawal from consortium FA
- Subpart B: Withdrawal from consortium to become member of applicant pool
- Subpart H: Letter of interest and supporting documents for FA
- Subpart H: Request to negotiate a FA
- Subpart H: Request to negotiate successor FA
- Subpart I: Final Offer
- Subpart J: Request for waiver
- Subpart P: Annual self-governance report

- *Title of Collection:* Tribal Self-Governance Program.

- *OMB Control Number:* 1076–0143.

- *Form Number:* Annual Self-Governance Report Form.

- *Type of Review:* Revision of a currently approved collection.

- *Respondents/Affected Public:* Federally recognized Indian Tribes and

Tribal Consortia participating in or wishing to enter into Tribal Self-Governance.

- *Total Estimated Number of Annual Respondents*: 492.

- *Total Estimated Number of Annual Responses*: 588.

- *Estimated Completion Time per Response*: Varies from 1 to 400 hours.

- *Total Estimated Number of Annual Burden Hours*: 11,276 hours.

- *Respondent's Obligation*: Required to obtain a benefit.

- *Frequency of Collection*: On occasion or annually.

- *Total Estimated Annual Non-hour Burden Cost*: \$20,800 for cost associated with attending training and hiring consultants to provide services for entering the Self-Governance Program.
- *Annual Costs to Federal Government*: \$1,725,535.

As part of our continuing effort to reduce paperwork and respondents' 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.

Send your written comments and suggestions on this information collection to OIRA listed in **ADDRESSES** by the date indicated in **DATES**. Please also send a copy to consultation@bia.gov and reference "OMB Control Number 1076-0143" in the subject line of your comments. You may also view the ICR at <https://www.reginfo.gov/public/Forward?SearchTarget=PRA&textfield=1076-0143>.

K. National Environmental Policy Act (NEPA)

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 is not required because the rule is covered by

a categorical exclusion under 43 CFR 46.210(i): "Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case." The Department also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under the National Environmental Policy Act.

L. Energy Effects (E.O. 13211)

This final rule is not a significant energy action under the definition in E.O. 13211; the rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy, and the rule has not otherwise been designated by the Administrator of OIRA as a significant energy action. A Statement of Energy Effects is not required.

M. Clarity of This Regulation

The Department is required by E.O. 12866 (section 1(b)(12)), 12988 (section 3(b)(1)(B)), and E.O. 13563 (section 1(a)), and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This final rule meets the criteria of:

- (a) Be logically organized;
- (b) Use the PROGRESS 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.

List of Subjects in 25 CFR Part 1000

Administrative practice and procedure, Grant programs—Indians, Indians, Indian Tribes, Reporting and recordkeeping requirements, Tribal Consortium.

■ For the reasons set forth in the preamble above, the Department of the Interior, Assistant Secretary—Indian Affairs, revises 25 CFR part 1000 to read as follows:

PART 1000—ANNUAL FUNDING AGREEMENTS UNDER THE TRIBAL SELF-GOVERNMENT ACT AMENDMENTS TO THE INDIAN SELF-DETERMINATION AND EDUCATION ACT

Subpart A—General Provisions

Sec.

1000.1 What is the authority of this part?

1000.5 What key terms do I need to know?

1000.10 What is the purpose and scope of this part?

1000.15 What is the congressional policy statement of this part?

1000.20 What is the Secretarial policy of this part?

1000.25 What is the effect on existing Tribal rights?

1000.30 What is the effect of these regulations on Federal program guidelines, manual, or policy directives?

1000.35 What happens if a court holds any provisions of these regulations in this part invalid?

Subpart B—Selection of Additional Tribes for Participation in Tribal Self-Governance

Sec.

Purpose and Definitions

1000.101 What is the purpose of this subpart?

1000.105 What is a "signatory"?

1000.110 What is a "nonsignatory Tribe"?

Eligibility

1000.115 Who may participate in Tribal self-governance?

1000.120 How many additional Tribes/Consortia may participate in self-governance per year?

1000.125 What must a Tribe/Consortium submit to be selected to participate in Self-Governance?

1000.130 What additional information may be submitted to the Secretary to facilitate negotiations?

1000.135 May a Consortium member Tribe withdraw from the Consortium and be selected to participate in Self-Governance?

1000.140 What is required during the "planning phase"?

1000.145 When does a Tribe/Consortium have an uncorrected "significant and material audit exception"?

1000.150 What are the consequences of having an uncorrected significant and material audit exception?

1000.155 Is the Secretary required to provide technical assistance to improve a Tribe's/Consortium's internal controls?

Selection To Participate in Self-Governance

1000.160 How is a Tribe/Consortium selected to participate in Self-Governance?

1000.165 When does OSG accept requests to participate in Self-Governance?

1000.170 Are there any time frames to negotiate an initial compact or funding agreement for a Tribe not presently participating in self-governance?

1000.175 How does a Tribe/Consortium withdraw its request to participate in Self-Governance?

1000.180 What if more than 50 Tribes/Consortium apply to participate in Self-Governance?

1000.185 What happens if a request is not complete?

1000.190 What happens if a Tribe/Consortium is selected to participate but does not execute a compact and a funding agreement?

- 1000.195 May a Tribe/Consortium be selected to negotiate a funding agreement under section 403(b)(2) of the Act without having or negotiating a funding agreement under 25 U.S.C. 5363(b)(1)?
- 1000.200 May a Tribe/Consortium be selected to negotiate a funding agreement under section 403(c) (25 U.S.C. 5363(c)) without negotiating a funding agreement under 25 U.S.C. 5363(b)(1) and/or section 403(b)(2) (25 U.S.C. 5363(b)(2))?

Withdrawal From a Consortium Funding Agreement

- 1000.205 What happens when a Tribe wishes to withdraw from a Consortium funding agreement?
- 1000.210 How are funds redistributed when a withdrawing Tribe fully or partially withdraws from a compact and funding agreement and enters a new contract or compact?
- 1000.215 If the withdrawing Tribe elects to operate a program carried out under a compact and funding agreement under title IV through a contract under title I, is the resulting contract considered a mature contract under 25 U.S.C. 5304(h)?
- 1000.220 How are funds distributed when a withdrawing Tribe fully or partially withdraws from a Consortium's compact and funding agreement and the withdrawing Tribe does not enter a new contract or compact?
- 1000.225 What amount of funding is to be removed from the Consortium's funding agreement for the withdrawing Tribe?
- 1000.230 What happens if there is a dispute between the Consortium and the withdrawing Tribe?
- 1000.235 When a Tribe withdraws from a Consortium, is the Secretary required to award to the withdrawing Tribe a portion of funds associated with a construction project if the withdrawing Tribe so requests?

Subpart C—Planning and Negotiation Grants for BIA Programs

- Sec.
- 1000.301 What is the purpose of this subpart?
- 1000.305 Are there grants available to assist Tribes/Consortia to meet the requirements to participate in self-governance?
- 1000.310 What is required to request planning and negotiation grants?
- 1000.315 Are planning and negotiation grants available?
- 1000.320 Must a Tribe/Consortium receive a planning or negotiation grant to be eligible to participate in self-governance?
- 1000.325 What happens if there are insufficient funds to award all of the requests for planning and negotiation grants in any given year?
- 1000.330 May a Tribe/Consortium that has received a planning grant also receive a negotiation grant?
- 1000.335 What are the Secretary's responsibilities upon a decision not to award a planning or negotiation grant?
- 1000.340 May a Tribe/Consortium administratively appeal the Secretary's decision to not award a grant under this subpart?

Subpart D—Financial Assistance for Planning and Negotiation Activities for Non-BIA Bureau Programs

- Sec.
- 1000.401 What is the purpose of this subpart?
- 1000.405 What funds are available to Tribes/Consortium for planning and negotiating activities with non-BIA bureaus?
- 1000.410 What kinds of planning and negotiation activities for non-BIA programs does financial assistance from non-BIA bureaus support?
- 1000.415 Who can apply to a non-BIA bureau for financial assistance to plan and negotiate non-BIA programs?
- 1000.420 Under what circumstances may financial assistance for planning and negotiation activities with non-BIA bureaus be awarded to Tribes/Consortia?
- 1000.425 How does the Tribe/Consortium know when and how to apply for financial assistance for planning and negotiation activities for a non-BIA program?
- 1000.430 What must be included in the application for financial assistance for planning and negotiation activities for a non-BIA program?
- 1000.435 How will the non-BIA bureau director/commissioner award financial assistance for planning and negotiation activities for a non-BIA program?
- 1000.440 May non-BIA bureaus provide technical assistance to a Tribe/Consortium in drafting its application?
- 1000.445 What are the non-BIA bureau director's/commissioner's responsibilities upon a decision to decline financial assistance?
- 1000.450 Can an applicant administratively appeal a decision not to award financial assistance?
- 1000.455 May a Tribe/Consortium reapply through a future planning and negotiation application if it has been previously denied?
- 1000.460 Will the non-BIA bureau notify Tribes/Consortium of the results of the selection process?

Subpart E—Compacts

- Sec.
- 1000.501 What is a self-governance compact?
- 1000.505 Which DOI office negotiates self-governance compacts?
- 1000.510 What is included in a self-governance compact?
- 1000.515 What provisions must be included in either a compact or funding agreement?
- 1000.520 Is a compact required to participate in self-governance?
- 1000.525 Can a Tribe/Consortium negotiate other terms and conditions?
- 1000.530 What is the duration of a compact?
- 1000.535 May a compact be amended?
- 1000.540 Can a Tribe/Consortium have a funding agreement without having negotiated a compact?
- 1000.545 May a participating Tribe/Consortium retain its existing compact which was executed prior to the enactment of Public Law 116–180?

- 1000.550 What happens if the Tribe/Consortium and Secretary fail to reach an agreement on a compact?

Subpart F—Funding Agreements for BIA Programs

- Sec.
- 1000.601 What is the purpose of this subpart?
- 1000.605 What is a funding agreement?
- Contents and Scope of Funding Agreements*
- 1000.610 What must be included in a funding agreement?
- 1000.615 Can additional provisions be included in a funding agreement?
- 1000.620 Does a Tribe/Consortium have the right to include provisions of title I of Public Law 93–638 in a funding agreement?
- 1000.625 What is the term of a funding agreement?
- 1000.630 Can a Tribe/Consortium negotiate a funding agreement with a term that exceeds one year?
- 1000.635 Does a funding agreement remain in effect after the end of its term?
- 1000.640 May a participating Tribe/Consortium retain its existing funding agreement which was executed prior to the enactment of Public Law 116–180?

Determining What Programs May Be Included in a Funding Agreement

- 1000.645 What PSFAs may be included in a funding agreement?
- 1000.650 How does the funding agreement specify the services provided, functions performed, and responsibilities assumed by the Tribe/Consortium and those retained by the Secretary?
- 1000.655 May a Tribe/Consortium redesign or consolidate the programs that are included in a funding agreement and reallocate funds for such programs?
- 1000.660 Do Tribes/Consortium need Secretarial approval to redesign BIA programs that the Tribe/Consortium administers under a funding agreement?
- 1000.665 Can the terms and conditions in a funding agreement be amended during the year it is in effect?

Determining Funding Agreement Amounts

- 1000.670 What funds must be transferred to a Tribe/Consortium under a funding agreement?
- 1000.675 What funds may not be included in a funding agreement?
- 1000.680 May the Secretary place any requirements on programs and funds that are otherwise available to Tribes/Consortium or Indians for which appropriations are made to agencies other than DOI?
- 1000.685 What funds are used to carry out inherent Federal functions?
- 1000.690 How does BIA determine the funding amount to carry out inherent Federal functions?
- 1000.695 Is the amount of funds withheld by the Secretary to cover the cost of inherent Federal functions subject to negotiation?
- 1000.700 May a Tribe/Consortium continue to negotiate a funding agreement pending an appeal of funding amounts?

associated with inherent Federal functions?

- 1000.705 What is a Tribal share?
- 1000.710 How does BIA determine a Tribe's/Consortium's share of funds to be included in a funding agreement?
- 1000.715 Can a Tribe/Consortium negotiate a Tribal share for programs outside its region/agency?
- 1000.720 May a Tribe/Consortium obtain discretionary or competitive funding that is distributed on a discretionary or competitive basis?
- 1000.725 Are all funds identified as Tribal shares always paid to the Tribe/Consortium under a funding agreement?
- 1000.730 How are savings that result from downsizing allocated?
- 1000.735 Do Tribes/Consortium need Secretarial approval to reallocate funds between programs that the Tribe/Consortium administers under the funding agreement?
- 1000.740 Can funding amounts negotiated in a funding agreement be adjusted during the year it is in effect?

Establishing Self-Governance Stable Base Budgets

- 1000.745 What are self-governance stable base budgets?
- 1000.750 Once a Tribe/Consortium establishes a stable base budget, are funding amounts renegotiated each year?
- 1000.755 How are self-governance stable base budgets established?
- 1000.760 How are self-governance stable base budgets adjusted?

Subpart G—Funding Agreements for Non-BIA Programs

- Sec.
- 1000.801 What is the purpose of this subpart?
- 1000.805 What is a funding agreement for a non-BIA program?
- 1000.810 What non-BIA programs are eligible for inclusion in a funding agreement?
- 1000.815 Are there non-BIA programs for which the Secretary must negotiate for inclusion in a funding agreement subject to such terms as the parties may negotiate?
- 1000.820 What programs are included under section 403(b)(2) (25 U.S.C. 5363(b)(2))?
- 1000.825 What programs are included under section 403(c) (25 U.S.C. 5363(c))?
- 1000.830 What does “special geographic, historical or cultural” mean?
- 1000.835 Under section 403(b)(2) (25 U.S.C. 5363(b)(2)), when must programs be awarded non-competitively?
- 1000.840 May a non-BIA bureau include in a funding agreement, on a non-competitive basis, programs of special geographic, historical, or cultural significance?
- 1000.845 Are there any non-BIA programs that may not be included in a funding agreement?
- 1000.850 Does a Tribe/Consortium need to be identified in an authorizing statute in order for a program or element of a program to be included in a non-BIA funding agreement?

- 1000.855 Will Tribes/Consortia participate in the Secretary's determination of what is to be included on the annual list of available programs?
- 1000.860 How will the Secretary consult with Tribes/Consortia in developing the list of available programs?
- 1000.865 What else is on the list in addition to eligible programs?
- 1000.870 May a bureau negotiate with a Tribe/Consortium for programs not specifically included on the annual list pursuant to 25 U.S.C. 5372(c)?
- 1000.875 How will a bureau negotiate a funding agreement for a program of special geographic, historical, or cultural significance to more than one Tribe/Consortium?
- 1000.880 When will this determination be made?
- 1000.885 What funds are included in a non-BIA funding agreement?
- 1000.890 How are indirect cost rates determined?
- 1000.895 How does the Secretary determine the amount of indirect costs for a non-BIA funding agreement?
- 1000.900 May the bureaus negotiate terms to be included in a funding agreement for non-BIA programs?
- 1000.905 Can a Tribe/Consortium reallocate, consolidate, and redesign funds for a non-BIA program?
- 1000.910 Do Tribes/Consortia need Secretarial approval to reallocate funds between title I eligible programs that the Tribe/Consortium administers under a non-BIA funding agreement?
- 1000.915 Can a Tribe/Consortium negotiate a funding agreement with a non-BIA bureau for which the performance period exceeds one year?
- 1000.920 Can the terms and conditions in a non-BIA funding agreement be amended during the year it is in effect?
- 1000.925 What happens if a funding agreement expires before the effective date of the successor Funding Agreement?

Subpart H—Negotiation Process

- Sec.
- 1000.1001 What is the purpose of this subpart?
- 1000.1005 What are the phases of the negotiation process?
- 1000.1010 Who may initiate the information phase?
- 1000.1015 Is it mandatory to go through the information phase before initiating the negotiation phase?
- 1000.1020 How does a Tribe/Consortium initiate the information phase?
- 1000.1025 What information is a Tribe/Consortium encouraged to include in a Request to Initiate the Information Phase?
- 1000.1030 When should a Tribe/Consortium submit a Request to Initiate the Information Phase to the Secretary?
- 1000.1035 What steps does the bureau take after a Request to Initiate the Information Phase is submitted by a Tribe/Consortium?
- 1000.1040 How does a Tribe/Consortium initiate the negotiation phase?

- 1000.1045 How and when does the Secretary respond to a request to negotiate a compact or BIA funding agreement?
- 1000.1050 How and when does the Secretary respond to a request to negotiate a non-BIA funding agreement?
- 1000.1055 What is the process for conducting the negotiation phase?
- 1000.1060 What issues must the bureau and the Tribe/Consortium address at negotiation meetings?
- 1000.1065 What happens when a compact or funding agreement is signed?
- 1000.1070 What happens if the Tribe/Consortium and bureau negotiators fail to reach an agreement on a compact or funding agreement?
- 1000.1075 When does the funding agreement become effective?
- 1000.1080 What is a subsequent funding agreement?
- 1000.1085 How is the negotiation of a subsequent funding agreement initiated?
- 1000.1090 What is the process for negotiating a subsequent funding agreement?

Subpart I—Final Offer

- Sec.
- 1000.1101 What is the purpose of this subpart?
- 1000.1105 When should a final offer be submitted?
- 1000.1110 How does a Tribe/Consortium submit a final offer?
- 1000.1115 What does a final offer contain?
- 1000.1120 When does the 60-day review period begin?
- 1000.1125 How does the Department acknowledge receipt of final offer?
- 1000.1130 May the Secretary request and obtain an extension of time of the 60-day review period?
- 1000.1135 What happens if the Secretary takes no action within the 60-day period (or any extensions thereof)?
- 1000.1140 Once the Tribe/Consortium's final offer has been accepted or accepted by operation of law, what is the next step?
- 1000.1145 On what basis may the Secretary reject a final offer?
- 1000.1150 How does the Secretary reject a final offer?
- 1000.1155 What is the “significant danger” or “risk” to the public health or safety, to natural resources, or to trust resources?
- 1000.1160 Is technical assistance available to a Tribe/Consortium to overcome the objections stated in the Secretary's rejection of a final offer?
- 1000.1165 If the Secretary rejects all or part of a final offer, is the Tribe/Consortium entitled to an appeal?
- 1000.1170 Do those portions of the compact, funding agreement, or amendment not in dispute go into effect?
- 1000.1175 Does appealing the final offer decision prevent the Secretary and the Tribe/Consortium from entering into any accepted compact, funding agreement or amendment provisions that are not in dispute?
- 1000.1180 What is the burden of proof in an appeal of a rejection of a final offer?

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Sec.

- 1000.1201 What regulations apply to Tribes/Consortia?
- 1000.1205 Can the Secretary grant a waiver of regulations to a Tribe/Consortium?
- 1000.1210 When can a Tribe/Consortium request a waiver of a regulation?
- 1000.1215 How does a Tribe/Consortium obtain a waiver?
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- 1000.1275 May a Tribe/Consortium continue to negotiate a funding agreement pending final decision on a waiver request?
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Sec.

- 1000.1301 What key construction terms do I need to know?

Purpose and Scope

- 1000.1305 What construction projects and programs included in a funding agreement or construction project agreement are subject to this subpart?
- 1000.1306 May a program or project-specific grant or contracting mechanism involving construction and related activities satisfy the requirements of this subpart?
- 1000.1307 May the Secretary accept funds from another Department for a program or project involving construction and related activities for transfer to the Tribe/Consortium under its funding agreement or construction project agreement?
- 1000.1310 What alternatives are available for a Tribe/Consortium to perform a construction program or project?
- 1000.1315 Does this subpart create an agency relationship?

Notification and Project Assumption

- 1000.1320 Is the Secretary required to consult with affected Tribes/Consortia

concerning construction projects and programs?

- 1000.1325 When does the Secretary confer with a Tribe/Consortium concerning Tribal preferences as to size, location, type, and other characteristics of a project?
- 1000.1330 What does a Tribe/Consortium do if it wants to perform a construction project or program under 25 U.S.C. 5367?
- 1000.1335 What must a Tribal proposal for a construction program or project contain?
- 1000.1340 May multiple projects be included in a single construction project agreement or funding agreement that includes a construction project?
- 1000.1345 Must a construction project proposal incorporate provisions of Federal construction guidelines and manuals?
- 1000.1350 What provisions relating to a construction project or program may be included in a funding agreement or construction project agreement?
- 1000.1355 What provisions must a Tribe/Consortium include in a construction project agreement or funding agreement that contains a construction project or program?

Requirements and Standards

- 1000.1360 What codes, standards and architects and engineers must a Tribe/Consortium use when performing a construction project under this part?

NEPA Process

- 1000.1365 Are Tribes/Consortia required to carry out activities involving NEPA in order to enter into a construction project agreement?
- 1000.1370 How may a Tribe/Consortium elect to assume some Federal responsibilities under NEPA?
- 1000.1375 How may a Tribe/Consortium carry out activities involving NEPA without assuming some Federal responsibilities?
- 1000.1379 Are Tribes/Consortia required to adopt a separate resolution or take equivalent Tribal action to assume some environmental responsibilities of the Secretary under NEPA, NHPA, and related laws and regulations for each construction project?
- 1000.1380 What additional provisions of law are related to NEPA and NHPA?
- 1000.1385 What is the typical environmental review process for construction projects?
- 1000.1390 Is the Secretary required to take into account the Indigenous Knowledge of Tribes/Consortia when preparing environmental studies under NEPA, NHPA, and related provisions of other laws and regulations?
- 1000.1395 May a Tribe/Consortium act as a cooperating agency or joint lead agency for environmental review purposes regardless of whether it exercises its option under § 1000.1370(a)(1)?
- 1000.1400 How does a Tribe/Consortium comply with NEPA and NHPA?
- 1000.1405 If a Tribe/Consortium adopts the environmental review procedures of a

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- 1000.1410 Are Federal funds available to cover the cost of Tribes/Consortia carrying out environmental responsibilities?
- 1000.1415 How are project and program environmental review costs identified?
- 1000.1420 What costs may be included in the budget for a construction project or program?
- 1000.1425 May the Secretary reject a Tribe's/Consortium's final offer of a construction project proposal submitted under subpart I based on a determination of Tribal capacity or capability?
- 1000.1430 On what basis may the Secretary reject a final offer of a construction project proposal made by a Tribe/Consortium?

Role of the Secretary

- 1000.1435 What is the Secretary's role in a construction project performed under this subpart?
- 1000.1440 What constitutes a "significant change" in the original scope of work?
- 1000.1445 May the Secretary suspend construction activities under the terms of a funding agreement or construction project agreement under title IV of the ISDEAA?
- 1000.1450 How are property and funding returned if there is a reassumption for substantial failure to carry out a construction project?
- 1000.1455 What happens when a Tribe/Consortium, suspended under § 1000.1445 for substantial failure to carry out the terms of a funding agreement that includes a construction project or program or a construction project agreement under title IV of the ISDEAA without good cause, does not correct the failure during the suspension?
- 1000.1460 How does the Secretary make advance payments to a Tribe/Consortium under a funding agreement or construction project agreement?
- 1000.1465 Is a facility built under this subpart eligible for annual operation and maintenance funding?

Role of the Tribe/Consortium

- 1000.1470 What is the Tribe's/Consortium's role in a construction project included in a funding agreement or construction project agreement under this subpart?
- 1000.1475 Is a Tribe/Consortium required to submit construction project progress and financial reports for construction projects?

Other

- 1000.1480 May a Tribe/Consortium continue work with construction funds remaining in a funding agreement or construction project agreement at the end of the funding year?
- 1000.1485 Must a construction project agreement or funding agreement that contains a construction project or

activity incorporate provisions of Federal construction standards?

- 1000.1490 May the Secretary require design provisions and other terms and conditions for construction projects or programs included in a funding agreement or construction project agreement under section 403(c) (25 U.S.C. 5363(c))?
- 1000.1495 Do all provisions of other subparts apply to construction portions of a funding agreement or construction project agreement?
- 1000.1500 When a Tribe withdraws from a Consortium, is the Secretary required to award to the withdrawing Tribe a portion of funds associated with a construction project if the withdrawing Tribe so requests?
- 1000.1505 May a Tribe/Consortium reallocate funds from a construction program to a non-construction program?
- 1000.1510 May a Tribe/Consortium reallocate funds among construction programs?
- 1000.1515 Must the Secretary retain project funds to ensure proper health and safety standards in construction projects?
- 1000.1520 What funding must the Secretary provide in a construction project agreement or funding agreement that includes a construction project or program?
- 1000.1525 Must Federal funds from other DOI sources be incorporated into a construction project agreement or funding agreement that includes a construction project or program?
- 1000.1530 May a Tribe/Consortium contribute funding to a project?

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- Sec.
- 1000.1601 What is the purpose of this subpart?
- 1000.1605 What other statutes and regulations apply to FTCA coverage?
- 1000.1610 Do Tribes/Consortia need to be aware of areas which FTCA does not cover?
- 1000.1615 Is there a deadline for filing FTCA claims?
- 1000.1620 How long does the Federal Government have to process a FTCA claim after the claim is received by the Federal agency, before a lawsuit may be filed?
- 1000.1625 Is it necessary for a compact or funding agreement to include any clauses about FTCA coverage?
- 1000.1630 Does FTCA apply to a compact and funding agreement if FTCA is not referenced in the compact or funding agreement?
- 1000.1635 To what extent shall the Tribe/Consortium cooperate with the Federal Government in connection with tort claims arising out of the Tribe's/Consortium's performance of a compact, funding agreement, or subcontract?
- 1000.1640 Does this coverage extend to subcontractors of compacts and funding agreements?
- 1000.1645 Is FTCA the exclusive remedy for a tort claim, including a claim concerning personal injury or death,

resulting from the performance of a compact or funding agreement?

- 1000.1650 What employees are covered by FTCA for claims arising out of a Tribe's/Consortia's performance of a compact or funding agreement?
- 1000.1655 Does FTCA cover employees of the Tribe/Consortium who are paid by the Tribe/Consortium from funds other than those provided through the funding agreement?
- 1000.1660 May persons who are not Indians or Alaska Natives assert claims under FTCA arising out of the performance of a compact or funding agreement by a Tribe/Consortium?
- 1000.1665 If the Tribe/Consortium or Tribe's/Consortium's employee receives a summons and/or a complaint alleging a tort covered by FTCA and arising out of the performance of a compact or funding agreement, what should the Tribe/Consortium do?

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- Sec.
- 1000.1701 What is the purpose of this subpart?
- 1000.1705 What does reassumption mean?
- 1000.1710 Under what circumstances may the Secretary reassume a program operated by a Tribe/Consortium under a funding agreement?
- 1000.1715 What is "imminent jeopardy" to a trust asset?
- 1000.1720 What is "imminent jeopardy" to natural resources?
- 1000.1725 What is "imminent jeopardy" to public health and safety?
- 1000.1730 What steps must the Secretary take prior to reassumption becoming effective?
- 1000.1735 Does the Tribe/Consortium have a right to a hearing prior to a non-immediate reassumption becoming effective?
- 1000.1740 What happens if the Secretary determines that the Tribe/Consortium has not corrected the conditions that the Secretary identified in the written notice?
- 1000.1745 What is the earliest date on which a reassumption by the Secretary can be effective?
- 1000.1750 Does the Secretary have the authority to immediately reassume a program?
- 1000.1755 What must a Tribe/Consortium do when a program is reassumed?
- 1000.1760 When must the Tribe/Consortium return funds to the Department?
- 1000.1765 May the Tribe/Consortium be reimbursed for actual and reasonable "wind up costs" incurred after the effective date of retrocession?
- 1000.1770 Is a Tribe's/Consortium's general right to negotiate a funding agreement adversely affected by a reassumption action?
- 1000.1775 When will the Secretary return management of a reassumed program?

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- Sec.
- 1000.1801 What is the purpose of this subpart?

- 1000.1805 Is a decision by a Tribe/Consortium not to include a program in a successor agreement considered a retrocession?
- 1000.1810 Who may retrocede a program in a funding agreement?
- 1000.1815 How does a Tribe/Consortium retrocede a program?
- 1000.1820 When will the retrocession become effective?
- 1000.1825 How will retrocession affect the Tribe's/Consortium's existing and future funding agreements?
- 1000.1830 Does the Tribe/Consortium have to return funds used in the operation of a retroceded program?
- 1000.1835 Does the Tribe/Consortium have to return property used in the operation of a retroceded program?
- 1000.1840 What happens to a Tribe's/Consortium's mature contract status if it has retroceded a program that is also available for self-determination contracting?
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- Sec.
- 1000.1901 What is the purpose of this subpart?
- 1000.1905 Does the Act alter the trust responsibility of the United States to Indian Tribes and individuals under self-governance?
- 1000.1910 What are "trust resources" for the purposes of the trust evaluation process?
- 1000.1915 What are "trust PSFAs" for the purposes of the trust evaluation process?
- 1000.1920 Can a Tribe/Consortium request the Secretary to conduct an assessment of the status of the trust assets, resource, and PSFAs?
- Annual Trust Evaluation
- 1000.1925 What is a trust evaluation?
- 1000.1930 How are trust evaluations conducted?
- 1000.1935 May the trust evaluation process be used for additional reviews?
- 1000.1936 May the parties negotiate review methods for purposes of the trust evaluation?
- 1000.1940 What are the responsibilities of the Secretary's designated representative(s) after the annual trust evaluation?
- 1000.1945 Is the trust evaluation standard or process different when the trust resource or asset is held in trust for an individual Indian or Indian allottee?
- 1000.1950 Does the annual trust review evaluation include a review of the Secretary's inherent Federal and retained operation trust PSFAs?
- 1000.1955 What are the consequences of a finding of imminent jeopardy in the Secretary's annual trust evaluation?
- 1000.1960 What if the Secretary's trust evaluation reveals problems that do not rise to the level of imminent jeopardy?
- 1000.1965 Who is responsible for taking corrective action?
- 1000.1970 What are the requirements of the Department's review team report?

1000.1975 May the Department conduct more than one trust evaluation per Tribe per year?

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Sec.

- 1000.2001 What is the purpose of this subpart?
- 1000.2005 Is the Secretary required to report on Self Governance?
- 1000.2010 What will the Secretary's annual report to Congress contain?
- 1000.2011 Is the Secretary required to review programs of the Department other than BIA, BIE, the Office of the Assistant Secretary for Indian Affairs, and the BTFA?
- 1000.2012 Is the Secretary required to annually publish information under this subpart in the **Federal Register**?
- 1000.2015 Must the Secretary seek comment on the report from Tribes/Consortia before submitting it to Congress?
- 1000.2020 What may the Tribe's/Consortium's annual report on self-governance address?
- 1000.2025 Are there other data submissions or reports that Tribes/Consortia may be requested to submit?
- 1000.2030 Are Tribes/Consortia required to submit Single Audit Act reports?
- 1000.2035 Is there an exemption available for the requirement to submit Single Audit Act reports?
- 1000.2040 Are Tribes/Consortia required to maintain reports and records in accordance with 25 U.S.C. 5305?

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Sec.

- 1000.2101 How can a Tribe/Consortium hire a Federal employee to help implement a funding agreement?
- 1000.2105 Can a Tribe/Consortium employee be detailed to a Federal service position?
- 1000.2110 How does the Freedom of Information Act apply?
- 1000.2115 How does the Privacy Act apply?
- 1000.2120 What audit requirements must a Tribe/Consortium follow?
- 1000.2125 How do OMB circulars and the Act apply to funding agreements?
- 1000.2130 How much time does the Federal Government have to make a claim against a Tribe/Consortium relating to any disallowance of costs, based on an audit?
- 1000.2135 Does a Tribe/Consortium have additional ongoing requirements to maintain minimum standards for Tribe/Consortium management systems?
- 1000.2140 Are there any restrictions on how funds awarded to a Tribe/Consortium under a funding agreement may be spent?
- 1000.2145 What standard applies to a Tribe's/Consortium's management of funds awarded under a funding agreement?
- 1000.2150 How may interest or investment income that accrues on funds awarded under a funding agreement be used?
- 1000.2155 Can a Tribe/Consortium retain savings from programs?

1000.2160 Can a Tribe/Consortium carry over funds not spent during the term of the funding agreement?

- 1000.2165 After a non-BIA funding agreement has been executed and the funds transferred to a Tribe/Consortium, can a bureau request the return of unexpended funds?
- 1000.2170 How can a person or group appeal a decision or contest an action related to a program operated by a Tribe/Consortium under a funding agreement?
- 1000.2175 Must Tribes/Consortia comply with the Secretarial approval requirements of 25 U.S.C. 81; 82a; and 476 regarding professional and attorney contracts?
- 1000.2180 Are funds awarded under a funding agreement non-Federal funds for the purpose of meeting matching or cost participation requirements?
- 1000.2185 Does Indian preference apply to services, activities, programs, and functions performed under a funding agreement?
- 1000.2190 Do the wage and labor standards in the Davis-Bacon Act apply to Tribes and Tribal Consortia?
- 1000.2195 Can a Tribe/Consortium use Federal supply sources in the performance of a funding agreement?
- 1000.2200 Does the Prompt Payment Act (31 U.S.C. 3901) apply to a BIA funding Agreement?
- 1000.2205 Does the Prompt Payment Act (31 U.S.C. 3901) apply to a non-BIA program funding agreement?
- 1000.2210 Is a Tribe/Consortium obligated to continue performance under a compact or funding agreement if the Secretary does not transfer sufficient funds?

Subpart R—Appeals

Sec.

- 1000.2301 What is the purpose of this subpart?
- 1000.2305 How must disputes be handled?
- 1000.2310 Does a Tribe/Consortium have any options besides an appeal?
- 1000.2315 What is the Secretary's burden of proof for appeals in this subpart?

Informal Conference

- 1000.2320 How does a Tribe/Consortium request an informal conference?
- 1000.2325 How is an informal conference held?
- 1000.2330 What happens after the informal conference?

Post-Award Disputes

- 1000.2335 How may a Tribe/Consortium appeal a decision made after the funding agreement or compact or an amendment to a funding agreement or compact has been signed?
- 1000.2340 What statutes and regulations govern resolution of disputes concerning signed funding agreements or compacts (and any signed amendments) that are appealed to the CBCA?

Pre-Award Disputes

- 1000.2345 What decisions may a Tribe/Consortium appeal under §§ 1000.2345 through 1000.2395?

1000.2350 What decisions may not be appealed under §§ 1000.2345 through 1000.2395?

- 1000.2351 To Whom may a Tribe/Consortia appeal a decision under § 1000.2345?
- 1000.2355 How does a Tribe/Consortium know where and when to file an appeal?
- 1000.2357 Which official is the appropriate bureau head or Assistant Secretary for purposes of subpart R?

Appeals to Bureau Head/Assistant Secretary

- 1000.2360 When and how must a Tribe/Consortium appeal an adverse pre-award decision to the bureau head/Assistant Secretary?
- 1000.2365 When must the bureau head (or appropriate Assistant Secretary) issue a final decision in the pre-award appeal?
- 1000.2370 When and how will the Assistant Secretary respond to an appeal by a Tribe/Consortium?

Appeals to IBIA

- 1000.2375 When and how must a Tribe/Consortium appeal an adverse pre-award decision to the IBIA?
- 1000.2380 What happens after a Tribe/Consortium files an appeal?
- 1000.2385 What procedures apply to Interior Board of Indian Appeals (IBIA) proceedings?
- 1000.2386 What regulations govern resolution of disputes that are appealed to the IBIA?
- 1000.2390 Will an appeal adversely affect the Tribe's/Consortium's rights in other compact, funding negotiations, or construction project agreement?
- 1000.2395 Will the decision on appeal be available for the public to review?

Appeals of an Immediate Reassumption of a Self-Governance Program

- 1000.2405 What happens in the case of an immediate reassumption under 25 U.S.C. 5366(b)?
- 1000.2410 Will there be a hearing?
- 1000.2415 What happens after the hearing?
- 1000.2420 Is the recommended decision always final?
- 1000.2425 If a Tribe/Consortium objects to the recommended decision, what action will the IBIA take?
- 1000.2430 Will an immediate reassumption appeal adversely affect the Tribe's/Consortium's rights in other self-governance negotiations?

Equal Access to Justice Act

- 1000.2435 Does the Equal Access to Justice Act (EAJA) apply to appeals under this subpart?

Subparts S—Conflicts of Interest

Sec.

- 1000.2501 Is a Tribe/Consortium required to have policies in place to address conflicts of interest?
- 1000.2505 What is an organizational conflict of interest?
- 1000.2510 What must a Tribe/Consortium do if an organizational conflict of interest arises under a funding agreement?
- 1000.2515 When must a Tribe/Consortium regulate its employees or subcontractors to avoid a personal conflict of interest?

- 1000.2520 What types of personal conflicts of interest involving Tribal officers, employees, or subcontractors would have to be regulated by a Tribe/Consortium?
- 1000.2525 What personal conflicts of interest must the standards of conduct regulate?

Subpart T—Tribal Consultation Process

Sec.

- 1000.2601 What is the purpose of this subpart?
- 1000.2605 When does the Secretary consult with Tribes and Consortia on matters related to self-governance?
- 1000.2610 What principles should guide consultations with Tribes and Consortia?
- 1000.2615 What notice must the Secretary provide to Tribes and Consortia of an upcoming consultation?
- 1000.2620 Is the Secretary required to allow written comments by Tribes and Consortia following a consultation?
- 1000.2625 What record must the Secretary maintain following a consultation with Tribes and Consortia?
- 1000.2630 How must the Secretary handle confidential or sensitive information provided by Tribes and Consortia during a consultation?

Authority: 25 U.S.C. 5373

Subpart A—General Provisions

§ 1000.1 What is the authority of this part?

This part is prepared and issued by the Secretary of the Interior with the active participation and representation of Indian Tribes, Tribal organizations and inter-Tribal consortia under the negotiated rulemaking procedures required by section 413 of the Indian Self-Determination and Education Assistance Act, Public Law 93–638, as amended by the PROGRESS for Indian Tribes Act, Public Law 116–180 (25 U.S.C. 5373).

§ 1000.5 What key terms do I need to know?

403(c) Program or Nexus Program means a non-BIA program eligible under 25 U.S.C. 5363(c) and, specifically, a program, function, service, or activity that is of special geographic, historical, or cultural significance to a self-governance Tribe/Consortium. These programs may also be referred to as “nexus programs.”

Act means title IV of the Indian Self-Determination and Education Assistance Act of 1975, Public Law 93–638, as amended by Public Law 103–413, Public Law 104–109, and Public Law 116–180.

BIA means the Bureau of Indian Affairs of the Department or any successor bureau. For purposes of this part, BIA shall include the Office of the Assistant Secretary for Indian Affairs, BIE, and BTFA, or any successor bureau, unless specified otherwise.

BIA Program means any program, service, function, or activity, or portion thereof, that is performed or administered by the Department through the BIA. For purposes of this part, BIA Program shall also include any PSFA performed or administered by the Department through the Office of the Assistant Secretary for Indian Affairs, BIE, or BTFA which are eligible for inclusion in a compact or funding agreement under the Act unless specified otherwise.

BIE means the Bureau of Indian Education of the Department, or any successor bureau.

BIE Program means any program, service, function, or activity, or portion thereof, that is performed or administered by the Department through the BIE and is eligible for inclusion in a compact and funding agreement under the Act.

BTFA means the Bureau of Trust Funds Administration of the Department, or any successor bureau, to which the Department has transferred fiduciary programs, services, functions, and activities from the Office of Special Trustee for American Indians, as it is referenced in 25 U.S.C. 5361, *et seq.*, as amended.

Bureau means a bureau, service, office, agency, and other such subsidiary entity within the Department.

Compact means a self-governance compact entered under 25 U.S.C. 5364.

Consortium means an organization of Indian Tribes that is authorized by those Tribes to participate in self-governance under this part and is responsible for negotiating, executing, and implementing funding agreements and compacts.

Construction management services (CMS) means activities limited to administrative support services, coordination, oversight of engineers and construction activities. CMS services include services that precede project design: all project design and actual construction activities are subject to subpart K of these regulations whether performed by a Tribe subcontractor, or consultant.

Construction program or construction project means a Tribal undertaking relating to the administration, planning, environmental determination, design, construction, repair, improvement, or expansion of roads, bridges, buildings, structures, systems, or other facilities for purposes of housing, law enforcement, detention, sanitation, water supply, education, administration, community, health, irrigation, agriculture, conservation, flood control,

transportation, or port facilities, or for other Tribal purposes.

Days means calendar days, except where the last day of any time period specified in this part falls on a Saturday, Sunday, or a Federal holiday, the period must carry over to the next business day unless otherwise prohibited by law.

Director means the Director of the Office of Self-Governance (OSG).

DOI or Department means the Department of the Interior.

Funding agreement means a funding agreement entered into under 25 U.S.C. 5363.

Funding year means either fiscal or calendar year.

Gross mismanagement means a significant violation, shown by a preponderance of the evidence, of a compact, funding agreement, or statutory or regulatory requirement applicable to Federal funds for a PSFA administered by an Indian Tribe under a compact or funding agreement.

Indian means a person who is a member of an Indian Tribe.

Indian Tribe or Tribe means any Indian Tribe, band, nation or other organized group or community, including pueblos, rancherias, colonies and any Alaska Native village, or regional or village corporations as defined in or established pursuant to the Alaska Native Claims Settlement Act, that is recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians.

Indirect costs means costs incurred for a common or joint purpose benefitting more than one program and that are not readily assignable to individual programs.

Indirect cost rates means the rate(s) arrived at through negotiation between an Indian Tribe/Consortium and the appropriate Federal agency.

Inherent Federal function means a Federal function that may not legally be delegated to an Indian Tribe.

Non-BIA Bureau means any bureau within the Department other than the BIA, the BIE, the BTFA, or the Office of the Assistant Secretary for Indian Affairs.

Non-BIA bureaus director/ commissioner means the director of Non-BIA bureaus and the commissioner of the Bureau of Reclamation.

Non-BIA Programs means all or a portion of a program, function, service, or activity that is administered by any bureau other than the BIA, the BIE, the BTFA, or the Office of the Assistant Secretary for Indian Affairs within the Department.

Office of Self-Governance (OSG) means the office within the Office of the

Assistant Secretary-Indian Affairs responsible for the implementation and development of the Tribal Self-Governance Program.

Program or *PSFA* means any program, service, function, or activity (or portions thereof) within the Department that is included in a funding agreement.

Public Law 93–638 means sections 1 through 9 and title I of the Indian Self-Determination and Education Assistance Act of 1975, as amended.

Reassumption means the Secretary, without consent of the Tribe/Consortium, takes control or operation of the PSFAs and associated funding in a compact or funding agreement, in whole or in part, and assumes the responsibility to provide such PSFAs.

Residual Funds means funding that is necessary for the Department to carry out inherent Federal functions that cannot be delegated to a Tribe/Consortia by law.

Retained Tribal shares means those funds that were available as a Tribal share but under the funding agreement were left with BIA to administer.

Retrocession means the voluntary full or partial return by a Tribe/Consortium to a bureau of a PSFA operated under a funding agreement before the agreement expires.

Secretary means the Secretary of the Interior or his or her designee authorized to act on the behalf of the Secretary as to the matter at hand.

Self-determination contract means a self-determination contract entered into under 25 U.S.C. 5321.

Self-governance means the Tribal Self-Governance Program established under 25 U.S.C. 5362.

Self-governance Tribe/Consortium means a Tribe or Consortium that has been selected to participate in self-governance. May also be referred to as “participating Tribe/Consortium.”

Subsequent funding agreement means a funding agreement negotiated after a Tribe’s/Consortium’s initial agreement with a bureau.

Tribal share means the portion of all funds and resources determined for that Tribe/Consortium that supports any program within BIA, the BIE, the BTFA, or the Office of the Assistant Secretary for Indian Affairs and are not required by the Secretary for the performance of an inherent Federal function.

§ 1000.10 What is the purpose and scope of this part?

(a) *Purpose.* This part codifies uniform and consistent rules for the Department implementing title IV of the Indian Self-Determination and Education Assistance Act, Public Law 93–638, 25 U.S.C. 5361 *et seq.*, as

amended by title II of Public Law 103–413, the Tribal Self-Governance Act of 1994 (108 Stat. 4250, October 25, 1994) and title I of Public Law 116–180, the PROGRESS for Indian Tribes Act (134 Stat. 857, October 21, 2020).

(b) *Scope.* These regulations are binding on the Secretary and on Tribes/Consortia carrying out programs, services, functions, and activities (PSFAs) (or portions thereof) under title IV except as otherwise specifically authorized by a waiver under 25 U.S.C. 5369(b) and this part.

(c) *Information Collection.* The information collection requirements contained in this part have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d), and assigned control number 1076–0143. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

§ 1000.15 What is the congressional policy statement of this part?

(a) *Congressional findings.* In the Act, the Congress found that:

(1) The Tribal right of self-governance flows from the inherent sovereignty of Indian Tribes and nations;

(2) The United States recognizes a special government-to-government relationship with Indian Tribes, including the right of the Tribes to self-governance, as reflected in the Constitution, treaties, Federal statutes, and the course of dealings of the United States with Indian Tribes;

(3) Although progress had been made, the Federal bureaucracy has discouraged, to some degree, the further compacting of Indian programs or hindered negotiations between the Department and Tribes for renewing self-governance compacts and funding agreements;

(4) Tribal Self-Governance was designed to improve and perpetuate the government-to-government relationship between Indian Tribes and the United States and to strengthen Tribal control over Federal funding and program management; and

(5) Congress further finds that:

(i) Transferring control over funding and decision making to Tribal governments, upon Tribal request, for Federal programs is an effective way to implement the Federal policy of government-to-government relations with Indian Tribes; and

(ii) Transferring control over funding and decision making to Tribal governments, upon request, for Federal

programs strengthens the Federal policy of Indian self-determination.

(b) *Congressional declaration of policy.* It is the policy of the Act to permanently establish and implement self-governance:

(1) To enable the United States to maintain and improve its unique and continuing relationship with, and responsibility to, Indian Tribes;

(2) To permit each Tribe to choose the extent of its participation in self-governance;

(3) To coexist with the provisions of the Indian Self-Determination and Education Assistance Act relating to the provision of Indian services by designated Federal agencies;

(4) To ensure the continuation of the trust responsibility of the United States to Indian Tribes and Indian individuals;

(5) To permit an orderly transition from Federal domination of programs and services to provide Indian Tribes with meaningful authority to plan, conduct, redesign, and administer PSFAs that meet the needs of the individual Tribal communities; and

(6) To provide for an orderly transition through a planned and measurable parallel reduction in the Federal bureaucracy.

(c) *PROGRESS Act policy.* As reflected in H. Rept. 116–422 and S. Rept. 116–34, it is the policy of the PROGRESS for Indian Tribes Act, Public Law 116–180:

(1) To clarify and streamline the Department’s process for approving self-governance compacts and funding agreements;

(2) To create similarities and administrative efficiencies between title IV and title V of Public Law 93–638, as amended; and

(3) To minimize delays to self-governance compacting or funding.

§ 1000.20 What is the Secretarial policy of this part?

In carrying out Tribal self-governance under title IV, it is the policy of the Secretary:

(a) To fully support and implement the foregoing policies to the full extent of the Secretary’s authority.

(b) To recognize and respect the unique government-to-government relationship between Tribes, as sovereign governments, and the United States.

(c) To have all bureaus of the Department work to further and protect the trust responsibility of the United States with respect to Tribes and individual Indians that exists under treaties, Executive orders, other laws, or court decisions.

(d) To have all bureaus of the Department work cooperatively and pro-

actively with Tribes/Consortia on a government-to-government basis within the framework of the Act and any other applicable provision of law, so as to make the ideals of self-determination and self-governance a reality.

(e) To have all bureaus of the Department work to streamline the process for Tribes/Consortia participating in or applying to participate in self-governance to establish administrative efficiencies and consistency with the processes under title IV and title V of Public Law 93–638, as amended.

(f) To have all bureaus of the Department actively share information with Tribes and Tribal Consortia to encourage Tribes and Tribal Consortia to become knowledgeable about the Department's programs and the opportunities to include them in a funding agreement.

(g) To interpret each Federal law and regulation, including this part, in a manner that facilitates the inclusion of programs in funding agreements and the implementation of funding agreements.

(h) That all bureaus of the Department will negotiate in good faith, to maximize implementation of the Self-Governance policy and carry out title IV and this part in a manner that maximizes the policy of Tribal self-governance.

(i) That, subject to Public Law 116–180, title I, § 101(a), Oct. 21, 2020, 134 Stat. 857, (25 U.S.C. 5361 Note), each provision of title IV and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Tribe or Consortium participating in self-governance, and that any ambiguity be resolved in favor of the Tribe or Consortium to facilitate the inclusion of programs in each funding agreement authorized.

(j) To timely enter into funding agreements under title IV, whenever possible.

(k) To afford Tribes and Tribal Consortia the maximum flexibility and discretion necessary to meet the needs of their communities consistent with their diverse demographic, geographic, economic, cultural, health, social, religious, and institutional needs. This includes recognition of and support for Indigenous Knowledge, and the Tribes' and Tribal Consortia's authority to apply such knowledge when performing PSFAs under this part. These policies are designed to facilitate and encourage Tribes and Tribal Consortia to participate in the planning, conduct, and administration of those Federal programs, included, or eligible for inclusion in a funding agreement.

(l) To the extent of the Secretary's authority, to maintain active

communication with Tribal governments regarding budgetary matters applicable to programs subject to the Act, and that are included in an individual funding agreement.

(m) To implement policies, procedures, and practices at the Department to ensure that the letter, spirit, and goals of the Act are fully and successfully implemented to the maximum extent allowed by law.

(n) To ensure that Executive Order 13175 on Consultation and Coordination with Indian Tribal Governments and any subsequent Executive Orders regarding consultation will apply to the implementation of these regulations.

§ 1000.25 What is the effect on existing Tribal rights?

Nothing in this part shall be construed as:

(a) Affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by Indian Tribes;

(b) Terminating, waiving, modifying, or reducing the trust responsibility of the United States to the Indian Tribe(s) or individual Indians. The Secretary must act in good faith in upholding this trust responsibility;

(c) Requiring an Indian Tribe to participate in self-governance; or

(d) Impeding awards by other Departments and agencies of the United States to Indian Tribes to administer Indian programs under any other applicable law.

§ 1000.30 What is the effect of these regulations on Federal program guidelines, manual, or policy directives?

Unless expressly agreed to by the Tribe/Consortium in a compact or funding agreement, the Tribe/Consortium shall not be subject to any agency circular, policy, manual, guidance, or rule adopted by the Department, except for the eligibility provisions of 25 U.S.C. 5324(g) and the regulations under this part to the extent a regulatory provision is not waived by the Secretary.

§ 1000.35 What happens if a court holds any provisions of these regulations in this part invalid?

If a court holds any provisions of these regulations in this part or their applicability to any person or circumstances invalid, the remainder of the regulations and their applicability to other people or circumstances are intended to operate to the fullest possible extent.

Subpart B—Selection of Additional Tribes for Participation in Tribal Self-Governance

Purpose and Definitions

§ 1000.101 What is the purpose of this subpart?

This subpart describes the selection process and eligibility criteria that the Secretary uses to decide that Indian Tribes may participate in Tribal self-governance as authorized by 25 U.S.C. 5362.

§ 1000.105 What is a “signatory”?

A signatory is a Tribe or Consortium that meets the eligibility criteria in §§ 1000.115 and 1000.125 and directly signs the agreements. A signatory may exercise all of the rights and responsibilities outlined in the compact and funding agreement and is legally responsible for all financial and administrative decisions made by the signatory.

§ 1000.110 What is a “nonsignatory Tribe”?

(a) A nonsignatory Tribe is a Tribe that either:

(1) Does not meet the eligibility criteria in §§ 1000.115 and 1000.125 and, by resolution of its governing body, authorizes a Consortium to participate in self-governance on its behalf; or

(2) Meets the eligibility criteria in §§ 1000.115 and 1000.125 but chooses to be a member of a Consortium and have a representative of the Consortium sign the compact and funding agreement on its behalf.

(b) A non-signatory Tribe under paragraph (a)(1) of this section:

(1) May not sign the compact and funding agreement. A representative of the Consortium must sign both documents on behalf of the Tribe.

(2) May only become a “signatory Tribe” if it independently meets the eligibility criteria in §§ 1000.115 and 1000.125.

Eligibility

§ 1000.115 Who may participate in Tribal self-governance?

There are two types of entities who may participate in Tribal self-governance:

- (a) Indian Tribes; and
- (b) Consortia of Indian Tribes.

§ 1000.120 How many additional Tribes/Consortia may participate in self-governance per year?

(a) The Secretary, acting through the Director of the OSG, may select not more than 50 new Indian Tribes per year from those Tribes eligible under 25 U.S.C. 5362(c) to participate in self-

governance. A Consortium of Indian Tribes counts as one Tribe for purposes of calculating the 50 additional Tribes per year.

(b) The limitation of not more than 50 new Tribes per year does not preclude a signatory Tribe from negotiating a new or amended compact or funding agreement. Such new or amended compacts or funding agreements do not count against the limitation of not more than 50 new Tribes per year.

§ 1000.125 What must a Tribe/Consortium submit to be selected to participate in Self-Governance?

The Tribe/Consortium must submit to OSG documentation that demonstrates the following:

(a) Successful completion of a planning phase as described in § 1000.140. A Consortium's planning activities satisfy this requirement for all its member Tribes for the purpose of the Consortium meeting this requirement.

(b) A request for participation in self-governance by a Tribal resolution and/or a final official action by the Tribal governing body. For a Consortium, the governing body of each Tribe must authorize its participation by a Tribal resolution and/or a final official action by the Tribal governing body that specifies the scope of the Consortium's authority to act on behalf of the Tribe.

(c) For a Tribe/Consortium required to perform an annual audit under the Single Audit Act and subpart F of 2 CFR part 200, financial stability and financial management capability as evidenced by the Tribe (or participating Tribes in a Consortium) having no uncorrected significant and material audit exceptions in the required annual audit of its self-determination or self-governance agreements with any Federal agency for the three fiscal years preceding the date on which the Tribe/Consortium requests participation, provided that documentation demonstrating the correction of any significant and material audit exceptions may include, but is not limited to, Agency Management Decision Letters issued in accordance with 2 CFR 200.521, Summary Schedule of Prior Audit Findings included in subsequent audit reports in accordance with 2 CFR 200.511, or any documentation provided by the Tribe/Consortium.

§ 1000.130 What additional information may be submitted to the Secretary to facilitate negotiations?

At the option of the Tribe/Consortium, a Tribe/Consortium may identify BIA and non-BIA programs that the Tribe/Consortium may wish to

subsequently negotiate for inclusion in a funding agreement. The inclusion of PSFAs in a funding agreement is not limited by the provision of this additional information.

§ 1000.135 May a Consortium member Tribe withdraw from the Consortium and be selected to participate in Self-Governance?

In accordance with the expressed terms of the compact or written agreement of the Consortium, a Consortium member Tribe (either a signatory or nonsignatory Tribe) may fully or partially withdraw from a participating Consortium its share of any program included in a compact or funding agreement to directly negotiate a compact and funding agreement. The withdrawing Tribe must do the following:

(a) Independently meet all of the eligibility criteria in §§ 1000.115 through 1000.140. If a Consortium's planning activities specifically consider self-governance activities for a member Tribe, that planning activity may be used to satisfy the planning requirements for the member Tribe if it applies for self-governance status on its own.

(b) Submit a notice of withdrawal to OSG and the Consortium as evidenced by a resolution of the Tribal governing body.

§ 1000.140 What is required during the "planning phase"?

The planning phase must be conducted to the satisfaction of the Tribe/Consortium and must include:

(a) Legal and budgetary research; and
(b) Internal Tribal government, planning, training, and organizational preparation related to the operation of PSFAs contemplated by the Tribe/Consortium.

§ 1000.145 When does a Tribe/Consortium have an uncorrected "significant and material audit exception"?

A Tribe/Consortium has an uncorrected significant and material audit exceptions if any of the audits that it submitted under § 1000.125(c) identifies:

(a) Significant deficiencies and material weaknesses in internal control over major programs and significant instances of abuse relating to major programs which the Tribe/Consortium has not corrected;

(b) Material noncompliance with the provisions of Federal statutes, regulations, or the terms and conditions of Federal awards related to a major program which the Tribe/Consortium has not corrected; or

(c) A single finding of known questioned costs subsequently

disallowed by a contracting officer or awarding official that exceeds \$25,000 (or such higher amount as may be established in 2 CFR 200.516).

§ 1000.150 What are the consequences of having an uncorrected significant and material audit exception?

If a Tribe/Consortium has an uncorrected significant and material audit exception, the Tribe/Consortium is ineligible to be selected to participate in self-governance until the Tribe/Consortium meets the documentation requirements in § 1000.125.

§ 1000.155 Is the Secretary required to provide technical assistance to improve a Tribe's/Consortium's internal controls?

Yes. In considering proposals by a Tribe/Consortium for participation in Self-Governance, if the Secretary determines that the Tribe/Consortium lacks adequate internal controls necessary to manage PSFAs proposed for inclusion in a compact or funding agreement under this part, the Secretary shall, as soon as practicable, provide the necessary technical assistance to assist the Tribe/Consortium in developing adequate internal controls in accordance with 25 U.S.C. 5324(q)(1).

Selection To Participate in Self-Governance

§ 1000.160 How is a Tribe/Consortium selected to participate in Self-Governance?

(a) For a Tribe not presently participating in Self Governance to be selected, the Tribe/Consortium may submit a request to the Director at any time, but no later than 180 days before the proposed effective date of the funding agreement (e.g., October 1, January 1, or such other date as the parties agree). The request must contain the documentation required in § 1000.125.

(b) OSG shall select a Tribe/Consortium to participate in self-governance upon a determination that the Tribe/Consortium has provided the required documentation in § 1000.125, consistent with 25 U.S.C. 5362(b)(1)(A).

(c) OSG shall notify the Tribe/Consortium no later than 45-days after receipt of the Tribe's/Consortium's request that the Tribe/Consortium has been selected to participate in self-governance or does not have a complete request under § 1000.185.

§ 1000.165 When does OSG accept requests to participate in Self-Governance?

OSG accepts requests at any time. A Tribe/Consortium may request a meeting or other informal discussion with the OSG before submitting its request to participate.

§ 1000.170 Are there any time frames to negotiate an initial compact or funding agreement for a Tribe not presently participating in self-governance?

Yes.

(a) Once selected to participate in self-governance, the parties should begin negotiations at least 180 days before the proposed effective date of the initial funding agreement and compact (e.g., October 1, January 1, or such other date as the parties agree in the initial funding agreement or compact).

(b) A Tribe/Consortium may be selected to participate during one year but negotiate a compact and funding agreement in a subsequent year. In this case, the Tribe/Consortium must, before the applicable period established in § 1000.160, submit to OSG documentation demonstrating continued eligibility under 25 U.S.C. 5362(c).

§ 1000.175 How does a Tribe/Consortium withdraw its request to participate in Self-Governance?

A Tribe/Consortium may withdraw its request to participate in Self-Governance by submitting a Tribal resolution or official action by the Tribal governing body to the Director of OSG.

§ 1000.180 What if more than 50 Tribes/Consortium apply to participate in Self-Governance?

The first 50 Tribes/Consortium who apply and are determined to be eligible under § 1000.160 shall have the option to begin to participate in self-governance. Any Tribe/Consortium denied participation due to the limitation in number of Tribes/Consortium is entitled to participate in the next fiscal year, provided the Tribe/Consortium remains eligible under 25 U.S.C. 5362(c).

§ 1000.185 What happens if a request is not complete?

If OSG determines that a Tribe's/Consortium's request is not complete, OSG will notify the Tribe/Consortium that the request is not complete under § 1000.125 by electronic mail and by letter, certified mail, return receipt requested no later than 45-days after receipt of the Tribe's/Consortium's request. The email and letter will explain what the Tribe/Consortium must do to complete the request.

§ 1000.190 What happens if a Tribe/Consortium is selected to participate but does not execute a compact and a funding agreement?

(a) The Tribe/Consortium remains eligible to negotiate a compact and funding agreement at any time unless:

(1) It does not satisfy the eligibility requirements under 25 U.S.C. 5362(c); or

(2) Submits a Tribal resolution or official action by the Tribal governing body to the Director, OSG requesting to withdraw its request to participate in Self-Governance.

(b) Whether or not a Tribe/Consortium executes an agreement has no effect on the selection of up to 50 new Tribes/Consortia in a subsequent year.

§ 1000.195 May a Tribe/Consortium be selected to negotiate a funding agreement under section 403(b)(2) of the Act without having or negotiating a funding agreement under 25 U.S.C. 5363(b)(1)?

Yes, a Tribe/Consortium may be selected to negotiate a funding agreement under 25 U.S.C. 5363(b)(2) without having or negotiating a funding agreement under 25 U.S.C. 5363(b)(1).

§ 1000.200 May a Tribe/Consortium be selected to negotiate a funding agreement under section 403(c) (25 U.S.C. 5363(c)) without negotiating a funding agreement under 25 U.S.C. 5363(b)(1) and/or section 403(b)(2) (25 U.S.C. 5363(b)(2))?

No, 25 U.S.C. 5363(c) of the Act states that any programs of special geographic, cultural, or historical significance to the Tribe/Consortium must be included in funding agreements negotiated under 25 U.S.C. 5363(a) and/or 25 U.S.C. 5363(b). A Tribe may be selected to negotiate a funding agreement under 25 U.S.C. 5363(c) at the same time that it negotiates a funding agreement under 25 U.S.C. 5363(b)(1) and/or 25 U.S.C. 5363(b)(2).

Withdrawal From a Consortium Funding Agreement**§ 1000.205 What happens when a Tribe wishes to withdraw from a Consortium funding agreement?**

(a) A Tribe wishing to withdraw from all or a part of a Consortium's funding agreement must notify the parties to the compact and funding agreement. The notice must:

(1) Be in the form of a Tribal resolution or other official action by the Tribal governing body; and

(2) Be received no later than 180 days before the effective date of the next Consortium funding agreement, unless the parties agree to another date.

(b) The resolution referred to in paragraph (a) of this section must indicate whether the Tribe wishes the withdrawn programs to be administered under a title IV funding agreement, title I contract, or directly by the bureau.

(c) The effective date of the withdrawal will be the date specified in the Tribal resolution and mutually

agreed upon by the parties that signed the compact and funding agreement. In the absence of a specific time set forth in the resolution, such withdrawal becomes effective on:

(1) The earlier of one year after the date of submission of the request, or the date on which the funding agreement expires; or

(2) Such date as may be mutually agreed upon by the withdrawing Tribe and the parties that signed the compact and funding agreement.

§ 1000.210 How are funds redistributed when a withdrawing Tribe fully or partially withdraws from a compact and funding agreement and enters a new contract or compact?

When a Tribe eligible to enter into a contract under title I or a compact or funding agreement under title IV fully or partially withdraws from a participating Consortium, and has proposed to enter into a contract or compact and funding agreement covering the withdrawn funds:

(a) The withdrawing Tribe is entitled to its Tribal share of funds supporting those programs that the Tribe will be carrying out under its own contract or compact and funding agreement (calculated on the same basis or methodology upon which the funds were included in the Consortium's funding agreement); and

(b) The funds referred to in paragraph (a) of this section must be transferred from the Consortium's funding agreement, on the condition that the provisions of 25 U.S.C. 5321 and 5324(i), as appropriate, apply to the withdrawing Tribe.

§ 1000.215 If the withdrawing Tribe elects to operate a program carried out under a compact and funding agreement under title IV through a contract under title I, is the resulting contract considered a mature contract under 25 U.S.C. 5304(h)?

If a Tribe withdrawing from a Consortium's funding agreement elects to operate a program carried out under a compact and funding agreement under title IV through a contract under title I, at the option of the Tribe, the resulting contract is considered a mature contract as long as the Tribe meets the requirements set forth in 25 U.S.C. 5304(h).

§ 1000.220 How are funds distributed when a withdrawing Tribe fully or partially withdraws from a Consortium's compact and funding agreement and the withdrawing Tribe does not enter a new contract or compact?

All funds not obligated by the Consortium associated with the withdrawing Tribe's returned Tribal share of funds, less close out costs, shall

be returned by the Consortium to DOI for operation of the programs included in the withdrawal.

§ 1000.225 What amount of funding is to be removed from the Consortium's funding agreement for the withdrawing Tribe?

When a Tribe withdraws from a Consortium, the Consortium's funding agreement must be reduced by the portion of funds attributable to the withdrawing Tribe. The Consortium must reduce the funding agreement on the same basis or methodology upon which the funds were included in the Consortium's funding agreement.

(a) If there is not a clear identifiable methodology upon which to base the reduction for a particular program, the parties to the compact and funding agreement must negotiate an appropriate amount on a case-by-case basis.

(b) If a Tribe withdraws in the middle of a funding year, the Consortium agreement must be amended to reflect:

(1) A reduction based on the amount of funds passed directly to the Tribe, or already spent or obligated by the Consortium on behalf of the Tribe; and

(2) That the Consortium is no longer providing those programs associated with the withdrawn funds.

(c) Unexpended funds from a previous fiscal year may be factored into the amount by which the Consortium agreement is reduced if:

(1) The parties to the compact and funding agreement and the withdrawing Tribe agree it is appropriate; and

(2) The funds are clearly identifiable.

§ 1000.230 What happens if there is a dispute between the Consortium and the withdrawing Tribe?

(a) The withdrawing Tribe and the parties to the compact and funding agreement must reach an agreement on the amount of funding and other issues associated with the program(s) involved.

(b) If agreement is not reached:

(1) For BIA Programs, the Director of OSG must make a decision on the funding or other issues involved within 45-days of the Tribe's or Consortium's written submittal of the dispute to the Director of OSG with a copy to the other party.

(2) For non-BIA Programs, the bureau head will make a decision on the funding or other issues involved.

(c) A copy of the decision made under paragraph (b) of this section must be distributed in accordance with the following table:

If the program is administered through . . .	then a copy of the decision must be sent to . . .
(1) The BIA	The BIA Regional Director, the BIA Director, the withdrawing Tribe, and the Consortium.
(2) The BIE	The BIE Associate Deputy Director, the BIE Director, the withdrawing Tribe, and the Consortium.
(3) The BTFA	The BTFA Director, the withdrawing Tribe, and the Consortium.
(4) The Office of the Assistant Secretary—Indian Affairs.	The Assistant Secretary for Indian Affairs, the withdrawing Tribe, and the Consortium.

(d) Any decision made under paragraph (b) of this section is appealable under subpart R of this part.

§ 1000.235 When a Tribe withdraws from a Consortium, is the Secretary required to award to the withdrawing Tribe a portion of funds associated with a construction project if the withdrawing Tribe so requests?

Under § 1000.205, a Tribe may withdraw from a Consortium and request that the Secretary award the Tribe its portion of a construction project's funds. The Secretary may decide not to award these funds if the Secretary determines that the award of the withdrawing Tribe's portion of funds would affect the ability of the remaining members of the Consortium to complete a severable or non-severable phase of the project within available funding.

(a) An example of a non-severable phase of a project would be the construction of a single building to serve all members of a Consortium.

(b) An example of a severable phase of a project would be the funding of a road in one village where the Consortium would be able to complete the roads in other villages that were part of the project approved initially in the funding agreement.

(c) The Secretary's decision under this section may be appealed under subpart R of this part.

Subpart C—Planning and Negotiation Grants for BIA Programs

§ 1000.301 What is the purpose of this subpart?

This subpart describes how a Tribe/Consortium seeking to begin or expand its participation in self-governance may request grants to assist with its required planning phase and to negotiate a compact and funding agreement.

§ 1000.305 Are there grants available to assist Tribes/Consortia to meet the requirements to participate in self-governance?

Yes, any Tribe/Consortium may apply, as provided in § 1000.315, for a grant to assist it to:

(a) Plan to participate in self-governance; and

(b) Negotiate the terms of the compact and funding agreement between the Tribe/Consortium and the Secretary.

§ 1000.310 What is required to request planning and negotiation grants?

A Tribe/Consortium seeking a planning or negotiation grant must submit the following:

(a) A resolution or other final action by the Tribe's/Consortium's governing body requesting to begin or expand its participation in self-governance and to receive a grant; and

(b) For a Tribe/Consortium required to perform an annual audit under the Single Audit Act and subpart F of 2 CFR part 200, evidence showing that the Tribe/Consortium has no uncorrected significant and material audit exceptions in the required annual audit of its self-determination or self-governance agreements with any Federal agency for the three fiscal years preceding its current request to participate in self-governance.

§ 1000.315 Are planning and negotiation grants available?

Subject to the availability of funds, the Department will annually publish a notice of the number of planning and negotiation grants available, an explanation of the application process for such grants, and the criteria for award. Questions may be directed to the OSG.

§ 1000.320 Must a Tribe/Consortium receive a planning or negotiation grant to be eligible to participate in self-governance?

No, a Tribe/Consortium may use other resources to meet the planning requirement and to negotiate. The award of a planning grant or a negotiation grant is not required in order to meet the planning phase requirement of the Act or to negotiate a compact or funding agreement.

§ 1000.325 What happens if there are insufficient funds to award all of the requests for planning and negotiation grants in any given year?

The Secretary must give funding priority to approved requests for negotiation grants if there are insufficient funds to award all the approved requests for planning and negotiation grants in any given year.

§ 1000.330 May a Tribe/Consortium that has received a planning grant also receive a negotiation grant?

Yes. A planning grant and a negotiation grant may be awarded to the same Tribe/Consortium in the same or separate years.

§ 1000.335 What are the Secretary's responsibilities upon a decision not to award a planning or negotiation grant?

The Secretary must communicate in writing the reasons for denying a planning or negotiation grant, and offer the Tribe/Consortium any technical assistance that might make an award possible.

§ 1000.340 May a Tribe/Consortium administratively appeal the Secretary's decision to not award a grant under this subpart?

No. The Secretary's decision to not award a grant under this subpart is final for the Department.

Subpart D—Financial Assistance for Planning and Negotiation Activities for Non-BIA Bureau Programs**§ 1000.401 What is the purpose of this subpart?**

This subpart describes additional requirements and criteria applicable to receiving financial assistance for planning and negotiating activities for a non-BIA program.

§ 1000.405 What funds are available to Tribes/Consortium for planning and negotiating activities with non-BIA bureaus?

(a) Tribes/Consortium may contact a non-BIA bureau to determine if funds may be available for the purpose of planning and negotiating activities with non-BIA bureaus under this subpart, including grants awarded pursuant to 25 U.S.C. 5362(e).

(b) Tribes/Consortium may also request information identified in § 1000.1025(b)(2).

§ 1000.410 What kinds of planning and negotiation activities for non-BIA programs does financial assistance from non-BIA bureaus support?

Financial assistance received by a Tribe/Consortium from non-BIA bureaus for planning and negotiation activities for non-BIA programs may support activities such as, but not limited to, the following:

(a) Information gathering and analysis;

(b) Planning activities, that may include notification and consultation with the appropriate non-BIA bureau and identification and/or analysis of activities, resources, and capabilities that may be needed for the Tribe/

Consortium to assume non-BIA programs; and

(c) Negotiation activities.

§ 1000.415 Who can apply to a non-BIA bureau for financial assistance to plan and negotiate non-BIA programs?

A Tribe/Consortium may apply for financial assistance to plan and negotiate non-BIA programs if the Tribe/Consortium meets the requirements of 25 U.S.C. 5362(e) and;

(a) Applied to participate in self-governance; or

(b) Has been selected to participate in self-governance; or

(c) Has negotiated and entered into an existing funding agreement.

§ 1000.420 Under what circumstances may financial assistance for planning and negotiation activities with non-BIA bureaus be awarded to Tribes/Consortia?

At the discretion of the non-BIA bureau's director/commissioner, financial assistance to plan and negotiate non-BIA programs may be awarded when requested by the Tribe/Consortium. A Tribe/Consortium may submit only one application per year for financial assistance under this section.

§ 1000.425 How does the Tribe/Consortium know when and how to apply for financial assistance for planning and negotiation activities for a non-BIA program?

Subject to the availability of funds, the Secretary will annually publish a notice in the *Federal Register* identifying the number of planning and negotiation grants available from non-BIA bureaus that includes an explanation for each non-BIA bureau describing the application process and criteria for award. The notice will identify a point-of-contact for each non-BIA bureau where questions about the grants can be directed. Notices for planning and negotiation grants for BIA programs are covered in § 1000.315.

§ 1000.430 What must be included in the application for financial assistance for planning and negotiation activities for a non-BIA program?

The application for financial assistance for planning and negotiation activities for a non-BIA program must include:

(a) Written notification by the governing body or its authorized representative of the Tribe's/Consortium's intent to engage in planning/negotiation activities like those described in § 1000.410;

(b) Written description of the planning and/or negotiation activities that the Tribe/Consortium intends to undertake, including, if appropriate, documentation of the relationship

between the proposed activities and the Tribe/Consortium;

(c) The proposed timeline for completion of the planning and/or negotiation activities to be undertaken; and

(d) The amount requested.

§ 1000.435 How will the non-BIA bureau director/commissioner award financial assistance for planning and negotiation activities for a non-BIA program?

The non-BIA bureau director/commissioner must review all applications received by the date specified in the announcement to determine whether or not the applications include the required elements outlined in the announcement. The non-BIA bureau must rank the complete applications submitted by the deadline using the criteria in the notice of funding availability.

§ 1000.440 May non-BIA bureaus provide technical assistance to a Tribe/Consortium in drafting its application?

Yes, upon request from the Tribe/Consortium and subject to the availability of resources, a non-BIA bureau may provide technical assistance to the Tribe/Consortium in the drafting of its application.

§ 1000.445 What are the non-BIA bureau director's/commissioner's responsibilities upon a decision to decline financial assistance?

The non-BIA bureau director/commissioner must communicate in writing the reasons for declining to award financial assistance and offer the Tribe/Consortium technical assistance that might make an award successful through a future application.

§ 1000.450 Can an applicant administratively appeal a decision not to award financial assistance?

No, all decisions made by the non-BIA bureau director/commissioner to award or not to award financial assistance under this subpart are final for the Department.

§ 1000.455 May a Tribe/Consortium reapply through a future planning and negotiation application if it has been previously denied?

Yes, a Tribe/Consortium may reapply through a future planning and negotiation application.

§ 1000.460 Will the non-BIA bureau notify Tribes/Consortium of the results of the selection process?

Yes, the non-BIA bureau will notify all applicant Tribes/Consortium in writing as soon as possible after completing the selection process.

Subpart E—Compacts**§ 1000.501 What is a self-governance compact?**

A self-governance compact is a legally binding and mutually enforceable written agreement that affirms the government-to-government relationship between a self-governance Tribe and the United States consistent with the trust responsibility of the Federal Government with respect to Indian Tribes that exists under treaties, Executive orders, court decisions, and other laws. The compact differs from a funding agreement in that parts of the compact apply to all bureaus within the Department rather than a single bureau.

§ 1000.505 Which DOI office negotiates self-governance compacts?

The DOI OSG negotiates self-governance compacts.

§ 1000.510 What is included in a self-governance compact?

A compact shall include general terms setting forth the government-to-government relationship consistent with the Federal Government's trust responsibility with respect to Indian Tribes that exists under treaties, Executive orders, court decisions, and other laws and such other terms as the parties intend to control during the term of the compact. Each self-governance compact must:

- (a) Specify and affirm the general terms of the government-to-government relationship between the Tribe and the Secretary;
- (b) State the general terms and conditions of the compact;
- (c) Identify the effective date of the compact;
- (d) Identify the duration of the compact; and
- (e) Include provisions that reflect the requirements of the Act in accordance with § 1000.515.

§ 1000.515 What provisions must be included in either a compact or funding agreement?

Subject to 25 U.S.C. 5365, the following must be included in either a compact or funding agreement. The Tribe/Consortium may include the following in either a compact or funding agreement:

- (a) Conflicts of interest;
- (b) Applicable cost principles and application of the Single Audit Act;
- (c) Limitations on remedies relating to cost disallowances;
- (d) For non-construction programs, authorization for the Tribe/Consortium to redesign or consolidate eligible programs and to reallocate funds for such programs;

- (e) Reassumption;
- (f) Retrocession; and
- (g) Recordkeeping.

§ 1000.520 Is a compact required to participate in self-governance?

Yes, a Tribe/Consortium must have a compact in order to participate in self-governance.

§ 1000.525 Can a Tribe/Consortium negotiate other terms and conditions?

Yes, the Secretary and a self-governance Tribe/Consortium may negotiate additional terms relating to the government-to-government relationship between the Tribe(s) and the United States consistent with the trust responsibility of the Federal Government with respect to Indian Tribes that exists under treaties, Executive orders, court decisions, and other laws. A Tribe/Consortium and the Secretary may agree to include any provision from title I of the Act, as amended, in a compact provided that the inclusion of any such provision shall be subject to, and shall not conflict with, section 101(a) of the PROGRESS for Indian Tribes Act, Pub. L. 116–180 (25 U.S.C. 5361 note).

§ 1000.530 What is the duration of a compact?

Upon approval and execution of a compact, the compact remains in effect for so long as authorized by Federal law or until terminated by mutual written agreement or retrocession or reassumption of all programs.

§ 1000.535 May a compact be amended?

A compact may be amended at any time subject to the applicable negotiation procedures contained in this part, or by written agreement of the parties.

§ 1000.540 Can a Tribe/Consortium have a funding agreement without having negotiated a compact?

No, a compact is a separate document from a funding agreement, and the compact may be negotiated prior to or at the same time as a funding agreement.

§ 1000.545 May a participating Tribe/Consortium retain its existing compact which was executed prior to the enactment of Public Law 116–180?

Yes, a participating Tribe/Consortium with a negotiated compact executed prior to October 21, 2020, the enactment of Public Law 116–180, shall have the option at any time after that date to:

- (a) Retain its existing compact, in whole or in part, to the extent that the provisions of the compact are not directly contrary to any express provision of the Act, as amended, or

(b) Negotiate a new compact in accordance with the Act.

§ 1000.550 What happens if the Tribe/Consortium and Secretary fail to reach an agreement on a compact?

If the Secretary and the Tribe/Consortium have negotiated and are unable to reach agreement, in whole or in part, on the terms of a compact then the Tribe/Consortium may submit a final offer in accordance with subpart I of this part.

Subpart F—Funding Agreements for BIA Programs**§ 1000.601 What is the purpose of this subpart?**

This subpart describes the components of funding agreements for BIA programs.

§ 1000.605 What is a funding agreement?

Funding agreements are legally binding and mutually enforceable written agreements negotiated and entered into between a self-governance Tribe/Consortium and the Secretary.

Contents and Scope of Funding Agreements**§ 1000.610 What must be included in a funding agreement?**

- (a) Each funding agreement must:
 - (1) Specify the PSFAs that the Tribe/Consortium is authorized to plan, conduct, consolidate, and administer and the responsibilities of the Secretary as outlined in § 1000.650;
 - (2) Provide for the Secretary to monitor the performance of trust functions administered by the Tribe/Consortium through the annual trust evaluation as specified in subpart O of this part;
 - (3) Provide for annual or semi-annual installments of advance payment(s), at the option of the Tribe/Consortium;
 - (4) Provide for the incorporation of required provisions of title I of Public Law 93–638, as amended, pursuant to section 201(d) of the PROGRESS for Indian Tribes Act, and for the incorporation of other provisions of title I of Public Law 93–638, as amended, at the option of the Tribe/Consortium;
 - (5) Provide for a stable base budget as outlined in §§ 1000.745 through 1000.760, at the option of the Tribe/Consortium;
 - (6) Prohibit the Secretary from waiving, modifying, or diminishing the trust responsibility of the United States;
 - (7) Specify the funding agreement's effective date;
 - (8) Prohibit the Tribe/Consortium from contracting with the Secretary for duplicative funds and/or PSFAs under title I;

(9) Provide that the Tribe/Consortium shall be eligible for new programs and new funding on the same basis as other Indian Tribes; and shall be responsible for the administration of programs in accordance with the compact or funding agreement;

(10) Provide the funding amount(s); and

(11) Include as attachments and incorporate by reference additional documents agreed upon by the parties.

(b) Subject to 25 U.S.C. 5365, the following must be included in either a compact or funding agreement. The Tribe/Consortium may include the following in either a compact or funding agreement:

(1) Conflicts of Interest;

(2) Applicable Cost Principles and application of the Single Audit Act;

(3) Limitations on remedies relating to cost disallowances;

(4) For non-construction programs, authorization for the Tribe/Consortium to redesign or consolidate programs and to reallocate funds for such programs;

(5) Reassumption;

(6) Retrocession; and

(7) Recordkeeping.

§ 1000.615 Can additional provisions be included in a funding agreement?

Yes, any provision that the parties mutually agreed upon may be included in a funding agreement.

§ 1000.620 Does a Tribe/Consortium have the right to include provisions of title I of Public Law 93–638 in a funding agreement?

Yes, a Tribe/Consortium has the right to include any provision of title I of Public Law 93–638, as amended, in a funding agreement.

§ 1000.625 What is the term of a funding agreement?

A funding agreement shall have the term mutually agreed to by the parties. Absent notification from a Tribe/Consortium that it is withdrawing or retroceding the operation of one or more programs identified in a funding agreement or by the nature of any noncontinuing PSFA contained in a funding agreement, the funding agreement shall remain in full force and effect until a subsequent funding agreement is executed.

§ 1000.630 Can a Tribe/Consortium negotiate a funding agreement with a term that exceeds one year?

Yes, at the option of the Tribe/Consortium, and subject to the availability of Congressional appropriations, a Tribe/Consortium may negotiate a funding agreement with a term that exceeds one year under 25 U.S.C. 5363(p)(4).

§ 1000.635 Does a funding agreement remain in effect after the end of its term?

Yes, the provisions of a funding agreement, including all recurring increases received and continuing eligibility for other increases, remain in full force and effect until a subsequent funding agreement is executed, including coverage of the Tribe/Consortium under the Federal Tort Claims Act (FTCA) 28 U.S.C. 2671 through 2680. Upon execution of a subsequent funding agreement, the provisions of such a funding agreement are retroactive to the term of the preceding funding agreement for purposes of calculating the amount of funding to which the Tribe/Consortium is entitled.

§ 1000.640 May a participating Tribe/Consortium retain its existing funding agreement which was executed prior to the enactment of Public Law 116–180?

Yes, a participating Tribe/Consortium with a funding agreement executed prior to October 21, 2020, the enactment of Public Law 116–180, shall have the option at any time after that date to:

(a) Retain its existing funding agreement, in whole or in part, to the extent that the funding agreement is not contrary to the Act, as amended by Public Law 116–180; or

(b) Negotiate a new funding agreement.

Determining What Programs May Be Included in a Funding Agreement

§ 1000.645 What PSFAs may be included in a funding agreement?

A Tribe/Consortium may include in its funding agreement PSFAs administered by the Secretary for the benefit of Indians because of their status as Indian, including, but not limited to those provided through the BIA, the BIE, the BTFA, the Office of the Assistant Secretary for Indian Affairs, and the Appraisal and Valuation Services Office, without regard to the agency or office of that Bureau or Office, including any PSFA identified in 25 U.S.C. 5363(b)(1).

§ 1000.650 How does the funding agreement specify the services provided, functions performed, and responsibilities assumed by the Tribe/Consortium and those retained by the Secretary?

(a) The funding agreement must specify in writing the services, functions, and responsibilities to be assumed by the Tribe/Consortium and the functions, services, and responsibilities to be retained by the Secretary.

(b) Any division of responsibilities between the Tribe/Consortium and BIA must be clearly stated in writing as part

of the funding agreement. Similarly, when there is a relationship between the program and BIA's inherent Federal functions, the relationship must be explained in the funding agreement.

§ 1000.655 May a Tribe/Consortium redesign or consolidate the programs that are included in a funding agreement and reallocate funds for such programs?

Except where a statute contains specific limitations on the use of funds, a Tribe/Consortium may redesign or consolidate programs included in a funding agreement and reallocate funds for such programs in any manner which it deems to be in the best interest of the Indian community being served, so long as the redesign or consolidation does not have the effect of denying eligibility for services to population groups otherwise eligible to be served under applicable Federal law; provided however, that a reduction in funds available for a program or service shall not be considered a denial of eligibility for services. However, redesign of construction project(s) included in a funding agreement must be done in accordance with subpart K of this part.

§ 1000.660 Do Tribes/Consortium need Secretarial approval to redesign BIA programs that the Tribe/Consortium administers under a funding agreement?

No, the Secretary does not have to approve a redesign of a program under the funding agreement, except when the redesign involves:

(a) Programs described in 25 U.S.C. 5363(b)(2) or (c); or

(b) A request to waive a regulation.

§ 1000.665 Can the terms and conditions in a funding agreement be amended during the year it is in effect?

Yes, terms and conditions in a funding agreement may be amended during the year it is in effect as agreed to by both the Tribe/Consortium and the Secretary.

Determining Funding Agreement Amounts

§ 1000.670 What funds must be transferred to a Tribe/Consortium under a funding agreement?

(a) Subject to the terms of a funding agreement, the Secretary must transfer to a Tribe/Consortium all funds provided for in the funding agreement, pursuant to 25 U.S.C. 5368. The Secretary shall provide funding for periods covered by joint resolution adopted by Congress making continuing appropriations, to the extent permitted by such resolution.

(b) At the option of the Tribe/Consortium, the Secretary must provide the following program funds to the

Tribe/Consortium through a funding agreement:

(1) An amount equal to the amount that the Tribe/Consortium would have been eligible to receive under contracts and grants for direct programs and contract support under title I of Public Law 93–638, as amended;

(2) Any funds that are specifically or functionally related to providing services and benefits to the Tribe/Consortium or its members by the Secretary without regard to the organizational level within BIA where such functions are carried out; and

(3) Any funds otherwise available to Indian Tribes or Indians for which appropriations are made to other Federal agencies and transferred to the Department as directed by law, an Interagency Agreement, or other means.

(c) Examples of the funds referred to in paragraphs (b)(1) and (2) of this section are:

(1) A Tribe's/Consortium's Public Law 93–638 contract amounts;

(2) Negotiated amounts of agency, regional and central office funds, including previously undistributed funds or new programs on the same basis as they are made available to other Tribes;

(3) Other recurring funding;

(4) Non-recurring funding;

(5) Special projects, if applicable;

(6) Construction;

(7) Wildland firefighting accounts;

(8) Competitive grants; and

(9) Congressional earmarked funding.

(d) Examples of the funds referred to in paragraph (b)(3) of this section are:

(1) Federal Highway Administration funds;

(2) Federal Transit Administration funds; and

(3) Funding pursuant to an approved plan under Public Law 102–477, as amended.

§ 1000.675 What funds may not be included in a funding agreement?

Funds associated with programs prohibited from inclusion under 25 U.S.C. 5363(m)(1) may not be included in a funding agreement.

§ 1000.680 May the Secretary place any requirements on programs and funds that are otherwise available to Tribes/Consortium or Indians for which appropriations are made to agencies other than DOI?

No, unless the Secretary is required to develop terms and conditions that are required by law or that are required by the agency to which the appropriation is made.

§ 1000.685 What funds are used to carry out inherent Federal functions?

The funds for BIA to carry out inherent Federal functions are the funds to support functions that may not legally be delegated to an Indian Tribe if all Tribes were to assume responsibilities for all BIA programs that the Act permits.

§ 1000.690 How does BIA determine the funding amount to carry out inherent Federal functions?

(a) Between October 1st and December 31st of each fiscal year, each regional and central office shall develop a document that contains its inherent Federal function information and cost calculation for that office based either on an enacted budget or Continuing Resolution budgetary guidance, and promptly distribute that document to each Tribe/Consortium served by that office.

(b) The Secretary shall amend the document throughout the year if programs are added or changed in ways that affect the inherent Federal functions directly associated with a PSFA transferred, or proposed to be transferred, into the funding agreement of the Tribe/Consortium, and distribute that revised document to any Tribe/Consortium served by that office and seeking to transfer a PSFA into a funding agreement under the Act.

(c) Once final budget amounts are known and suballocated, the Secretary will provide an updated document within 90 days to each Tribe/Consortium.

(d) Inherent Federal function information must clearly identify the legal authority that specifically precludes delegation to a Tribe/Consortium.

(e) Cost calculations must be limited to the minimum amount of funds necessary to carry out specific inherent Federal functions necessary for that office to administer PSFAs transferred to the funding agreement.

(f) The development of the document in paragraph (a) of this section must be based on the following principles:

(1) Uniformity and consistency in the identification of inherent Federal functions and in the calculation of their associated costs;

(2) The determination of inherent Federal functions in each office is based only on those inherent Federal functions actually being performed at that office; and

(3) The Secretary shall consult with Tribes/Consortium on inherent Federal function determinations and associated cost calculations at various forums,

including the Tribal Interior Budget Council (TIBC).

(g) In negotiating the amount of funds due a Tribe/Consortium in a funding agreement, the Secretary may withhold from transfer to the funding agreement only those funds to carry out inherent Federal functions associated with the PSFAs assumed in the funding agreement, unless otherwise expressly agreed to by the Tribe/Consortium in the funding agreement.

(h) Upon the request of a Tribe/Consortium, the Secretary must promptly provide a specific description of each inherent Federal function directly associated with a PSFA transferred, or proposed to be transferred, into the funding agreement of the Tribe/Consortium, along with the detailed basis for the Secretary's associated cost calculation.

§ 1000.695 Is the amount of funds withheld by the Secretary to cover the cost of inherent Federal functions subject to negotiation?

Yes, the Secretary's calculation of such costs is an appropriate subject during the negotiation of a funding agreement because it affects the amount of funds available for transfer to the funding agreement. If the Tribe/Consortium and the Secretary are unable to agree on the amount of funds to be withheld by the Secretary to cover the Secretary's expense of carrying out inherent Federal functions directly associated with the PSFAs assumed in the funding agreement, the Tribe/Consortium may exercise any of its options under 25 U.S.C. 5366(c), including the final offer process in subpart I of this part.

§ 1000.700 May a Tribe/Consortium continue to negotiate a funding agreement pending an appeal of funding amounts associated with inherent Federal functions?

Yes, pending appeal of funding amounts associated with inherent Federal functions, any Tribe/Consortium may continue to negotiate a funding agreement using the information under § 1000.690 that is being appealed. This information will be subject to later adjustment based on the final determination of a Tribe's/Consortium's appeal.

§ 1000.705 What is a Tribal share?

A Tribal share is the portion of all funds and resources determined for a particular Tribe (or Tribes within a Consortium) that support any program within BIA, BIE, BTFA, or the Office of the Assistant Secretary for Indian Affairs and are not required by the Secretary for the performance of an

inherent Federal function as described in §§ 1000.685 through 1000.695.

§ 1000.710 How does BIA determine a Tribe's/Consortium's share of funds to be included in a funding agreement?

There are typically two methods for determining the amount of funds to be included in the funding agreement:

(a) *Formula-driven.* For formula-driven programs, a Tribe's/Consortium's amount is determined by first identifying the funds for BIA to carry out inherent Federal functions and second, by applying the distribution formula to the remaining eligible funding for each program involved.

(1) Distribution formulas must be reasonably related to the function or service performed by an office, and must be consistently applied to all Tribes within each regional and agency office.

(2) The process in paragraph (a) of this section for calculating a Tribe's funding under self-governance must be consistent with the process used for calculating funds available to non-self-governance Tribes.

(b) *Tribal-specific.* For programs whose funds are not distributed on a formula basis as described in paragraph (a) of this section, a Tribe's funding amount will be determined on a Tribe-by-Tribe basis and may differ between Tribes. Examples of these funds may include special project funding, awarded competitive grants, earmarked funding, and construction or other one-time or non-recurring funding for which a Tribe is eligible.

§ 1000.715 Can a Tribe/Consortium negotiate a Tribal share for programs outside its region/agency?

Yes, where BIA services for a particular Tribe/Consortium are provided from a location outside its immediate agency or region, the Tribe may negotiate its share from the BIA location where the service is actually provided.

§ 1000.720 May a Tribe/Consortium obtain discretionary or competitive funding that is distributed on a discretionary or competitive basis?

Funds provided for Indian services/programs that have not been mandated by Congress to be distributed on a competitive/discretionary basis may be distributed to a Tribe/Consortium under a formula-driven method. In order to receive such funds, a Tribe/Consortium must be eligible and qualified to receive such funds. A Tribe/Consortium that receives such funds under a formula-driven methodology would no longer be eligible to compete for these funds.

§ 1000.725 Are all funds identified as Tribal shares always paid to the Tribe/Consortium under a funding agreement?

No, at the discretion of the Tribe/Consortium, Tribal shares may be left, in whole or in part, with BIA for certain programs. This is referred to as a "retained Tribal share."

§ 1000.730 How are savings that result from downsizing allocated?

Funds that are saved as a result of downsizing in BIA are allocated to Tribes/Consortium in the same manner as Tribal shares as provided for in § 1000.710.

§ 1000.735 Do Tribes/Consortium need Secretarial approval to reallocate funds between programs that the Tribe/Consortium administers under the funding agreement?

No, except with respect to programs described in 25 U.S.C. 5363(b)(2) or (c) or as otherwise required by law, the Secretary does not have to approve the reallocation of funds between programs that a Tribe/Consortium administers under a funding agreement. However, reallocation of funds for construction project(s) included in a funding agreement must be done in accordance with subpart K of this part.

§ 1000.740 Can funding amounts negotiated in a funding agreement be adjusted during the year it is in effect?

Yes, funding amounts negotiated in a funding agreement may be adjusted under the following circumstances:

(a) *Congressional action.* (1) Increases/decreases as a result of Congressional appropriations and/or a directive in the statement of managers accompanying a conference report on an appropriations bill or continuing resolution.

(2) General decreases due to Congressional action must be applied consistently to BIA, self-governance Tribes/Consortium, and Tribes/Consortium not participating in self-governance.

(3) General increases due to Congressional appropriations must be applied consistently, except where used to achieve equitable distribution among regions and Tribes.

(4) A Tribe/Consortium will be notified of any decrease and be provided an opportunity to reconcile.

(b) *Mistakes.* If the Tribe/Consortium or the Secretary can identify and document substantive errors in calculations, the parties will renegotiate the amounts and make every effort to correct such errors.

(c) *Mutual Agreement.* Both the Tribe/Consortium and the Secretary may agree to renegotiate amounts at any time.

Establishing Self-Governance Stable Base Budgets

§ 1000.745 What are self-governance stable base budgets?

(a) A Tribe/Consortium self-governance stable base budget is the amount of recurring funding to be transferred to the Tribe/Consortium, for a period specified in the funding agreement. This amount must be adjusted to reflect subsequent annual changes in Congressional appropriations. It includes amounts that are eligible to be base transferred or have been base transferred from BIA budget accounts to self-governance budget accounts. As allowed by Congress, self-governance stable base budgets are derived from:

(1) A Tribe's/Consortium's Public Law 93–638 contract amounts;

(2) Negotiated agency, regional, and central office amounts;

(3) Other recurring funding;

(4) Special Projects, if applicable;

(5) Programmatic shortfall;

(6) Tribal priority allocation increases and decreases;

(7) Pay costs and retirement cost adjustments; and

(8) Any other inflationary cost adjustments.

(b) Self-governance stable base budgets must not include any non-recurring program funds, construction and wildland firefighting accounts, Congressional earmarks, or other funds specifically excluded by Congress. These funds are negotiated annually and may be included in the funding agreement but must not be included in the self-governance stable base budget.

(c) Self-governance stable base budgets may not include other recurring type programs that are currently in Tribal priority allocations (TPA) such as general assistance, housing improvement program (HIP), road maintenance and contract support. Should these later four programs ever become base transferred to Tribes, then they may be included in a self-governance Tribe's stable base budget.

(d) A funding agreement shall not specify the funding associated with a program described in 25 U.S.C. 5363(b)(2) or (c) without the Secretary's agreement.

§ 1000.750 Once a Tribe/Consortium establishes a stable base budget, are funding amounts renegotiated each year?

No, unless otherwise requested by the Tribe/Consortium, these amounts are not renegotiated each year. If a Tribe/Consortium renegotiates funding levels:

(a) It must negotiate all funding levels in the funding agreement using the

process for determining funds for BIA to carry out inherent Federal functions on the same basis as other Tribes; and

(b) It is eligible for funding amounts of new programs or available programs not previously included in the funding agreement on the same basis as other Tribes.

§ 1000.755 How are self-governance stable base budgets established?

At the request of the Tribe/Consortium, a self-governance stable base budget identifying each Tribe's funding amount is included in BIA's budget justification for the following year, subject to Congressional appropriation.

§ 1000.760 How are self-governance stable base budgets adjusted?

Self-governance stable base budgets must be adjusted as follows:

(a) *Congressional action.* (1) Increases/decreases as a result of Congressional appropriations and/or a directive in the statement of managers accompanying a conference report on an appropriations bill or continuing resolution.

(2) General decreases due to Congressional action must be applied consistently to BIA, self-governance Tribes/Consortium, and Tribes/Consortium not participating in self-governance.

(3) General increases due to Congressional appropriations must be applied consistently, except where used to achieve equitable distribution among regions and Tribes.

(4) A Tribe/Consortium will be notified of any decrease and be provided an opportunity to reconcile.

(b) *Mistakes.* If the Tribe/Consortium or the Secretary can identify and document substantive errors in calculations, the parties will renegotiate such amounts and make every effort to correct the errors.

(c) *Mutual agreement.* Both the Tribe/Consortium and the Secretary may agree to renegotiate amounts at any time.

Subpart G—Funding Agreements for Non-BIA Programs

§ 1000.801 What is the purpose of this subpart?

This subpart describes program eligibility, funding, terms, and conditions of funding agreements for non-BIA programs.

§ 1000.805 What is a funding agreement for a non-BIA program?

Funding agreements for non-BIA programs are legally binding and mutually enforceable agreements between a bureau and a Tribe/

Consortium participating in the self-governance program that contain:

(a) A description of that portion or portions of a bureau program that are to be performed by the Tribe/Consortium; and

(b) Associated funding, terms and conditions under which the Tribe/Consortium will assume a program, or portion of a program.

§ 1000.810 What non-BIA programs are eligible for inclusion in a funding agreement?

Programs authorized by sections 403(b)(2) and 403(c) (25 U.S.C. 5363(b)(2) and 5363(c)), as amended, are eligible for inclusion in a funding agreement. The Secretary will publish annually a list of these programs in accordance with 25 U.S.C. 5372(c)(3) and (4).

§ 1000.815 Are there non-BIA programs for which the Secretary must negotiate for inclusion in a funding agreement subject to such terms as the parties may negotiate?

Yes, those programs, or portions thereof, that are eligible for inclusion in funding agreements under section 403(b)(2) (25 U.S.C. 5363(b)(2)).

§ 1000.820 What programs are included under section 403(b)(2) (25 U.S.C. 5363(b)(2))?

Those non-BIA programs, or portions thereof, that are eligible for inclusion in funding agreements under the Act, as amended.

§ 1000.825 What programs are included under section 403(c) (25 U.S.C. 5363(c))?

Non-BIA programs within the Department of special geographic, historical, or cultural significance to participating Tribes, individually or as members of a Consortium, are eligible for inclusion in funding agreements under section 403(c) (25 U.S.C. 5363(c)).

§ 1000.830 What does “special geographic, historical or cultural” mean?

(a) *Geographic* generally refers to all lands presently “on or near” an Indian reservation, and all other lands within “Indian country,” as defined by 18 U.S.C. 1151. In addition, “geographic” includes:

(1) Lands of former reservations;

(2) Lands on or near those conveyed or to be conveyed under the Alaska Native Claims Settlement Act (ANCSA);

(3) Judicially established aboriginal lands of a Tribe or a Consortium member or as verified by the Secretary; and

(4) Lands and waters pertaining to Indian rights in natural resources, hunting, fishing, gathering, and subsistence activities, provided or

protected by treaty or other applicable law.

(b) *Historical* generally refers to programs or lands having a particular history that is relevant to the Tribe. For example, particular trails, forts, significant sites, or educational activities that relate to the history of a particular Tribe.

(c) *Cultural* refers to programs, sites, or activities as defined by individual Tribal traditions and may include, for example:

(1) Sacred and medicinal sites;

(2) Gathering of medicines or materials such as grasses for basket weaving; or

(3) Other traditional activities, including, but not limited to, subsistence hunting, fishing, and gathering.

(d) In determining whether a Tribe/Consortium has demonstrated a non-BIA program's special geographic, historical or cultural significance to such Tribe/Consortium, the Secretary shall interpret each Federal law and regulation in a manner that will facilitate the inclusion of a program in, and the implementation of, a funding agreement.

§ 1000.835 Under section 403(b)(2) (25 U.S.C. 5363(b)(2)), when must programs be awarded non-competitively?

Non-BIA programs eligible for inclusion in funding agreements under the Act, as amended, must be awarded non-competitively.

§ 1000.840 May a non-BIA bureau include in a funding agreement, on a non-competitive basis, programs of special geographic, historical, or cultural significance?

Yes, if there is a special geographic, historical, or cultural significance to the program or activity administered by the bureau, the law affords the non-BIA bureau the discretion to include the programs or activities in a funding agreement on a non-competitive basis.

§ 1000.845 Are there any non-BIA programs that may not be included in a funding agreement?

(a) Inherently Federal functions in accordance with 25 U.S.C. 5361(6) and 5363(k).

(b) Programs where the statute establishing the existing program does not authorize the type of participation sought by the Tribe/Consortium. In determining whether a statute “does not authorize the type of participation sought by” the Tribe/Consortium within the meaning of 25 U.S.C. 5363(k), the Department shall take the following factors into consideration:

(1) Tribes need not be identified in an authorizing statute in order for a

program, or element of a program, to be included in a funding agreement;

(2) The lack of specificity in a statute by itself does not create a blanket exclusion from inclusion of a program, or element of a program, in a funding agreement; and

(3) It is not an adequate ground to refuse to compact specific functions that are not inherently Federal in character, simply because an organic statute vests an agency with generic management authority over a broad category of land.

(c) The Secretary shall interpret each Federal law and regulation in a manner that facilitates:

(1) The inclusion of programs in funding agreements; and

(2) The implementation of funding agreements.

§ 1000.850 Does a Tribe/Consortium need to be identified in an authorizing statute in order for a program or element of a program to be included in a non-BIA funding agreement?

No, the Act, as amended, favors the inclusion of a wide range of programs.

§ 1000.855 Will Tribes/Consortia participate in the Secretary's determination of what is to be included on the annual list of available programs?

Yes, the Secretary must consult each year with Tribes/Consortia participating in self-governance programs regarding which bureau programs are eligible for inclusion in funding agreements. If a Tribe/Consortium makes a written request for a program to be included on the annual list for non-BIA reporting found in subpart P of this part (§§ 1000.2010(c) and 1000.2012), the Secretary must provide a written rationale if the Secretary does not include such program.

§ 1000.860 How will the Secretary consult with Tribes/Consortia in developing the list of available programs?

(a) The Secretary shall consult with Tribes/Consortia in developing the list of available programs in accordance with subpart T of this part.

(b) In addition to the requirements in subpart T of this part:

(1) The Secretary must publish the previous year's list of available programs in accordance with 25 U.S.C. 5372(c)(3) in the **Federal Register** prior to October 1 of each year. The list must include:

(i) All of the Secretary's proposed additions and revisions for the coming year with an explanation; and

(ii) Programmatic targets detailed in § 1000.2010(e) and an initial point of contact for each bureau.

(2) If the Secretary does not plan to include a Tribal suggestion or revision

in the final published list, the Secretary must provide to such Tribe/Consortium a written explanation of reasons consistent with § 1000.855.

§ 1000.865 What else is on the list in addition to eligible programs?

The list will also include programmatic targets and an initial point of contact for each bureau. Programmatic targets will be established as part of the consultation process described in § 1000.860.

§ 1000.870 May a bureau negotiate with a Tribe/Consortium for programs not specifically included on the annual list pursuant to 25 U.S.C. 5372(c)?

Yes, the annual list will specify that bureaus will negotiate for other programs eligible under 25 U.S.C. 5363(b)(2) when requested by a Tribe/Consortium. Bureaus may negotiate for 25 U.S.C. 5363(c) programs whether or not they are on the list.

§ 1000.875 How will a bureau negotiate a funding agreement for a program of special geographic, historical, or cultural significance to more than one Tribe/Consortium?

(a) If a program is of special geographic, historical, or cultural significance to more than one Tribe/Consortium, the bureau may allocate the program among the several Tribes/Consortia through separate funding agreements or select one Tribe/Consortium with whom to negotiate a funding agreement.

(b) In making a determination under paragraph (a) of this section, the bureau will, in consultation with the affected Tribes/Consortia, consider:

(1) The special significance of each Tribe's or Consortium member's interest; and

(2) The statutory objectives being served by the bureau program.

(c) The bureau's decision will be final for the Department.

§ 1000.880 When will this determination be made?

It will occur during the pre-negotiation process, subject to the timeframes in subpart H of this part (*see e.g.*, §§ 1000.1035 and 1000.1050).

§ 1000.885 What funds are included in a non-BIA funding agreement?

Non-BIA bureaus determine the amount of funding to be included in the funding agreement using the following principles:

(a) 403(b)(2) *Programs* (25 U.S.C. 5363(b)(2)). In general, funds are provided in a funding agreement to the Tribe/Consortium in an amount equal to the amount that it is eligible to receive

under section 106 of the Act, as amended.

(b) 403(c) *Programs* (25 U.S.C. 5363(c)). (1) The funding agreement will include:

(i) Amounts equal to the direct program or project costs the bureau would have incurred were it to operate that program at the level of work mutually agreed to in the funding agreement; and:

(ii) Allowable indirect costs; and

(iii) Such amounts as the Tribe/Consortium and the Secretary may negotiate for pre-award, start-up and direct contract support costs.

(2) A bureau is not required to include management and support funds from the regional or central office level in a funding agreement, unless:

(i) The Tribe/Consortium will perform work previously performed at the regional or central office level;

(ii) The work is not compensated in the indirect cost rate; and

(iii) Including management and support costs in the funding agreement does not result in the Tribe/Consortium being paid twice for the same work when negotiated indirect cost rate is applied.

§ 1000.890 How are indirect cost rates determined?

The Department's Interior Business Center (IBC) or other cognizant Federal agency and the Tribe/Consortium negotiate indirect cost rates. These rates are based on the applicable provisions of subpart E of 2 CFR part 200, or other applicable OMB cost circular and the provisions of title I of the Act, as amended. These rates are used generally by all Federal agencies for contracts and grants with the Tribe/Consortium, including self-governance agreements.

§ 1000.895 How does the Secretary determine the amount of indirect costs for a non-BIA funding agreement?

The Secretary determines the amount of indirect costs for a non-BIA funding agreement by:

(a) Applying the negotiated indirect cost rate to the appropriate direct cost base; or

(b) At the Tribe's/Consortium's option, negotiating a lump sum amount for indirect costs.

§ 1000.900 May the bureaus negotiate terms to be included in a funding agreement for non-BIA programs?

Yes, as provided for by 25 U.S.C. 5363(b)(2) and 5363(c) and as necessary to meet program mandates while consistent with this subpart, provided, however, that a bureau may not require in a funding agreement that a Tribe/Consortium retain, hire or assign a

Federal employee in a contracted program, nor may a bureau condition its approval of a funding agreement upon a requirement that a Tribe/Consortium retain, hire or assign a Federal employee in a contracted program.

§ 1000.905 Can a Tribe/Consortium reallocate, consolidate, and redesign funds for a non-BIA program?

Yes, 25 U.S.C. 5365(d)(2) permits such reallocation, consolidation, and redesign upon joint agreement of the Secretary and the Tribe/Consortium.

§ 1000.910 Do Tribes/Consortia need Secretarial approval to reallocate funds between title I eligible programs that the Tribe/Consortium administers under a non-BIA funding agreement?

No, unless otherwise required by law, the Secretary does not have to approve the reallocation of funds with the exception of construction projects.

§ 1000.915 Can a Tribe/Consortium negotiate a funding agreement with a non-BIA bureau for which the performance period exceeds one year?

Yes, subject to the terms of the funding agreement, a Tribe/Consortium and a non-BIA bureau may agree to provide for the performance under the funding agreement to extend beyond the fiscal year. However, the Secretary may not obligate funds in excess and advance of available appropriations.

§ 1000.920 Can the terms and conditions in a non-BIA funding agreement be amended during the year it is in effect?

Yes, terms and conditions in a non-BIA funding agreement may be amended during the year it is in effect as agreed to by both the Tribe/Consortium and the Secretary.

§ 1000.925 What happens if a funding agreement expires before the effective date of the successor Funding Agreement?

If the effective date of a successor funding agreement is not on or before the expiration of the current funding agreement, subject to terms mutually agreed upon by the Tribe/Consortium and the Secretary at the time the current funding agreement was negotiated or in a subsequent amendment, the Tribe/Consortium may continue to carry out the program authorized under the funding agreement to the extent resources permit. During this extension period, the current funding agreement shall remain in effect, including coverage of the Tribe/Consortium under the Federal Tort Claims Act (FTCA) 28 U.S.C. 2671–2680 (1994); and the Tribe/Consortium may use any funds remaining under the funding agreement, savings from other programs or Tribal funds to carry out the program. Nothing

in this section authorizes a funding agreement to be continued beyond the completion of the program authorized under the funding agreement or the amended funding agreement. This section also does not entitle a Tribe/Consortium to receive, nor does it prevent a Tribe/Consortium from receiving, additional funding under any successor funding agreement. The successor funding agreement must provide funding to the Tribe/Consortium at a level necessary for the Tribe/Consortium to perform the PSFA, or portions thereof, for the full period they were or will be performed.

Subpart H—Negotiation Process

§ 1000.1001 What is the purpose of this subpart?

This subpart provides the process and timelines for negotiating a self-governance compact with the Secretary and a funding agreement with any bureau.

§ 1000.1005 What are the phases of the negotiation process?

There are two phases of the negotiation process:

- (a) The information phase; and
- (b) The negotiation phase.

§ 1000.1010 Who may initiate the information phase?

Any Tribe/Consortium that has been selected to participate in self-governance may initiate the information phase.

§ 1000.1015 Is it mandatory to go through the information phase before initiating the negotiation phase?

No, a Tribe/Consortium may go directly to the negotiation phase.

§ 1000.1020 How does a Tribe/Consortium initiate the information phase?

A Tribe/Consortium initiates the information phase by sending to the Secretary a written request clearly identified as a “Request to Initiate the Information Phase”. This request notifies the Secretary of the Tribe’s/Consortium’s interest in negotiating for a program(s) and request for information about the program(s). This request must be sent:

- (a) If in electronic form (PDF), which is the preferred method, to *SGINFORMATION-REQUEST@bia.gov*; or
- (b) If in paper form by United States Mail or express courier to Director, Office of Self-Governance, at the headquarters address indicated on the official Department, OSG website.

§ 1000.1025 What information is a Tribe/Consortium encouraged to include in a Request to Initiate the Information Phase?

(a) A Tribe/Consortium is encouraged to include the following in a Request to Initiate the Information Phase:

- (1) As specifically as possible, the program(s) for which the Tribe/Consortium is interested in negotiating under this subpart;
 - (2) The bureau, service, office, or agency (bureau) that administers the program(s) of interest;
 - (3) The scope(s) of program activity in which the Tribe/Consortium is interested;
 - (4) If applicable, a brief explanation of the cultural, historical, or geographic significance to the Tribe/Consortium of the program(s);
 - (5) A request for budget, staffing, and other locations of the offices providing administrative support;
 - (6) Other information that the Tribe/Consortium may choose to submit for the Secretary’s consideration; and
 - (7) The Tribe’s/Consortium’s designated contact.
- (b) The Tribe/Consortium may choose to request information and technical assistance in a Request to Initiate the Information Phase notice including, but not limited to:
- (1) Information that will assist the Tribe/Consortium in initiating and/or implementing the negotiation process;
 - (2) Information regarding grants or funds within the bureau, or other known possible sources of funding, that may be available to the Tribe/Consortium for planning and negotiating, or renegotiating a compact and/or funding agreement;
 - (3) Information on any funds available within the bureau, or from other sources of funding, that the Tribe/Consortium may include in the funding agreement for performing the program(s);
 - (4) Information contained in the previous year, present year, and, if available, next year’s budget proposed by the President at the national program level and the regional/local level;
 - (5) Information used to support budget allocations for the programs identified (e.g., full time equivalents and other relevant factors);
 - (6) Information used to operate and/or evaluate a program, such as statutory and regulatory requirements and program standards;
 - (7) If applicable, information regarding how a program is administered by more than one bureau, including a point of contact for information for the other bureau(s); and
 - (8) Technical assistance from the bureau in preparing documents or materials that may be required for the

Tribe/Consortium in the negotiation process.

§ 1000.1030 When should a Tribe/Consortium submit a Request to Initiate the Information Phase to the Secretary?

A Tribe/Consortium may submit a Request to Initiate the Information Phase to the Secretary at any time.

§ 1000.1035 What steps does the bureau take after a Request to Initiate the Information Phase is submitted by a Tribe/Consortium?

(a) Within 15 days of receipt of a Tribe's/Consortium's Request to Initiate the Information Phase, the bureau will respond in writing to the Tribe's/Consortium's identified point of contact and identify the person designated as the bureau's representative responsible for providing information under this subpart. The bureau representative shall in good faith fulfill the following responsibilities:

(1) In accordance with paragraph (b) of this section, provide the Tribe/Consortium with all program budget and program information from each organizational level of the bureau(s); and

(2) Notify any other bureau as required under this subpart.

(b) Within 30 calendar days of receipt of the Tribe's/Consortium's request, the bureau representative must provide to the Tribe/Consortium the information responsive to the Tribe's/Consortium's Request to Initiate the Information Phase, if otherwise consistent with the bureau's budgetary process and subject to other applicable law. Responsive information includes, at a minimum:

(1) Information regarding program, budget, staffing, and locations of the offices administering the program identified by the Tribe/Consortium and related administrative support programs; and

(2) Such other information requested by the Tribe/Consortium in its request.

(c) Upon request by a Tribe/Consortium, the bureau will provide technical assistance to the Tribe/Consortium and be available to meet with Tribal/Consortium representatives to explain the information provided and discuss other questions from the Tribe/Consortium;

(d) The bureau shall issue a written explanation if it determines it cannot provide information required under paragraph (b) of this section within the 30-day period. If a bureau makes such a determination, then the bureau must provide any other information that is reasonably related to the Tribe/Consortium's request and the date when other information, not provided within

30 days but available for disclosure to the Tribe/Consortium, can be provided;

(e) The Secretary shall provide information under this section in a manner that facilitates the inclusion of programs in funding agreements and the implementation of funding agreements (25 U.S.C. 5369);

(f) If a bureau fails to timely provide information under this subpart, the Tribe/Consortium may:

(1) File a Freedom of Information Act request. These requests shall be considered for a fee waiver under the Freedom of Information Act; and/or

(2) Appeal in accordance with subpart R of this part.

§ 1000.1040 How does a Tribe/Consortium initiate the negotiation phase?

A Tribe/Consortium initiates the negotiation phase by sending to the Secretary a written request clearly identified as a Request to Initiate the Negotiation Phase. This request notifies the Secretary of the Tribe's/Consortium's interest in negotiating for a program(s). This request must be sent:

(a) If in electronic form (PDF), which is the preferred method, to SGNEGOTIATION-REQUEST@bia.gov; or

(b) If in paper form by United States Mail or express courier to the Director, Office of Self-Governance, at the headquarters address indicated on the official Department, OSG website.

§ 1000.1045 How and when does the Secretary respond to a request to negotiate a compact or BIA funding agreement?

Within 15 days of receiving a Request to Initiate the Negotiation Phase for a compact or BIA funding agreement, OSG will respond in writing to the Tribe's/Consortium's identified point of contact and identify the person designated as the lead Federal negotiator. OSG and the Tribe/Consortium will negotiate a compact or funding agreement in accordance with applicable provisions of this part.

§ 1000.1050 How and when does the Secretary respond to a request to negotiate a non-BIA funding agreement?

Within 15 days of receiving a Tribe's/Consortium's Request to Initiate the Negotiation Phase for a non-BIA funding agreement, the Department will take the steps in this section:

(a) If the program involves multiple bureaus, the Secretary will identify the lead Federal negotiator(s);

(b) If the program is authorized for negotiations by 25 U.S.C. 5363(b)(2), the bureau will identify the lead Federal negotiator(s).

(c) If the program may be authorized for negotiations by 25 U.S.C. 5363(c),

the bureau will identify the lead Federal negotiator(s) and schedule a pre-negotiation discussion with the Tribe/Consortium as soon as possible. The purpose of the discussion is to assist the bureau in determining if the program is available for negotiation. If there is agreement that a program is eligible for inclusion in a funding agreement, the parties may jointly agree to waive this discussion.

(d) Within 10 days after convening a discussion under paragraph (c) of this section, or no later than 30 days of receipt by the Secretary of the Tribe's/Consortium's Request to Initiate the Negotiation Phase:

(1) If the program is available for inclusion in a funding agreement, the bureau will begin negotiating a non-BIA funding agreement in accordance with subpart G of this part; or

(2) If the program is unavailable for negotiation, the bureau will provide a written explanation of why the program is unavailable for inclusion in a funding agreement.

§ 1000.1055 What is the process for conducting the negotiation phase?

(a) Within 30 days of receiving a written Request to Initiate the Negotiation Phase, the bureau and the Tribe/Consortium will agree to a date to conduct an initial negotiation meeting. Subsequent meetings will be held with reasonable frequency at reasonable times.

(b) Tribe/Consortium and bureau lead negotiators must:

(1) Be authorized to negotiate on behalf of their government; and

(2) Involve all necessary persons in the negotiation process.

(c) Once negotiations have been completed, with the parties in agreement concerning all terms and conditions of a compact and/or funding agreement, the parties will acknowledge in writing the date on which agreement was reached and:

(1) The Secretary and Tribe/Consortium will finalize the compact and/or funding agreement for submission to the Tribe/Consortium within 15 days or by a mutually agreed upon date; and

(2) Upon the Secretary's receipt of a compact or funding agreement signed by the Tribe/Consortium, the Secretary will execute and return the funding agreement by a mutually agreed upon date not to exceed 45 days, and the compact by a mutually agreed upon date not to exceed 90 days.

§ 1000.1060 What issues must the bureau and the Tribe/Consortium address at negotiation meetings?

The negotiation meetings referred to in § 1000.1055 must address at a minimum the following:

- (a) The specific Tribe/Consortium proposal(s) and intentions;
- (b) Legal or program issues that the bureau or the Tribe/Consortium identify as concerns;
- (c) Options for negotiating programs and related budget amounts, including mutually agreeable options for developing alternative formats for presenting budget information to the Tribe/Consortium;
- (d) Dates for conducting and concluding negotiations;
- (e) Protocols for conducting negotiations;
- (f) Responsibility for preparation of a written summary of the discussions; and
- (g) Who will prepare an initial draft of the compact or funding agreement, as applicable.

§ 1000.1065 What happens when a compact or funding agreement is signed?

- (a) After all necessary parties have signed the compact or funding agreement, a copy is sent to the Tribe/Consortium.
- (b) No later than 90 days before the proposed effective date of an executed funding agreement, the Secretary shall forward a copy of the funding agreement to each Indian Tribe/Consortium served by the local BIA Agency office that serves any Tribe/Consortium that is a party to the funding agreement. The Secretary's obligation under 25 U.S.C. 5363(f) shall not impact the funding agreement's effective date as specified under § 1000.1075.

§ 1000.1070 What happens if the Tribe/Consortium and bureau negotiators fail to reach an agreement on a compact or funding agreement?

If the bureau and Tribe/Consortium are unable to agree, in whole or in part, on the terms of a compact or funding agreement (including funding levels) then the final offer process in subpart I of this part shall apply.

§ 1000.1075 When does the funding agreement become effective?

A funding agreement shall become effective on the date it is fully executed or as identified by its terms.

§ 1000.1080 What is a subsequent funding agreement?

A subsequent funding agreement is negotiated after a Tribe's/Consortium's existing funding agreement. The parties to the funding agreement should generally use the terms of the existing

funding agreement to expedite and simplify the exchange of information and the negotiation process.

§ 1000.1085 How is the negotiation of a subsequent funding agreement initiated?

Although a written request is desirable to document the precise request and date of the request, a written request is not mandatory. If either party anticipates a significant change in an existing program in the funding agreement, it should notify the other party of the change at the earliest possible date so that the other party may plan accordingly.

§ 1000.1090 What is the process for negotiating a subsequent funding agreement?

The Tribe/Consortium and the bureau shall use the procedures in §§ 1000.1005 through 1000.1070.

Subpart I—Final Offer**§ 1000.1101 What is the purpose of this subpart?**

This subpart explains the final offer process provided by the Act for resolving, within a specific timeframe, disputes that may develop in negotiation of compacts, funding agreements, or amendments thereof.

§ 1000.1105 When should a final offer be submitted?

The Tribe/Consortium may submit a final offer when it has determined that the Tribe/Consortium and the Secretary are unable to agree, in whole or in part, on the terms of a compact, funding agreement, or amendment (including funding levels).

§ 1000.1110 How does a Tribe/Consortium submit a final offer?

(a) A Tribe/Consortium must submit its written final offer for a compact or funding agreement, or amendment thereof:

- (1) If in electronic form (PDF), which is the preferred method, to *SGFINAL-OFFER@bia.gov* for any DOI program; or
- (2) If in paper form by United States Mail or express courier to the Director, Office of Self-Governance, at the headquarters address indicated in the official Department, OSG website.

(b) The document should be separate from the compact, funding agreement or amendment and clearly identified as a "Final Offer."

§ 1000.1115 What does a final offer contain?

A final offer must contain a description of the disagreement between the Secretary and the Tribe/Consortium, the Tribe's/Consortium's final proposal to resolve the disagreement, including

any draft proposed terms to be included in a compact, funding agreement, or amendment, and the name and contact information for the person authorized to act on behalf of the Tribe/Consortium.

§ 1000.1120 When does the 60-day review period begin?

The 60-day review period begins on the date the final offer is received at the office's mailing or email address identified in this subpart. Demonstration of receipt includes a postal return receipt, express delivery service receipt, or date stamp; all email submissions are presumed received by the Secretary no later than the next business day following transmission from the Tribe/Consortium.

§ 1000.1125 How does the Department acknowledge receipt of final offer?

- (a) Within 10 days of receipt by the officials designated by the Secretary in § 1000.1110, the Department will send the Tribe/Consortium a written acknowledgement of the final offer.
- (b) The acknowledgement reference in paragraph (a) of this section shall include:
 - (1) A statement acknowledging receipt of the final offer;
 - (2) The date the final offer was received and the last day of the applicable statutory review period;
 - (3) If applicable, the Secretary may request additional information. A request for more information has no effect on deadlines for a response under this subpart; and
 - (4) A statement notifying the Tribe/Consortium that technical assistance is available upon request to comply with paragraph (b)(3) of this section.

§ 1000.1130 May the Secretary request and obtain an extension of time of the 60-day review period?

(a) Yes, the Secretary may request an extension of time before the expiration of the 60-day review period. The Tribe/Consortium may either grant or deny the Secretary's request for an extension. To be effective, any grant of extension of time must be in writing and be signed by the person authorized by the Tribe/Consortium to grant the extension before the expiration of the 60-day review period.

(b) The deadline described in paragraph (a) of this section may be extended for any additional length of time as agreed upon in writing by the Tribe/Consortium and the Secretary, and

(c) The 60-day period may be extended up to 30 days for circumstances beyond the control of the Secretary, upon written request from the Secretary to the Tribe/Consortium.

(d) A Tribe/Consortium must respond within 10 days of receiving the Secretary's request for an extension under paragraph (c) of this section.

§ 1000.1135 What happens if the Secretary takes no action within the 60-day period (or any extensions thereof)?

The final offer is:

(a) Accepted automatically by operation of law for a compact or funding agreement provision except as to its application to a program described under 25 U.S.C. 5363(c); or

(b) Rejected automatically by operation of law with respect to any program described under 25 U.S.C. 5363(c).

§ 1000.1140 Once the Tribe/Consortium's final offer has been accepted or accepted by operation of law, what is the next step?

After the Tribe/Consortium's final offer is accepted or accepted by the operations of law, within 10 days the parties will amend the compact or funding agreement to incorporate the accepted terms of the final offer.

§ 1000.1145 On what basis may the Secretary reject a final offer?

The Secretary may reject a final offer for one of the following reasons:

(a) The amount of funds proposed in the final offer exceeds the applicable funding level to which the Tribe/Consortium is entitled under the Act;

(b) The program that is the subject of the final offer is an inherent Federal function that cannot legally be delegated to a Tribe/Consortium or is subject to discretion of the Secretary under the Act;

(c) The Tribe/Consortium cannot carry out the program in a manner that would not result in significant danger or risk to the public health or safety, to natural resources, or to trust resources;

(d) The Tribe/Consortium is not eligible to participate in self-governance under 25 U.S.C. 5362;

(e) The funding agreement would violate a Federal statute or regulation; or

(f) With respect to a program or portion of a program included in a final offer pursuant to 25 U.S.C. 5363(b)(2), the program or the portion of the program is not otherwise available under 25 U.S.C. 5321(a)(1)(E).

§ 1000.1150 How does the Secretary reject a final offer?

The Secretary rejects a final offer by providing written notice to the Tribe/Consortium based on the criteria in § 1000.1145 not more than 60 days after the receipt of a final offer, or a later date in accordance with § 1000.1130.

§ 1000.1155 What is the "significant danger" or "risk" to the public health or safety, to natural resources, or to trust resources?

A significant danger or risk is determined on a case-by-case basis in accordance with 25 U.S.C. 5366.

§ 1000.1160 Is technical assistance available to a Tribe/Consortium to overcome the objections stated in the Secretary's rejection of a final offer?

Yes, the Secretary must provide technical assistance to overcome the objection stated in the notification of the rejection of the final offer.

§ 1000.1165 If the Secretary rejects all or part of a final offer, is the Tribe/Consortium entitled to an appeal?

Yes, the Tribe/Consortium is entitled to appeal the decision of the Secretary, with an agency hearing on the record, and the right to engage in full discovery relevant to any issue raised in the matter. The procedures for appeals are found in subpart R of this part. Alternatively, at its option, the Tribe/Consortium has the right to initiate an action challenging the Secretary's decision in U.S. District Court under 25 U.S.C. 5331(a).

§ 1000.1170 Do those portions of the compact, funding agreement, or amendment not in dispute go into effect?

Yes, subject to 25 U.S.C. 5366(c)(6)(A)(iv).

§ 1000.1175 Does appealing the final offer decision prevent the Secretary and the Tribe/Consortium from entering into any accepted compact, funding agreement or amendment provisions that are not in dispute?

No, appealing the decision does not prevent the Secretary and Tribe/Consortium from entering into any accepted, severable provisions of a compact, funding agreement, or amendment that are not in dispute.

§ 1000.1180 What is the burden of proof in an appeal of a rejection of a final offer?

With respect to any appeal, hearing, or civil action, brought under this subpart, the Secretary shall have the burden of clearly demonstrating the validity of the grounds for rejecting the final offer.

Subpart J—Waiver of Regulations

§ 1000.1201 What regulations apply to Tribes/Consortia?

All regulations that govern the operation of programs included in a funding agreement apply unless waived under this subpart. To the maximum extent practical, the parties should identify these regulations in the funding agreement.

§ 1000.1205 Can the Secretary grant a waiver of regulations to a Tribe/Consortium?

Yes, a Tribe/Consortium may ask the Secretary to grant a waiver of some or all Department regulation(s) applicable to a program, in whole or in part, operated by a Tribe/Consortium under a compact or funding agreement.

§ 1000.1210 When can a Tribe/Consortium request a waiver of a regulation?

A Tribe/Consortium may request a waiver of a regulation:

(a) As part of the negotiation process;

(b) At any time after a funding agreement has been executed; or

(c) Following a denial decision, provided that the Tribe/Consortium acknowledges that the submission commences a new 120-day review period under § 1000.1240.

§ 1000.1215 How does a Tribe/Consortium obtain a waiver?

(a) A Tribe/Consortium must submit its written waiver request for any DOI compact, funding agreement, or amendment thereof:

(1) In electronic form (PDF), which is the preferred method, by email to SGWAIVER-REQUEST@bia.gov; or

(2) If in paper form by United States Mail or express courier to Director, Office of Self-Governance at the headquarters address indicated on the official Department OSG website.

(b) The waiver request, including one made under § 1000.1210(a), must be a separate document from the compact, funding agreement, or amendment and clearly identified as a "Waiver Request."

§ 1000.1220 How does a Tribe/Consortium operating a Public Law 102–477 Plan obtain a waiver?

(a) For a waiver request involving any program that has been integrated under an approved plan authorized by Public Law 102–477, as amended, or proposed to be integrated under a Public Law 102–477 plan, the Tribe must submit the request to the BIA—Division of Workforce Development.

(b) The provisions of 25 U.S.C. 3406 (b), *et seq.*, governing submission, review, decision, dispute resolution, and appeal apply to a waiver request submitted under paragraph (a) of this section.

(c) If a waiver of regulations had been previously obtained for a program administered by the Department that is later integrated into a plan authorized by Public Law 102–477, such waiver of regulations will continue to be in effect.

§ 1000.1225 May a Tribe/Consortium request an optional meeting or other informal discussion to discuss a waiver request?

(a) Yes, a Tribe/Consortium may request an optional meeting or other informal discussion with the appropriate bureau official(s).

(b) To provide reasonable time for consideration, the Tribe/Consortium may request a meeting or other informal discussion to be held with the appropriate bureau official(s) no less than 30 days before the end of the 120-day period, unless the parties agree on another date.

(c) For all purposes relating to these meeting or informal discussion procedures, the parties are the designated representatives of the Tribe/Consortium and the appropriate bureau official(s) from whom the waiver is requested.

§ 1000.1230 Is a bureau required to provide technical assistance to a Tribe/Consortium concerning waivers?

Yes.

(a) *Prior to submission of a waiver request.* A Tribe/Consortium considering a waiver request under this part may request, and a bureau shall provide, technical assistance to assist the Tribe/Consortium to prepare and submit the waiver request.

(b) *After submission of a waiver request.* Not later than 60 days after receipt of a Tribe's/Consortium's waiver request, unless the parties agree on another date, a bureau shall, if applicable:

(1) Provide technical assistance to overcome any objection which the bureau might have to the request while a waiver request is under consideration; and/or

(2) Identify additional information that may assist the bureau in making a decision.

§ 1000.1235 How does the Secretary respond to a waiver request?

Within 10 business days of receipt, the officials designated by the Secretary in § 1000.1215 will email to the Tribe/Consortium a letter:

(a) Acknowledging receipt of the waiver request; and

(b) Identifying the date the waiver request was received and the last day of the applicable statutory review period.

§ 1000.1240 When must the Secretary make a decision on a waiver request?

(a) Not later than 120 days after receipt of a waiver request by the Secretary and the Secretary's designated officials in accordance with § 1000.1215.

(b) This 120-day period may be extended for any length of time, as

agreed upon by both the Tribe/Consortium and the Secretary.

§ 1000.1245 How does the Secretary make a decision on the waiver request?

(a) The Secretary must issue a written decision explaining the rationale for denying or approving the requested waiver.

(b) If the Secretary issues a written decision denying the requested waiver, it must describe the basis for the specific finding that the identified text in the regulation may not be waived because such a waiver is prohibited by Federal law.

(c) The decision is final for the Department.

§ 1000.1250 What happens if the Secretary neither approves nor denies a waiver request within the time specified in § 1000.1240?

If the Secretary fails to make a determination with respect to a waiver request within the period specified in § 1000.1240 (including any extension agreed to under that section), the waiver request is automatically, by operation of law,

(a) Deemed approved except for programs eligible under section 403(b)(2) or section 403(c) (25 U.S.C. 5363(b)(2) or 5363(c)), as amended; or

(b) Deemed denied with respect to programs eligible under section 403(b)(2) or section 403(c) (25 U.S.C. 5363(b)(2) or 5363(c)), as amended. Such deemed denial is a final decision for the Department.

§ 1000.1255 May a Tribe/Consortium appeal the Secretary's decision to deny its request for a waiver of a regulation?

Yes, the Tribe/Consortium may appeal the Secretary's decision consistent with applicable law, including 25 U.S.C. 5331. The burden of proof shall be as set forth in § 1000.2315.

§ 1000.1260 What is the term of a waiver?

Upon approval, a waiver is deemed approved until such time as rescinded by the Tribe/Consortium.

§ 1000.1265 May a Tribe/Consortium withdraw a waiver request?

Yes. If a Tribe/Consortium chooses to withdraw a waiver request before the Secretary makes a decision, it must do so in writing prior to the end of the 120-day time frame.

§ 1000.1270 May a Tribe/Consortium have more than one waiver request pending before the Secretary at the same time?

Yes. A Tribe/Consortium may have more than one waiver request pending before the Secretary at the same time,

provided that each waiver request affects a different regulatory provision.

§ 1000.1275 May a Tribe/Consortium continue to negotiate a funding agreement pending final decision on a waiver request?

Yes, pending final decision on a waiver request, any Tribe/Consortium may continue to negotiate and implement a funding agreement. The regulation will apply until it is waived. The funding agreement will be subject to later adjustment based on an affirmative final decision on the Tribe's/Consortium's waiver request.

§ 1000.1280 How is a waiver decision documented for the record?

The waiver approval is made part of the funding agreement by attaching a copy of it to the funding agreement and by mutually executing any necessary conforming amendments to the funding agreement. The waiver requests and bureau's decision document(s), pursuant to § 1000.1245, will be posted and archived on the OSG website or successor technology within 30 days of the decision. Such posting/archiving shall include deemed approved and deemed denied decisions under § 1000.1250. All decisions shall be made available on request, and a summary of decisions will be included in the Self Governance Annual Report to Congress.

Subpart K—Construction*Construction Definitions***§ 1000.1301 What key construction terms do I need to know?**

Budget means a statement of the funds required to complete the scope of work in a construction project. For cost reimbursement agreements, budgets may be stated using broad categories such as planning, design, construction, project administration, and contingency. For fixed price agreements, budgets may be stated as lump sums, unit cost pricing, or a combination thereof.

Construction management services (CMS) means activities limited to administrative support services; coordination; and monitoring oversight of the planning, design, and construction process. CMS activities typically include:

(1) Coordination and information exchange between the Tribe/Consortium and the Federal Government;

(2) Preparation of a Tribe's/Consortium's project agreement; and

(3) A Tribe's/Consortium's subcontract scope of work identification and subcontract preparation, and competitive selection of construction contract subcontractors.

Construction phase is the phase of a construction project during which the

project is constructed, and includes labor, materials, equipment and services necessary to complete the work, in accordance with the construction project agreement.

Construction program or construction project means a Tribal undertaking relating to the administration, planning, environmental determination, design, construction, repair, improvement, or expansion of roads, bridges, buildings, structures, systems, or other facilities for purposes of housing, law enforcement, detention, sanitation, water supply, education, administration, community, health, irrigation, agriculture, conservation, flood control, transportation, or port facilities, or for other Tribal purposes.

Construction project agreement means a negotiated agreement between the Secretary and a Tribe/Consortium, that at a minimum:

(1) Establishes project phase start and completion dates, which may extend over a period of one or more years;

(2) Provides a general description of the project, including the scope of work, references to design criteria and standards by which it will be accomplished, and other terms and conditions;

(3) Identifies the responsibilities of the Tribe/Consortium and the Secretary;

(4) Addresses how project-related environmental considerations will be addressed;

(5) Identifies the owner and operations and maintenance entity of the proposed work;

(6) Provides a budget;

(7) Provides a payment process;

(8) Establishes the duration of the agreement based on the time necessary to complete the specified scope of work, which may be one or more years; and

(9) Identifies the agreement of the Secretary and Tribe/Consortium over which entity will bear any additional costs necessary to meet changes in scope, or errors or omissions in design and construction.

Design phase is the phase of a construction project during which project plans, specifications, and other documents are prepared that are used to construct the project. Site investigation, final site selection and environmental review and determination activities are completed in this phase if not conducted as part of the planning phase.

NEPA means the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*).

NHPA means the National Historic Preservation Act (16 U.S.C. 470 *et seq.*).

Planning phase is the phase of a construction project agreement during which planning services are provided.

Planning services may include performing a needs assessment, completing and/or verifying master plans, developing justification documents, conducting pre-design site investigations, developing budget cost estimates, conducting feasibility studies as needed, conducting environmental review activities and justifying the need for the project.

SHPO means State Historic Preservation Officer.

Scope of work or specific scope of work means a brief written description of the work to be accomplished under the construction project, sufficient to confirm that the project is consistent with the purpose for which the Secretary has allocated funds.

THPO means Tribal Historic Preservation Officer.

Purpose and Scope

§ 1000.1305 What construction projects and programs included in a funding agreement or construction project agreement are subject to this subpart?

(a) All construction programs and construction projects included in a funding agreement under title IV are subject to this subpart.

(b) The following programs and activities are not construction programs and activities for the purposes of this subpart:

(1) Activities limited to providing planning services, administrative support services, coordination, responsibility for the construction project, site-management and administration of the project, which may include cost management, project budgeting, project scheduling and procurement.

(2) The BIA Housing Improvement Program;

(3) The BIA Road Maintenance Program and other road maintenance activities as maintenance is defined by 23 U.S.C. 101;

(4) Operation and maintenance programs;

(5) Projects using funds transferred under an approved Public Law 102–477 plan; and

(6) Non-403(c) Programs that are less than \$100,000, subject to 25 U.S.C. 5363(e)(2), other applicable Federal law, and § 1000.1515.

§ 1000.1306 May a program or project-specific grant or contracting mechanism involving construction and related activities satisfy the requirements of this subpart?

Yes, program or project-specific contracting mechanisms or agreements involving construction and related activities will satisfy the requirements of this subpart and may be incorporated

into the Tribe/Consortium's funding agreement, provided that such program or project-specific contracting mechanism or agreement addresses all the requirements of 25 U.S.C. 5367 that are applicable to the construction program or project. Nothing herein shall require the Secretary to duplicate the Federal requirements of 25 U.S.C. 5367 that are applicable to the project in the program or project-specific contracting mechanism or agreement.

§ 1000.1307 May the Secretary accept funds from another Department for a program or project involving construction and related activities for transfer to the Tribe/Consortium under its funding agreement or construction project agreement?

Yes, the Secretary may accept funds from another Department for a program or project involving construction and related activities for transfer to the Tribe/Consortium under its funding agreement or construction project agreement, subject to an interagency agreement between the Secretary and the Federal agency, with the concurrence of the Tribe/Consortium before such interagency agreement is finalized, that addresses the purpose, intent, Federal oversight and other responsibilities for the construction program or project, and related activities.

§ 1000.1310 What alternatives are available for a Tribe/Consortium to perform a construction program or project?

(a) As authorized by 25 U.S.C. 5367(g), and at the option of the Tribe/Consortium, construction project funding proposals shall be negotiated with the Secretary pursuant to the statutory process in 25 U.S.C. 5324, and any resulting agreement shall be incorporated into the funding agreement as an “addendum”; or

(b) A Tribe/Consortium may negotiate a construction project with the Secretary pursuant to the statutory process in 25 U.S.C. 5324, and incorporate any resulting construction project agreement into a separate title I construction contract and funding agreement subject to title I and the part 900 regulations, including subpart J (Construction) of part 900. Such construction project shall not be subject to this subpart.

§ 1000.1315 Does this subpart create an agency relationship?

No, a BIA or non-BIA construction program or project does not automatically create an agency relationship. However, Federal law, provisions of a funding agreement, or Federal actions may create an agency relationship.

*Notification and Project Assumption***§ 1000.1320 Is the Secretary required to consult with affected Tribes/Consortia concerning construction projects and programs?**

Yes, before developing a new project resource allocation methodology and application process the Secretary must consult with all Indian Tribes/Consortia as set forth in subpart I of this part.

§ 1000.1325 When does the Secretary confer with a Tribe/Consortium concerning Tribal preferences as to size, location, type, and other characteristics of a project?

Before spending any funds for planning, design, construction, or renovation projects, whether or not subject to a competitive application and ranking process, the Secretary must confer with any Indian Tribe/Consortium that would be significantly affected by the expenditure to determine and honor Tribal preferences whenever practicable concerning the size, location, type, and other characteristics of the project.

§ 1000.1330 What does a Tribe/Consortium do if it wants to perform a construction project or program under 25 U.S.C. 5367?

(a) A Tribe/Consortium may start the process of developing a construction project proposal to include in a funding agreement or construction project agreement by:

(1) Notifying the Secretary in writing that the Tribe/Consortium wishes to perform one or more construction projects under 25 U.S.C. 5367; or

(2) Submitting a proposed construction project agreement for consideration and negotiation, or

(3) A combination of the actions described in paragraphs (a)(1) and (2) of this section.

(b) Within 30 days after receiving a request from a Tribe/Consortium, the Secretary and the Tribe/Consortium shall exchange all applicable information available to each party about the project including, but not limited to, planning, construction drawings, maps, engineering reports, design reports, plans of requirements, cost estimates, environmental assessments, or environmental impact reports and archaeological reports.

§ 1000.1335 What must a Tribal proposal for a construction program or project contain?

A construction project proposal must contain all of the required elements of a construction project contained in § 1000.1355. In addition to these minimum requirements, a Tribe/Consortium may include additional items for negotiation.

§ 1000.1340 May multiple projects be included in a single construction project agreement or funding agreement that includes a construction project?

Yes, a Tribe/Consortium may include multiple projects in a single funding agreement or construction project agreement if funded by the same bureau, or may add additional projects by amendment(s) to an existing funding agreement or construction project agreement with the same bureau.

§ 1000.1345 Must a construction project proposal incorporate provisions of Federal construction guidelines and manuals?

(a) No, the Tribe/Consortium and the Secretary must agree upon and specify appropriate building codes and architectural and engineering standards (including health and safety) which must be in conformity with nationally recognized standards for comparable projects as long as they meet or exceed the requirements of 25 U.S.C. 5367(d).

(b) The Secretary may provide, or the Tribe/Consortium may request, Federal construction guidelines and manuals for consideration by the Tribe/Consortium in the preparation of its construction project proposal. If Tribal construction codes and standards (including national, regional, State, or Tribal building codes or contrition industry standards) that meet or exceed otherwise applicable standards, the Secretary must accept the Tribally proposed standards.

§ 1000.1350 What provisions relating to a construction project or program may be included in a funding agreement or construction project agreement?

Unless otherwise agreed to in writing by a Tribe/Consortium, no provision of title 41, United States Code, the Federal Acquisition Regulations, or any other law or regulation pertaining to Federal procurement, shall apply to any construction program or project carried out under title IV of the Act. Absent a negotiated agreement, such provisions and regulatory requirements do not apply.

§ 1000.1355 What provisions must a Tribe/Consortium include in a construction project agreement or funding agreement that contains a construction project or program?

(a) For each construction project or program carried out by the Tribe/Consortium under 25 U.S.C. 5367, the Tribe/Consortium and the Secretary shall negotiate a provision in the construction project agreement or funding agreement that identifies:

(1) The approximate start and completion dates for the project, which may extend over a period of one or more years;

(2) A general description of the project, including the scope of work, references to design criteria, and other terms and conditions;

(3) The responsibilities of the Tribe/Consortium for the project;

(4) How project-related environmental considerations will be addressed;

(5) The amount of Federal funds provided for the project;

(6) The terms and conditions by which funding for the project, including contingency funds, will be paid to the Tribe/Consortium by the Secretary;

(7) The obligations of the Tribe/Consortium to comply with the applicable codes and standards referenced in 25 U.S.C. 5367(d) and applicable Federal laws and regulations;

(8) The agreement of the parties over who will bear any additional costs necessary to meet changes in scope, or errors or omissions in design and construction;

(9) The entity responsible to issue any Certificate of Occupancy, if applicable; and

(10) Other terms and conditions the parties mutually agree upon.

(b) The Tribe/Consortium shall include in the construction project agreement or funding agreement that includes a construction project or program a provision for the submission to the Secretary of progress reports and financial status reports not less than semi-annually commencing after funding for the project is received by the Tribe/Consortium and continuing until the construction of the project is complete.

*Requirements and Standards***§ 1000.1360 What codes, standards and architects and engineers must a Tribe/Consortium use when performing a construction project under this part?**

In carrying out a construction project under this subpart, a Tribe/Consortium must:

(a) Adhere to applicable Federal, State, local, and Tribal building codes, architectural and engineering standards, and applicable Federal guidelines regarding design, space, and operational standards, appropriate for the particular project; and

(b) Use only architects and engineers who:

(1) Are licensed to practice in the State in which the facility will be built; and

(2) Certify that:

(i) They are qualified to perform the work required by the specific construction involved; and

(ii) Upon completion of design, the plans, and specifications meet or exceed the applicable construction and safety codes.

NEPA Process

§ 1000.1365 Are Tribes/Consortia required to carry out activities involving NEPA in order to enter into a construction project agreement?

No, Tribes/Consortia are not required to carry out any activities involving NEPA in order to enter into a construction project agreement.

§ 1000.1370 How may a Tribe/Consortium elect to assume some Federal responsibilities under NEPA?

(a) A Tribe/Consortium may, subject to the agreement of the Secretary, elect to assume some Federal responsibilities under NEPA, NHPA, and related provisions of other laws and regulations that would apply if the Secretary were to undertake a construction project by adopting a resolution:

(1) Designating a certifying Tribal officer to represent the Indian Tribe and to assume the status of a responsible Federal official under those Acts, laws, or regulations; and

(2) Accepting the jurisdiction of the United States courts for the purpose of enforcing the responsibilities of the certifying Tribal officer assuming the status of a responsible Federal official under those Acts, laws, or regulations.

(b) Notwithstanding paragraph (a) of this section, nothing in this section authorizes the Secretary to include in any compact or funding agreement duties of the Secretary under NEPA, NHPA, and other related provisions of law that are inherent Federal functions.

§ 1000.1375 How may a Tribe/Consortium carry out activities involving NEPA without assuming some Federal responsibilities?

A Tribe/Consortium may elect to carry out some or all activities involving development and preparation of applicable documentation under NEPA, NHPA and related provisions of other laws and regulations for final review and approval by the Secretary.

§ 1000.1379 Are Tribes/Consortia required to adopt a separate resolution or take equivalent Tribal action to assume some environmental responsibilities of the Secretary under NEPA, NHPA, and related laws and regulations for each construction project?

No, the Tribe/Consortium may adopt a single resolution or take equivalent Tribal action to assume some environmental responsibilities of the Secretary for NEPA, NHPA, and related laws and regulations for a single project, multiple projects, a class of projects, or all projects performed under 25 U.S.C. 5367.

§ 1000.1380 What additional provisions of law are related to NEPA and NHPA?

(a) Depending upon the nature and the location of the construction project, environmental laws related to NEPA and NHPA may include:

(1) Archaeological and Historical Data Preservation Act (54 U.S.C. 3120501 through 3120508);

(2) Archeological Resources Protection Act (16 U.S.C. 470aa *et seq.*);

(3) Clean Air Act (42 U.S.C. 7401 *et seq.*);

(4) Clean Water Act (33 U.S.C. 1251 *et seq.*);

(5) Coastal Barrier Improvement Act (16 U.S.C. 3501 *et seq.*);

(6) Coastal Barrier Resources Act (16 U.S.C. 3501 *et seq.*);

(7) Coastal Zone Management Act (16 U.S.C. 1451 *et seq.*);

(8) Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601 *et seq.*);

(9) Endangered Species Act (16 U.S.C. 1531 *et seq.*);

(10) Farmland Protection Policy Act (7 U.S.C. 4201 *et seq.*);

(11) Marine Protection, Research, and Sanctuaries Act (33 U.S.C. 1401 through 1445; 16 U.S.C. 1431 through 1447F; 33 U.S.C. 2801 through 2805);

(12) National Trails System Act (16 U.S.C. 1241 *et seq.*);

(13) Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 *et seq.*);

(14) Noise Control Act (42 U.S.C. 4901 *et seq.*);

(15) Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*);

(16) Safe Drinking Water Act (42 U.S.C. 300f *et seq.*);

(17) Toxic Substance Control Act (15 U.S.C. 2601 *et seq.*);

(18) Wild and Scenic Rivers Act (16 U.S.C. 1271 *et seq.*); and

(19) Wilderness Act (16 U.S.C. 1131 *et seq.*)

(b) This section provides a list of environmental laws for informational purposes only and does not create any legal rights or remedies, or imply private rights of action.

§ 1000.1385 What is the typical environmental review process for construction projects?

(a) During the environmental review process, the following activities may occur:

(1) Consult with appropriate Tribal, Federal, state, local officials, and interested parties on potential environmental effects;

(2) Document assessment of reasonably foreseeable environmental effects;

(3) Perform necessary environmental surveys and inventories;

(4) Consult with the Advisory Council on Historic Preservation, acting through the SHPO or THPO, to ensure compliance with the NHPA;

(5) In applying a categorical exclusion under NEPA, evaluate whether extraordinary circumstances exist in which a normally excluded project may have a significant effect, and therefore require preparation of an environmental assessment or environmental impact statement;

(6) Identify methods to avoid or mitigate potential adverse effects; and

(7) Obtain environmental permits and approvals as required.

(b) This section is for informational purposes only and does not create any legal rights or remedies, or imply private rights of action.

§ 1000.1390 Is the Secretary required to take into account the Indigenous Knowledge of Tribes/Consortia when preparing environmental studies under NEPA, NHPA, and related provisions of other law and regulations?

Yes, Council on Environmental Quality (CEQ) regulations direct agencies to make use of high-quality information including reliable data and resources, models, and Indigenous Knowledge, in carrying out their responsibilities under NEPA. The Secretary recognizes that Tribes/Consortia hold relevant information and perspectives regarding the environment, and Indigenous Knowledge can inform the Secretary's environmental analysis. Similarly, section 106 of NHPA (54 U.S.C. 306108) establishes a process to ensure that the Secretary take into account the effects of a project the Department carries out, licenses, or assists on historic properties.

§ 1000.1395 May a Tribe/Consortium act as a cooperating agency or joint lead agency for environmental review purposes regardless of whether it exercises its option under § 1000.1370(a)(1)?

Yes, consistent with 40 CFR 1501.7(b) and 1501.8, a Tribe/Consortium may act as a cooperating agency or joint lead agency for environmental review purposes under this part. For informational purposes only, the term "cooperating agency" is defined at 40 CFR 1508.1(g) and the criteria for a Tribe/Consortium to act as a "cooperating agency" are set out in 40 CFR 1501.8 and Department regulations at 43 CFR 46.225, respectively.

§ 1000.1400 How does a Tribe/Consortium comply with NEPA and NHPA?

(a) A Tribe/Consortium complies with NEPA and NHPA by:

(1) Developing and adopting their own environmental review procedures

that meet or exceed applicable Federal requirements;

(2) Adopting the procedures of the Secretary; or

(3) Adopting the procedures of another Federal agency.

(b) The Tribe/Consortium shall reference such procedures in the funding agreement or construction project agreement and use such procedures in undertaking the project.

§ 1000.1405 If a Tribe/Consortium adopts the environmental review procedures of a Federal agency, is the Tribe/Consortium responsible for ensuring the agency's policies and procedures meet the requirements of NEPA, NHPA, and related environmental laws?

No, the Federal agency is responsible for ensuring its own policies and procedures meet the requirements of NEPA, NHPA, and related environmental laws, not the Tribe/Consortium.

§ 1000.1410 Are Federal funds available to cover the cost of Tribes/Consortia carrying out environmental responsibilities?

Yes, funds are available:

(a) For project-specific environmental costs through the construction project agreement or funding agreement that includes the construction project; and

(b) For environmental review program costs through a funding agreement and/or a construction project agreement.

§ 1000.1415 How are project and program environmental review costs identified?

(a) The Tribe/Consortium and the Secretary shall work together during the initial stages of project development to identify program and project related costs associated with carrying out environmental responsibilities for proposed projects. The goal in this process is to identify the costs associated with all foreseeable environmental review activities.

(b) If unforeseen environmental review and compliance costs are identified during the performance of the construction project, the Tribe/Consortium or, at the request of the Tribe/Consortium, the Tribe/Consortium and Secretary may do one or more of the following:

(1) Mitigate adverse environmental effects;

(2) Alter the project scope of work; and/or

(3) Add additional program and/or project funding, including seeking supplemental appropriations.

§ 1000.1420 What costs may be included in the budget for a construction project or program?

(a) A Tribe/Consortium may include costs allowed by applicable provisions

of subpart E of 2 CFR part 200, and costs allowed under 25 U.S.C. 5367, 25 U.S.C. 5325 and 25 U.S.C. 5324(m). The cost incurred will vary depending on which phase of the construction process the Tribe/Consortium is conducting and type of construction project agreement that will be used.

(b) Regardless of whether a construction project agreement or funding agreement that includes a construction project is fixed priced or cost-reimbursement, budgets may include costs or fees associated with the following:

(1) Construction project proposal preparation;

(2) Conducting community meetings to develop project documents;

(3) Architects, engineers, and other consultants to prepare project planning documents, to develop project plans and specifications, and to assist in oversight of the design during construction;

(4) Real property lease or acquisition;

(5) Development of project surveys including topographical surveys, site boundary descriptions, geotechnical surveys, archeological surveys, and NEPA compliance;

(6) Project management, superintendence, safety, and inspection;

(7) Travel, including local travel incurred as a direct result of conducting the construction project agreement and remote travel in conjunction with the project;

(8) Consultants, such as demographic consultants, planning consultants, attorneys, accountants, and personnel who provide services, to include construction management services;

(9) Project site development;

(10) Project construction cost;

(11) General, administrative overhead, and indirect costs;

(12) Securing and installing moveable equipment, telecommunications and data processing equipment, furnishings, including works of art, and special purpose equipment when part of a construction contract;

(12) Other costs directly related to performing the construction project;

(13) Project Contingency;

(i) A cost-reimbursement project agreement budgets contingency as a broad category. Project contingency remaining at the end of the project is considered savings.

(ii) Fixed-price agreements budget project contingency in the lump sum price or unit price.

(c) In the case of a fixed-price project agreement, a reasonable profit determined by taking into consideration the relevant risks and local market conditions.

§ 1000.1425 May the Secretary reject a Tribe's/Consortium's final offer of a construction project proposal submitted under subpart I of this part based on a determination of Tribal capacity or capability?

No, the Secretary may not reject a Tribe's/Consortium's final offer of a construction project based on a determination of Tribal capacity or capability.

§ 1000.1430 On what basis may the Secretary reject a final offer of a construction project proposal made by a Tribe/Consortium?

As described in subpart I of this part, rejection of a final offer by the Secretary for a construction project must be based on a specific finding by the Secretary that clearly demonstrates, or that is supported by a controlling legal authority, that one or more of the statutory criteria under 25 U.S.C. 5366(c)(6) exist to reject the final offer.

Role of the Secretary

§ 1000.1435 What is the Secretary's role in a construction project performed under this subpart?

The Secretary has the following role regarding a construction program or project contained in a funding agreement or construction project agreement:

(a) On a schedule negotiated by the Secretary and the Tribe/Consortium, to ensure health and safety standards and compliance with Federal law, the Secretary shall review and verify, to the satisfaction of the Secretary:

(1) That project planning and documents prepared by the Tribe/Consortium in advance of initial construction are in conformity with the obligations of the Tribe/Consortium under 25 U.S.C. 5367(d); and

(2) Before the project planning and design documents are implemented, that subsequent document amendments that result in a significant change in construction are in conformity with the obligations of the Tribe/Consortium under 25 U.S.C. 5367(d).

(b) Where no time is otherwise specified in a funding agreement or construction project agreement, the Secretary shall complete the review and verification of project documents required under 25 U.S.C. 5367(h) and provide a Tribe/Consortium a written response within 30 days of the Secretary's receipt from the Tribe/Consortium of project planning and design documents. Absent a written response by the Secretary within the 30-day period, the project planning and design documents, or amendments to such documents, shall be deemed to be

conformity with the Tribe's obligations under 25 U.S.C. 5367(d).

(c) The Secretary must approve any proposed changes in the construction project that require;

(1) An increase in the negotiated funding amount; or

(2) An increase in the negotiated performance period; or

(3) A significant departure from the scope or objective of the construction program as agreed to in the funding agreement or construction project agreement.

(d) A Tribe/Consortium may make immaterial changes to the performance period and make budget adjustments within available Federal funding without an amendment to the funding agreement or construction project agreement.

(e) The Secretary may conduct onsite project oversight visits semiannually or on an alternate schedule agreed to by the Secretary and the Tribe/Consortium. The Secretary must provide the Tribe/Consortium with reasonable advance written notice to assist the Tribe/Consortium in coordinating the visit. The purpose of the visit is to review the progress under the construction project agreement or funding agreement. At the request of the Tribe/Consortium, the Secretary must provide the Tribe/Consortium a written site visit report;

(f) Where the Secretary and the Tribe/Consortium share construction project or program activities, the Secretary and Tribe/Consortium shall provide for the exchange of information;

(g) The Secretary may reassume the construction portion of a funding agreement or construction project agreement if the Secretary, in accordance with subpart M of this part, makes a written finding of:

(1) A significant failure to substantially carry out the terms of the funding agreement or construction agreement without good cause; or

(2) Imminent jeopardy to a physical trust asset, to a natural resource, or that adversely affects public health and safety as provided in subpart M of this part.

§ 1000.1440 What constitutes a "significant change" in the original scope of work?

A significant change in the original scope of work is:

(a) A change that would result in a cost that exceeds the total of the Federal project funds available and the Tribe's/Consortium's contingency funds; or

(b) A material departure from the original scope of work, including substantial departure from timelines negotiated in the construction project agreement.

§ 1000.1445 May the Secretary suspend construction activities under the terms of a funding agreement or construction project agreement under title IV of the ISDEAA?

(a) The Secretary may, in lieu of reassumption under subpart M of this part, allow a Tribe/Consortium to suspend certain work under a construction project included in a funding agreement or construction project agreement under title IV of the ISDEAA for up to 30 days only if the Secretary notifies the Tribe/Consortium in writing that the Secretary has found that:

(1) Site conditions adversely affect health and safety; or

(2) Work in progress or completed for the construction project fails to substantially carry out the terms of the construction project agreement or funding agreement without good cause.

(b) The Secretary may suspend only work directly related to the criteria specified in paragraph (a) of this section unless other reasons for suspension are specifically negotiated in the funding agreement or construction project agreement under title IV of the ISDEAA.

(c) Unless the Secretary determines that a health and safety emergency requiring immediate reassumption under subpart M of this part exists, before requesting a suspension of work on the project by the Tribe/Consortium, the Secretary must provide:

(1) A 5-working days written notice to the Tribe/Consortium specifying the reasons the Secretary requests a suspension of certain project work; and

(2) A reasonable opportunity for the Tribe/Consortium to correct the problem.

(d) The Tribe/Consortium must be compensated for reasonable costs due to any suspension of work that occurred through no fault of the Tribe/Consortium. Project funds will not be used for this purpose. However, if suspension occurs due to the action or inaction of the Tribe/Consortium, then project funds will be used to cover suspension related activities.

§ 1000.1450 How are property and funding returned if there is a reassumption for substantial failure to carry out a construction project?

If there is a reassumption by the Secretary of a project for substantial failure to carry out the funding agreement or construction project agreement, property and funding will be returned as provided in subparts M and N of this part.

§ 1000.1455 What happens when a Tribe/Consortium, suspended under § 1000.1445 for substantial failure to carry out the terms of a funding agreement that includes a construction project or program or a construction project agreement under title IV of the ISDEAA without good cause, does not correct the failure during the suspension?

Except when the Secretary makes a finding of imminent jeopardy to a physical trust asset, a natural resource, or public health and safety, requiring immediate reassumption as provided in subpart M of this part, a finding by the Secretary of substantial failure to carry out the terms of the construction project agreement under title IV of the ISDEAA or funding agreement that includes a construction project or program without good cause is not corrected or resolved by the Tribe/Consortium during the suspension of work, the Secretary may initiate a reassumption at the end of the 30-day suspension of work if an extension has not been negotiated. Any unresolved dispute will be processed in accordance with the Contract Disputes Act of 1978, 41 U.S.C. 7101, *et seq.*

§ 1000.1460 How does the Secretary make advance payments to a Tribe/Consortium under a funding agreement or construction project agreement?

(a) For all construction projects performed under a funding agreement or construction project agreement, advance payments shall be made annually or semiannually, at the Tribe's/Consortium's option as provided in 25 U.S.C. 5367(f). The initial payment shall include all contingency funding for the project or phase of the project to the extent that there are funds appropriated for that purpose.

(b) The amount of subsequent advance payments is based on the mutually agreeable project schedule reflecting:

(1) Work to be accomplished within the advance payment period;

(2) Work already accomplished; and

(3) Total prior payments for each annual or semiannual advance payment period.

(c) For lump sum, fixed price agreements, at the request of the Tribe/Consortium, payments shall be based on an advance payment period measured as follows:

(1) One year; or

(2) Project Phase (e.g., planning, design, construction). If project phase is chosen by the Tribe/Consortium as the payment period, the full amount of funds necessary to perform the work for that phase of the construction project agreement is payable in the initial advance payment. For multi-phase projects, the planning and design phases

must be completed prior to the transfer of funds by the Secretary for the associated construction phase. The completion of the planning and design phases will include at least one opportunity for Secretarial approval in accordance with § 1000.1435.

(d) For construction project agreements, the amount of advance payments shall include the funds necessary to perform the work identified in the advance payment period of one year.

(e) Any agreement to advance funds under paragraph (b), (c) or (d) of this section is subject to the availability of appropriations.

(f) Initial advance payments are due within 10 days of the effective date of the funding agreement or construction project agreement, and subsequent advance payments are due:

(1) Within 10 days of apportionment for annual payments, or

(2) Within 10 days of the start date of the project phase for phase payments.

§ 1000.1465 Is a facility built under this subpart eligible for annual operation and maintenance funding?

Yes, upon completion of a facility constructed under the Act, the Secretary shall include the facility among those eligible for annual operation and maintenance funding support comparable to that provided for similar facilities funded by the Department as annual appropriations are available and to the extent that the facility size and complexity and other factors do not exceed the funding formula criteria for comparable buildings.

Role of the Tribe/Consortium

§ 1000.1470 What is the Tribe's/Consortium's role in a construction project included in a funding agreement or construction project agreement under this subpart?

(a) In carrying out a construction project under the Act, a Tribe/Consortium shall assume responsibility for the completion of the construction project and of a facility that is usable for the purpose for which the Tribe/Consortium received funding, including day-to-day on-site management and administration of the project, in accordance with the negotiated funding agreement or construction project agreement. However, Tribes/Consortia are not required to perform beyond the amount of funds provided. For example, a Tribe/Consortium may encounter unforeseen circumstances during the term of a funding agreement or construction project agreement. If this occurs, options available to the Tribe/

Consortium include, but are not limited to:

(1) Reallocating existing funding;
(2) Reducing/revising the scope of work that does not require an amendment because it does not result in a significant change;

(3) Utilizing savings;
(4) Requesting additional funds or appropriations;
(5) Utilizing interest earnings;
(6) Seeking funds from other sources; and/or

(7) Redesigning or re-scoping that does not result in a significant change by amendment as provided in the funding agreement the construction project agreement.

(b) The Tribe/Consortium must give the Secretary timely notice of any proposed changes to the project that require an increase to the negotiated funding amount or an increase in the negotiated performance period or any other significant departure from the scope or objective of the project. The Tribe/Consortium and Secretary may negotiate to include timely notice requirements in the funding agreement or construction project agreement.

§ 1000.1475 Is a Tribe/Consortium required to submit construction project progress and financial reports for construction projects?

Yes, as required under § 1000.1355(b), construction project progress reports and financial reports are only required for active construction projects. The construction progress and financial reports shall provide the following information:

(a) Construction project progress reports contain information about accomplishments during the reporting period and issues and concerns of the Tribe/Consortium relating to the project, if any. Construction progress information will include the following, as applicable:

(1) Phase(s) of the project completed or in progress including but not limited to design complete, environmental review complete, and construction underway;

(2) Milestone project event(s) reached (e.g., 50% of the project is completed);

(3) Other information mutually agreeable to the Tribe/Consortium and the Secretary.

(4) Upon project completion, the final construction progress report will provide notification to the Secretary that the project has been completed in accordance with the approved project scope, including any changes in the project scope of work.

(b) Construction project financial reports contain information regarding

the amount of funds expended during the reporting period and financial concerns of the Tribe/Consortium concerning the project, if any.

Other

§ 1000.1480 May a Tribe/Consortium continue work with construction funds remaining in a funding agreement or construction project agreement at the end of the funding year?

Yes, any funds remaining in a funding agreement or construction project agreement for a project at the end of the funding year may be spent for construction under the terms of the funding agreement or construction project agreement for which the funds were awarded.

§ 1000.1485 Must a construction project agreement or funding agreement that contains a construction project or activity incorporate provisions of Federal construction standards?

(a) No, the Secretary may, however, provide information about Federal standards as early as possible in the construction process.

(b) If Tribal construction codes and standards (including national, regional, State, or Tribal building codes or construction industry standards), including health and safety, meet or exceed applicable Federal codes and standards, then the Secretary must accept the Tribe's/Consortium's proposed codes and standards.

(c) The Secretary may also accept commonly accepted industry construction codes and standards; provided that such codes and standards meet or exceed otherwise applicable Federal standards for the construction project.

§ 1000.1490 May the Secretary require design provisions and other terms and conditions for construction projects or programs included in a funding agreement or construction project agreement under section 403(c) (25 U.S.C. 5363(c))?

Yes, the relevant bureau may provide to the Tribe/Consortium project design criteria and other terms and conditions that are required for such a construction project or program. The construction project or program must be completed in accordance with the terms and conditions set forth in the funding agreement or construction project agreement.

§ 1000.1495 Do all provisions of other subparts apply to construction portions of a funding agreement or construction project agreement?

Yes, all provisions of other subparts apply to construction portions of a funding agreement or construction project agreement unless those

provisions are inconsistent with this subpart.

§ 1000.1500 When a Tribe withdraws from a Consortium, is the Secretary required to award to the withdrawing Tribe a portion of funds associated with a construction project if the withdrawing Tribe so requests?

Under § 1000.235, a Tribe may withdraw from a Consortium and request its portion of a construction project's funds. The Secretary may decide not to award these funds if the award will affect the Consortium's ability to complete a non-severable phase of the project within available funding. A non-severable phase of a project would include but is not limited to the construction of a single building serving a Consortium. A severable phase of a project would include but is not limited to the funding for a road in one village where the Consortium would be able to complete the roads in the other villages that were part of the project approved initially in the funding agreement. The Secretary's decision under this section may be appealed under subpart R of this part.

§ 1000.1505 May a Tribe/Consortium reallocate funds from a construction program to a non-construction program?

No, a Tribe/Consortium may not reallocate funds from a construction program to a non-construction program unless otherwise provided under the relevant appropriation acts.

§ 1000.1510 May a Tribe/Consortium reallocate funds among construction programs?

Yes, a Tribe/Consortium may reallocate funds among construction programs if permitted by appropriations law or if approved in advance by the Secretary.

§ 1000.1515 Must the Secretary retain project funds to ensure proper health and safety standards in construction projects?

Yes, the Secretary must retain project funds to ensure proper health and safety standards in construction projects. Examples of purposes for which bureaus may retain funds include:

- (a) Determining or approving appropriate construction standards to be used in funding agreements;
- (b) Verifying that there is an adequate Tribal inspection system utilizing licensed professionals;
- (c) Providing for sufficient monitoring of design and construction by the Secretary; and
- (d) Requiring corrective action during performance when appropriate.

§ 1000.1520 What funding must the Secretary provide in a construction project agreement or funding agreement that includes a construction project or program?

The Secretary must provide funding for a construction project agreement or funding agreement that includes a construction project or program in accordance with 25 U.S.C. 5325 and 25 U.S.C. 5363(g)(3).

§ 1000.1525 Must Federal funds from other DOI sources be incorporated into a construction project agreement or funding agreement that includes a construction project or program?

Yes, at the request of the Tribe/Consortium, the Secretary must include Federal funds from other DOI sources as permitted by law, whether on an ongoing or a one-time basis.

§ 1000.1530 May a Tribe/Consortium contribute funding to a project?

Yes, at the discretion of a Tribe/Consortium, a Tribe/Consortium may contribute funds to a construction project.

Subpart L—Federal Tort Claims

§ 1000.1601 What is the purpose of this subpart?

This subpart explains the applicability of the Federal Tort Claims Act (FTCA). This section covers:

- (a) Coverage of claims arising out of the performance under compacts and funding agreements;
- (b) Procedures for filing claims under FTCA; and
- (c) Procedures for a Tribe/Consortium to cooperate with the Federal Government in connection with tort claims arising out of the Tribe's/Consortium's performance of a compact or funding agreement under this part.

§ 1000.1605 What other statutes and regulations apply to FTCA coverage?

A number of other statutes and regulations apply to FTCA coverage, including the Federal Tort Claims Act (28 U.S.C. 1346(b), 2401, 2671 through 2680), 25 U.S.C. 5376, and related U.S. Department of Justice regulations in 28 CFR part 14.

§ 1000.1610 Do Tribes/Consortia need to be aware of areas which FTCA does not cover?

Yes, there are claims against Tribes/Consortia which are not covered by FTCA, claims which may not be pursued under FTCA, and remedies that are excluded by FTCA. The following general guidance is not intended as a definitive description of coverage, which is subject to review by the U.S.

Department of Justice and the courts on a case-by-case basis.

(a) *What claims are expressly barred by FTCA and therefore may not be made against the United States, a Tribe, or Consortium?* Any claim under 28 U.S.C. 2680, including claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights, unless otherwise authorized by 28 U.S.C. 2680(h).

(b) *What claims may not be pursued under FTCA?* (1) Claims against subcontractors arising out of the performance of subcontracts with a Tribe/Consortium;

(2) Claims for on-the-job injuries which are covered by workmen's compensation;

(3) Claims for breach of contract rather than tort claims; or

(4) Claims resulting from activities performed by an employee which are outside the scope of employment.

(c) *What remedies are expressly excluded by FTCA and therefore are barred?* (1) Punitive damages, unless otherwise authorized by 28 U.S.C. 2674; and

(2) Other remedies not permitted under applicable state law.

§ 1000.1615 Is there a deadline for filing FTCA claims?

Yes, claims shall be filed within 2 years of the date of accrual. (28 U.S.C. 2401).

§ 1000.1620 How long does the Federal Government have to process a FTCA claim after the claim is received by the Federal agency, before a lawsuit may be filed?

The Federal Government has 6 months to process a FTCA claim after the claim is received by the Federal agency, before a lawsuit may be filed.

§ 1000.1625 Is it necessary for a compact or funding agreement to include any clauses about FTCA coverage?

No, clauses about FTCA coverage are optional. At the request of Tribes/Consortia, a compact or funding agreement shall include the following clause to clarify the scope of FTCA coverage:

For purposes of FTCA coverage, the Tribe/Consortium and its employees (including individuals performing personal services contracts with the Tribe/Consortium) are deemed to be employees of the Federal Government while performing work under the compact or funding agreement. This status is not changed by the source of the funds used by the Tribe/Consortium to pay the employee's salary and

benefits unless the employee receives additional compensation for performing covered services from anyone other than the Tribe/Consortium.

§ 1000.1630 Does FTCA apply to a compact and funding agreement if FTCA is not referenced in the compact or funding agreement?

Yes. In accordance with 25 U.S.C. 5376, FTCA applies to a compact or funding agreement even if the compact or funding agreement does not mention it.

§ 1000.1635 To what extent shall the Tribe/Consortium cooperate with the Federal Government in connection with tort claims arising out of the Tribe's/Consortium's performance of a compact, funding agreement, or subcontract?

(a) The Tribe/Consortium shall designate in writing to the Secretary an individual to serve as tort claims liaison with the Federal Government.

(b) As part of the notification required by 28 U.S.C. 2679(c), the Tribe/Consortium shall notify the Secretary immediately in writing of any tort claim (including any proceeding before an administrative agency or court) filed against the Tribe/Consortium or any of its employees that relates to performance of a compact, funding agreement, or subcontract.

(c) The Tribe/Consortium, through its designated tort claims liaison, shall assist the appropriate Federal agency in preparing a comprehensive, accurate, and unbiased report of the incident so that the claim may be properly evaluated. This report should be completed within 60 days of notification of the filing of the tort claim. The report should be complete in every significant detail and include as appropriate:

(1) The date, time and exact place of the accident or incident;

(2) A concise and complete statement of the circumstances of the accident or incident;

(3) The names and addresses of Tribal and/or Federal employees involved as participants or witnesses;

(4) The names and addresses of all other eyewitnesses;

(5) An accurate description of all government and other privately-owned property involved and the nature and amount of damage, if any;

(6) A statement as to whether any person involved was cited for violating a Federal, State, or Tribal law, ordinance, or regulation;

(7) The Tribe's/Consortium's determination as to whether any of its employees (including Federal employees assigned to the Tribe/Consortium) involved in the incident

giving rise to the tort claim were acting within the scope of their employment in the performance of the compact or funding agreement at the time the incident occurred;

(8) Copies of all relevant documentation, including available police reports, statements of witnesses, newspaper accounts, weather reports, plats and photographs of the site or damaged property, such as may be necessary or useful for purposes of claim determination by the Federal agency; and

(9) Insurance coverage information, copies of medical bills, and relevant employment records.

(d) The Tribe/Consortium shall cooperate with and provide assistance to the U.S. Department of Justice attorneys assigned to defend the tort claim, including, but not limited to, case preparation, discovery, and trial.

(e) If requested by the Secretary, the Tribe/Consortium shall make an assignment and subrogation of all the Tribe's/Consortium's rights and claims (except those against the Federal Government) arising out of a tort claim against the Tribe/Consortium.

(f) If requested by the Secretary, the Tribe/Consortium shall authorize representatives of the Secretary to settle or defend any claim and to represent the Tribe/Consortium in or take charge of any action.

(g) If the Federal Government undertakes the settlement or defense of any claim or action, the Tribe/Consortium shall provide all reasonable additional assistance in reaching a settlement or asserting a defense.

§ 1000.1640 Does this coverage extend to subcontractors of compacts and funding agreements?

No, subcontractors or subgrantees providing services to a Public Law 93–638 Tribe/Consortium are generally not covered.

§ 1000.1645 Is FTCA the exclusive remedy for a tort claim, including a claim concerning personal injury or death, resulting from the performance of a compact or funding agreement?

Yes, except as explained in § 1000.1610(b). No claim may be filed against a Tribe/Consortium or employee based upon performance of a compact or funding agreement. All claims shall be filed against the United States and are subject to the limitations and restrictions of FTCA.

§ 1000.1650 What employees are covered by FTCA for claims arising out of a Tribe's/Consortia's performance of a compact or funding agreement?

The following employees are covered by FTCA for claims:

(a) Permanent employees of the Tribe/Consortium;

(b) Temporary employees of the Tribe/Consortium;

(c) Persons providing services without compensation in the performance of a compact or funding agreement; and;

(d) Federal employees assigned to a Tribe/Consortium under the compact or funding agreement including those under the Intergovernmental Personnel Act.

§ 1000.1655 Does FTCA cover employees of the Tribe/Consortium who are paid by the Tribe/Consortium from funds other than those provided through the funding agreement?

Yes, FTCA covers employees of the Tribe/Consortium who are not paid from funds transferred under a funding agreement as long as the services out of which the claim arose were performed under the compact or funding agreement.

§ 1000.1660 May persons who are not Indians or Alaska Natives assert claims under FTCA arising out of the performance of a compact or funding agreement by a Tribe/Consortium?

Yes, any person(s) may assert tort claims under FTCA arising out of the performance of a compact or funding agreement by Tribes/Consortia under this subpart.

§ 1000.1665 If the Tribe/Consortium or Tribe's/Consortium's employee receives a summons and/or a complaint alleging a tort covered by FTCA and arising out of the performance of a compact or funding agreement, what should the Tribe/Consortium do?

As part of the notification required by 28 U.S.C. 2679(c), if the Tribe/Consortium or Tribe's/Consortium's employee receives a summons and/or complaint alleging a tort covered by FTCA and arising out the performance of a compact or funding agreement, the Tribe/Consortium should immediately:

(a) Inform the Assistant Solicitor, Procurement and Patents, Office of the Solicitor, Department of the Interior, Room 6511, 1849 C Street NW, Washington, DC 20240.

(b) Inform the Tribe's/Consortium's tort claims liaison, and

(c) Forward all of the materials identified in § 1000.1635(c) to the contacts given in paragraphs (a) and (b) of this section.

Subpart M—Reassumption

§ 1000.1701 What is the purpose of this subpart?

This subpart explains when the Secretary can reassume a program without the consent of a Tribe/Consortium.

§ 1000.1705 What does reassumption mean?

Reassumption means the Secretary, without consent of the Tribe/Consortium, takes control or operation of the PSFAs and associated funding in a compact or funding agreement, in whole or in part, and assumes the responsibility to provide such PSFAs.

§ 1000.1710 Under what circumstances may the Secretary reassume a program operated by a Tribe/Consortium under a funding agreement?

The Secretary may reassume a program and the associated funding if the Secretary makes a specific finding relating to that program of:

(a) Imminent jeopardy to a trust asset, a natural resource, or public health and safety that:

(1) Is caused by an act or omission of the Tribe/Consortium; and

(2) Arises out of a failure to carry out the compact or funding agreement; or

(b) Gross mismanagement with respect to funds transferred to a Tribe/Consortium under a compact or funding agreement, as determined by the Secretary in consultation with the Inspector General, as appropriate.

§ 1000.1715 What is “imminent jeopardy” to a trust asset?

Imminent jeopardy means an immediate threat and likelihood of significant devaluation, degradation, damage, or loss of a trust asset, or the intended benefit from the asset caused by the actions or inactions of a Tribe/Consortium in performing trust functions. This includes disregarding Federal trust standards and/or Federal law while performing trust functions if the disregard creates such an immediate threat.

§ 1000.1720 What is “imminent jeopardy” to natural resources?

The standard for natural resources is the same as for a physical trust asset, except that a review for compliance with the specific mandatory statutory provisions related to the program as reflected in the funding agreement must also be considered.

§ 1000.1725 What is “imminent jeopardy” to public health and safety?

Imminent jeopardy to public health and safety means an immediate and significant threat of serious harm to human well-being, including conditions that may result in serious injury, or death, caused by Tribal/Consortium action or inaction or as otherwise provided in a funding agreement.

§ 1000.1730 What steps must the Secretary take prior to reassumption becoming effective?

Except as provided in § 1000.1750 for immediate reassumption, prior to a reassumption becoming effective, the Secretary must:

(a) Notify the Tribe/Consortium in writing of the details of the findings required under § 1000.1710;

(b) Request specific corrective action to remedy the mismanagement of the funds or programs within a reasonable period of time which in no case may be less than 45 days;

(c) Offer and provide, if requested, the necessary technical assistance and advice to assist the Tribe/Consortium overcome the conditions that led to the findings described under (a); and

(d) Provide the Tribe/Consortium with a hearing on the record as provided under subpart R of this part.

§ 1000.1735 Does the Tribe/Consortium have a right to a hearing prior to a non-immediate reassumption becoming effective?

Yes, at the request of the Tribe/Consortium, the Secretary must provide a hearing on the record prior to or in lieu of the corrective action period identified in § 1000.1730(b).

§ 1000.1740 What happens if the Secretary determines that the Tribe/Consortium has not corrected the conditions that the Secretary identified in the written notice?

(a) The Secretary shall provide a second written notice to the Tribe/Consortium served by the compact or funding agreement that the compact or funding agreement will be rescinded, in whole or in part.

(b) The second notice shall include:

(1) The intended effective date of the Secretary's reassumption;

(2) The details and facts supporting the intended reassumption; and

(3) Instructions that explain the Tribe/Consortium's right to a formal hearing within 30 days of receipt of the notice.

§ 1000.1745 What is the earliest date on which a reassumption by the Secretary can be effective?

Except as provided in § 1000.1750, no program may be reassumed by the Secretary until 30 days after the final resolution of the hearing and any subsequent appeals to provide the Tribe/Consortium with an opportunity to take corrective action in response to any adverse final ruling.

§ 1000.1750 Does the Secretary have the authority to immediately reassume a program?

Yes, the Secretary may immediately reassume operation of a program and associated funding upon providing to

the Tribe/Consortium written notice in which the Secretary makes a finding of:

(a) Imminent and substantial jeopardy and irreparable harm to a trust asset, a natural resource, or public health and safety that:

(1) Is caused by an act or omission by the Tribe/Consortium; and

(2) Arises out of a failure to carry out the terms of an applicable compact or funding agreement.

(b) If the Secretary reassumes operation of a program under this provision, the Secretary must provide the Tribe/Consortium with a hearing on the record not later than 10 days after the date of reassumption.

§ 1000.1755 What must a Tribe/Consortium do when a program is reassumed?

On the effective date of reassumption, the Tribe/Consortium must, at the request of the Secretary, deliver all property and equipment, and title thereto:

(a) That the Tribe/Consortium received for the program under the funding agreement; and

(b) That has a per item value in excess of \$5,000, or as otherwise provided in the funding agreement.

§ 1000.1760 When must the Tribe/Consortium return funds to the Department?

The Tribe/Consortium must return unexpended funds, less “wind up costs,” that remain available to the Department as soon as practical after the effective date of the reassumption.

§ 1000.1765 May the Tribe/Consortium be reimbursed for actual and reasonable “wind up costs” incurred after the effective date of retrocession?

Yes, the Tribe/Consortium may be reimbursed for actual and reasonable “wind up costs” to the extent that funds are available.

§ 1000.1770 Is a Tribe's/Consortium's general right to negotiate a funding agreement adversely affected by a reassumption action?

A reassumption action taken by the Secretary does not affect the Tribe/Consortium's ability to negotiate a funding agreement for programs not affected by the reassumption.

§ 1000.1775 When will the Secretary return management of a reassumed program?

A reassumed program may be included in future funding agreements, but the Secretary may include conditions in the terms of the funding agreement to ensure that the circumstances that caused jeopardy to attach do not reoccur.

Subpart N—Retrocession**§ 1000.1801 What is the purpose of this subpart?**

This subpart explains what happens when a Tribe/Consortium fully or partially and voluntarily returns a program to a bureau before the expiration of the term of the compact or funding agreement.

§ 1000.1805 Is a decision by a Tribe/Consortium not to include a program in a successor agreement considered a retrocession?

No, a decision by a Tribe/Consortium not to include a program in a successor agreement is not considered a retrocession.

§ 1000.1810 Who may retrocede a program in a funding agreement?

A Tribe/Consortium may retrocede a program. However, the right of a Consortium member to retrocede may be subject to the terms of the agreement among the members of the Consortium and §§ 1000.205 through 1000.235.

§ 1000.1815 How does a Tribe/Consortium retrocede a program?

The Tribe/Consortium must submit:

- (a) A written notice to:
 - (1) The Office of Self-Governance for BIA programs; or
 - (2) The appropriate bureau for non-BIA programs; and
- (b) A Tribal resolution or other official action of its governing body.

§ 1000.1820 When will the retrocession become effective?

The retrocession becomes effective on the date that is mutually agreed to by the parties in writing. In the absence of a mutually agreed upon effective date, the retrocession becomes effective on the earlier of:

- (a) One year after the date the Tribe/Consortium submits its notice of retrocession; or
- (b) The date the funding agreement expires.

§ 1000.1825 How will retrocession affect the Tribe's/Consortium's existing and future funding agreements?

Retrocession does not affect other parts of the funding agreement or funding agreements with other bureaus. A Tribe/Consortium may request to negotiate for and include retroceded programs in future funding agreements or through a self-determination contract.

§ 1000.1830 Does the Tribe/Consortium have to return funds used in the operation of a retroceded program?

The Tribe/Consortium and the Secretary must negotiate the amount of funds that have not been obligated by

the Tribe/Consortium to be returned to the Secretary, less close out costs, for the Secretary's operation of the retroceded program. This amount must be based on such factors as the time remaining or functions remaining in the funding cycle or as provided in the funding agreement.

§ 1000.1835 Does the Tribe/Consortium have to return property used in the operation of a retroceded program?

On the effective date of any retrocession, the Tribe/Consortium must, at the option of the Secretary, return all property and equipment, and title thereto:

- (a) That was acquired with funds under the funding agreement for the program being retroceded; and
- (b) That has a per item current fair market value in excess of \$5,000 at the time of the retrocession, or as otherwise provided in the funding agreement.

§ 1000.1840 What happens to a Tribe's/Consortium's mature contract status if it has retroceded a program that is also available for self-determination contracting?

If a Tribe/Consortium retrocedes operation of a program carried out under a title IV funding agreement, at the option of the Tribe/Consortium, the resulting self-determination contract is considered mature if the Tribe/Consortium meets the requirements of 25 U.S.C. 5304(h).

§ 1000.1845 How does retrocession affect a bureau's operation of the retroceded program?

The level of operation of the program will depend upon the amount of funding that is returned with the retrocession.

Subpart O—Trust Evaluation**§ 1000.1901 What is the purpose of this subpart?**

This subpart describes how the trust responsibility of the United States is legally maintained through a system of trust evaluations when Tribes/Consortia perform trust PSFAs through funding agreements under the Act. It describes the principles and processes upon which trust evaluations by the Secretary will be based.

§ 1000.1905 Does the Act alter the trust responsibility of the United States to Indian Tribes and individuals under self-governance?

No, the Act does, however, permit a Tribe/Consortium to assume management responsibilities for trust assets and resources on its own behalf and on behalf of individual Indians. Under the Act, the Secretary has a trust

responsibility to conduct annual trust evaluations of a Tribe's/Consortium's performance of trust PSFAs under a funding agreement to ensure that Tribal and individual trust assets and resources are managed in accordance with the legal principles and standards governing the performance of trust PSFAs set out in the funding agreement or as provided for by law.

§ 1000.1910 What are "trust resources" for the purposes of the trust evaluation process?

(a) Trust resources include property and interests in property:

- (1) That are held in trust by the United States for the benefit of a Tribe or individual Indians; or

(2) That are subject to restrictions upon alienation.

(b) Trust assets include:

- (1) Other assets, trust revenue, royalties, or rental, including natural resources, land, water, minerals, funds, property, or claims, and any intangible right or interest in any of the foregoing;

(2) Any other property, asset, or interest therein, or treaty right for which the United States is charged with a trust responsibility. For example, water rights and off-reservation treaty rights.

(c) This definition defines trust resources and trust assets for purposes of the trust evaluation process only.

§ 1000.1915 What are "trust PSFAs" for the purposes of the trust evaluation process?

Trust PSFAs are those programs, services, functions and activities necessary to the management of assets and resources held in trust by the United States for an Indian Tribe or individual Indian.

§ 1000.1920 Can a Tribe/Consortium request the Secretary to conduct an assessment of the status of the trust assets, resource, and PSFAs?

If the parties agree in writing and it is practical, the Secretary may arrange for a written assessment by the Department of the status of the trust resource and asset at the time of the transfer of the PSFAs or at a later time. The parties shall agree upon an estimate of time required to complete a baseline assessment. Upon completion of the assessment report by the Department, the Secretary's designated representative shall provide a copy of the assessment to the Tribe/Consortium within 30 days.

*Annual Trust Evaluation***§ 1000.1925 What is a trust evaluation?**

A trust evaluation is an annual review and evaluation of trust functions performed by a Tribe/Consortium to ensure that the functions are performed

in accordance with trust standards as defined by Federal law. Trust evaluations address trust functions performed by the Tribe/Consortium on its own behalf as well as trust functions performed by the Tribe/Consortium for the benefit of individual Indians or Alaska Natives.

§ 1000.1930 How are trust evaluations conducted?

(a) Each year the Secretary's designated representative(s) will conduct an evaluation of trust PSFAs for each funding agreement. The Secretary's designated representative(s) will coordinate in writing with the leadership of the Tribe/Consortium, with a copy to the designated Tribe's/Consortium's representative(s), to arrange the evaluation of trust PSFAs and throughout the trust evaluation, including the written report required by § 1000.1940.

(b) This section describes the general framework for trust evaluations. However, each Tribe/Consortium may develop, with the appropriate bureau, an individualized trust evaluation method to allow for the Tribe's/Consortium's unique history, circumstances, trust resources and assets, and the terms and conditions of its funding agreement. An individualized trust evaluation must, at a minimum, contain the measures in paragraph (d) of this section.

(c) To facilitate the trust evaluation so as to mitigate costs and maximize efficiency, each Tribe/Consortium must provide access to all records, plans, and other pertinent documents relevant to the trust PSFAs under review not otherwise available to the Department.

(d) The Secretary's designated representative(s) will:

- (1) Review trust transactions;
- (2) Conduct on-site inspections of trust resources and assets, as appropriate, at a time to be coordinated between the parties;
- (3) Review compliance with applicable statutory and regulatory requirements;
- (4) Review compliance with the trust provisions and standards as may be negotiated and included in the funding agreement;
- (5) Ensure that the same level of trust services is provided to individual Indians as would have been provided by the Secretary;
- (6) Document deficiencies in the performance of trust PSFAs discovered during the trust evaluation in the final report which the Department will submit to the Tribe/Consortium pursuant to § 1000.1940; and

(7) Ensure the fulfillment of the Secretary's trust responsibility to Tribes and individual Indians by documenting the existence of:

- (i) Systems of internal controls;
- (ii) Trust standards; and
- (iii) Safeguards against conflicts of interest in the performance of trust PSFAs.

§ 1000.1935 May the trust evaluation process be used for additional reviews?

Yes, if the parties agree in writing to such additional reviews.

§ 1000.1936 May the parties negotiate review methods for purposes of the trust evaluation?

Yes, unless review methods are otherwise provided by Federal law, the Secretary's designated representative will negotiate review methods at the request of the Tribe/Consortium for inclusion in a funding agreement as provided in § 1000.1930(b).

§ 1000.1940 What are the responsibilities of the Secretary's designated representative(s) after the annual trust evaluation?

The Secretary's representative(s) must prepare a written report documenting the results of the trust evaluation within 60 days of the Department's completion of an on-site and/or desk review.

(a) The Secretary's representative(s) will provide the Tribe/Consortium representative(s) with a copy of the report for review and comment before finalization.

(b) The Secretary's representative(s) will attach to the report any Tribal/Consortium comments that the representative receives.

(c) The Secretary's representative(s) must respond to the Tribe's/Consortium's comments as part of the final trust evaluation report.

§ 1000.1945 Is the trust evaluation standard or process different when the trust resource or asset is held in trust for an individual Indian or Indian allottee?

No, Tribes/Consortia are under the same obligation as the Secretary to perform trust PSFAs and related activities in accordance with trust protection standards and principles whether managing Tribally or individually owned trust resources and assets. The Department's process for conducting the annual evaluation of Tribal/Consortium performance of trust PSFAs on behalf of individual Indians is the same as that used in evaluating performance of Tribal trust PSFAs.

§ 1000.1950 Does the annual trust review evaluation include a review of the Secretary's inherent Federal and retained operation trust PSFAs?

(a) When the annual trust evaluation by the Secretary reveals a deficient performance of trust PSFAs by a Tribe/Consortium due in part to the action or inaction of a bureau, it will trigger an evaluation by the Department of the Secretary's inherent Federal functions and any retained trust PSFAs pertaining to the bureau's action or inaction.

(b) The appropriate Department officials will be notified in writing by the Secretary's representative of the need for corrective action. A copy of such written notice shall be sent by the Secretary's representative to the Tribe/Consortium. The review of the Secretary's trust PSFAs shall be based on the standards in Federal law.

§ 1000.1955 What are the consequences of a finding of imminent jeopardy in the Secretary's annual trust evaluation?

(a) A finding of imminent jeopardy to a trust asset, natural resource, or public health and safety that is caused by an act or omission of the Tribe/Consortium and that arises out of a failure by the Tribe/Consortium to carry out the compact or funding agreement, triggers the Federal reassumption process (*see* subpart M of this part), unless the conditions in paragraph (b) of this section are met.

(b) The reassumption process will not be triggered if the Secretary's designated representative determines that the Tribe/Consortium:

- (1) Can cure the conditions causing jeopardy within 60 days; and
- (2) Will not cause significant loss, harm, or devaluation of a trust asset, natural resources, or the public health and safety.

§ 1000.1960 What if the Secretary's trust evaluation reveals problems that do not rise to the level of imminent jeopardy?

Where problems not rising to the level of imminent jeopardy are caused by Tribal/Consortium action or inaction, the conditions must be:

- (a) Documented in the Department's annual trust evaluation report;
- (b) Reported to the Secretary; and
- (c) Reported in writing to:
 - (1) The governing body of the Tribe; and
 - (2) In the case of a Consortium, to the governing body of each Tribe on whose behalf the Consortium is performing the trust PSFAs.

§ 1000.1965 Who is responsible for taking corrective action?

The Tribe/Consortium is primarily responsible for identifying and

implementing corrective actions for matters contained in the funding agreement, but the Department may also suggest possible corrective measures for Tribal/Consortium consideration.

§ 1000.1970 What are the requirements of the Department's review team report?

A report summarizing the results of the trust evaluation will be prepared by the Secretary's designated representative(s) and copies provided to the Tribe/Consortium within the time frame specified in § 1000.1940. The annual trust evaluation report must:

- (a) Be written objectively, concisely, and clearly;
- (b) Present information accurately and fairly, including only relevant and adequately supported information, findings, and conclusions; and
- (c) Include a written response from the Tribe/Consortium to the draft report provided to the Tribe/Consortium by the Secretary's representative(s).

§ 1000.1975 May the Department conduct more than one trust evaluation per Tribe per year?

(a) Yes, if the Department receives information that it concludes rises to the level of a threat of imminent jeopardy to a trust asset, natural resource, or the public health and safety, caused by an act or omission of a Tribe/Consortium and arises out of a failure to carry out a compact or funding agreement, the Department, as trustee, may conduct a preliminary investigation. The Department:

- (1) Shall promptly contract the Tribe/Consortium to discuss the nature of the threat;
- (2) Will follow up with notification to the Tribe/Consortium in writing, and
- (3) May conduct an on-site inspection upon 2 days' advance written notice to the Tribe/Consortium.

(b) If the preliminary investigation shows that appropriate, sufficient data are present to indicate there may be imminent jeopardy, the Secretary's designated representative shall follow the reassumption procedures in accordance with subpart M of this part.

Subpart P—Reports

§ 1000.2001 What is the purpose of this subpart?

This subpart describes what reports are developed under self-governance by the Secretary and the Tribes/Consortia.

§ 1000.2005 Is the Secretary required to report on Self Governance?

Yes, on January 1 of each year, the Secretary will submit a report on self-governance to the Congress. The report will be based on:

- (a) Information contained in funding agreements;
- (b) Annual audit reports, and
- (c) Data of the Secretary regarding the disposition of Federal funds.

§ 1000.2010 What will the Secretary's annual report to Congress contain?

The Secretary's report will:

- (a) Identify:
 - (1) The relative costs and benefits of self-governance;
 - (2) With particularity, all funds that are specifically or functionally related to the provision by the Secretary of services and benefits to self-governance Indian Tribes and members of Indian Tribes;
 - (3) The funds transferred to each Tribe/Consortium and the corresponding reduction in the Federal employees and workload; and
 - (4) The funding formula for individual Tribal shares of all Central Office funds, together with the comments of affected Indian Tribes, developed for the report to Congress as required by 25 U.S.C. 5372(d).

(b) Include the separate views and comments of each Indian Tribe or Tribal organization; and

(c) Include a list of:

(1) All such programs that the Secretary determines, in consultation with Indian Tribes participating in self-governance, are eligible for negotiation to be included in a funding agreement at the request of a participating Indian Tribe;

(2) All such programs which Indian Tribes have formally requested to include in a funding agreement under section 403(c) (25 U.S.C. 5363(c)) due to the special geographic, historical, or cultural significance of the program to the Indian Tribe, indicating whether each request was granted or denied, and stating the grounds for any denial; and

(d) Include in this report, in the aggregate, a description of the internal controls that were inadequate, the technical assistance provided, and a description of Secretarial actions taken to address any remaining inadequate internal controls after the provision of technical assistance and implementation of the plan required by 25 U.S.C. 5324(q)(1).

(e) Programmatic targets established by the Secretary, after consulting with participating Tribes/Consortia, to encourage bureaus of the Department, other than the BIA, the BIE, the BTFA, or the Office of Assistant Secretary for Indian Affairs to ensure that an appropriate portion of those programs are available to be included in funding agreements.

§ 1000.2011 Is the Secretary required to review programs of the Department other than BIA, BIE, the Office of the Assistant Secretary for Indian Affairs, and the BTFA?

Yes. In order to optimize opportunities for including non-BIA programs in agreements with Tribes/Consortia participating in self-governance under the Act, the Secretary shall review all non-BIA programs without regard to the agency or office concerned.

§ 1000.2012 Is the Secretary required to annually publish information under this subpart in the Federal Register?

Yes, the Secretary shall annually review and publish in the **Federal Register**, after consulting with Tribes/Consortia participating in self-governance, revised lists under § 1000.2010(c)(1) and (2) and programmatic targets under § 1000.2010(e), and make such information available to all participating Tribes/Consortia.

§ 1000.2015 Must the Secretary seek comment on the report from Tribes/Consortia before submitting it to Congress?

Yes, before the report of the Secretary is submitted to Congress, it must be distributed by the Secretary to Tribes/Consortia for comment. The comment period must not be less than 30 days.

§ 1000.2020 What may the Tribe's/Consortium's annual report on self-governance address?

(a) The Tribe's/Consortium's annual self-governance report may address:

- (1) A list of unmet Tribal needs in order of priority;
- (2) The approved, year-end Tribal/Consortium budget for the programs and services funded under self-governance, summarized, and annotated as the Tribe/Consortium may deem appropriate;
- (3) Identification of any reallocation of trust programs;
- (4) Program and service delivery highlights, which may include a narrative of specific program redesign or other accomplishments, or benefits attributed to self-governance; and
- (5) At the Tribe's/Consortium's option, a summary of the highlights of the report referred to in paragraph (a)(2) of this section and other pertinent information the Tribe/Consortium may wish to report.

(b) The report submitted under this section is intended to provide the Department with information necessary to meet its Congressional reporting responsibilities and to fulfill its responsibility as an advocate for self-governance. The report is not intended to be burdensome, and Tribes/Consortia

are encouraged to design and present the report in a brief and concise manner.

§ 1000.2025 Are there other data submissions or reports that Tribes/Consortia may be requested to submit?

Yes, Tribes/Consortia may be requested to submit data for the Secretary to determine allocation of funds to be awarded under a funding agreement.

§ 1000.2030 Are Tribes/Consortia required to submit Single Audit Act reports?

Yes. The Single Agency Audit Act, 31 U.S.C. 7501 *et seq.*, and subparts E and F of 2 CFR part 200 applies to a funding agreement under this part. The Tribe/Consortium must provide to the designated official an annual single audit report as prescribed by 31 U.S.C. 7501, *et seq.*

§ 1000.2035 Is there an exemption available for the requirement to submit Single Audit Act reports?

Yes. In accordance with 2 CFR 200.501(d), a non-Federal entity that expends less than the amount as published by OMB during the entity's fiscal year in Federal awards is exempt from submitting an annual single audit report for that year.

§ 1000.2040 Are Tribes/Consortia required to maintain reports and records in accordance with 25 U.S.C. 5305?

Yes, Tribes/Consortia are required to maintain reports and records in accordance with 25 U.S.C. 5305.

Subpart Q—Operational Provisions

§ 1000.2101 How can a Tribe/Consortium hire a Federal employee to help implement a funding agreement?

If a Tribe/Consortium chooses to hire a Federal employee, it can use, in addition to any other available options, one of the arrangements listed in this section:

(a) The Tribe/Consortium can use its own personnel hiring procedures. Federal employees hired by the Tribe/Consortium are separated from Federal service.

(b) The Tribe/Consortium can “direct hire” a Federal employee as a Tribal/Consortium employee. The employee will be separated from Federal service and work for the Tribe/Consortium, but maintain a negotiated Federal benefit package that is paid for by the Tribe/Consortium out of funding agreement program funds; or

(c) The Tribe/Consortium can negotiate an agreement under the Intergovernmental Personnel Act, 5 U.S.C. 3371 through 3375, 25 U.S.C. 323, 25 U.S.C. 48, or other applicable Federal law. The employee will remain

a Federal employee during the term of the agreement.

§ 1000.2105 Can a Tribe/Consortium employee be detailed to a Federal service position?

Yes, under the Intergovernmental Personnel Act, 5 U.S.C. 3371 through 3375, 25 U.S.C. 323, 25 U.S.C. 48, or other applicable law, when permitted by the Secretary.

§ 1000.2110 How does the Freedom of Information Act apply?

(a) Access to records maintained by the Secretary is governed by the Freedom of Information Act (5 U.S.C. 552) and other applicable Federal law.

(b) Unless the Tribe/Consortium specifies otherwise in a funding agreement, records of the Tribe/Consortium shall not be considered Federal records for the purpose of the Freedom of Information Act.

(c) The Freedom of Information Act does not apply to records maintained solely by Tribes/Consortia.

§ 1000.2115 How does the Privacy Act apply?

Unless the Tribe/Consortium specifies otherwise, records of the Tribe/Consortium shall not be considered Federal records for the purposes of the Privacy Act.

§ 1000.2120 What audit requirements must a Tribe/Consortium follow?

The Single Agency Audit Act, 31 U.S.C. 7501 *et seq.*, and subparts E and F of 2 CFR part 200 apply to a funding agreement under this part. The Tribe/Consortium must provide to the designated official an annual single audit as prescribed by 31 U.S.C. 7501, *et seq.*

§ 1000.2125 How do OMB circulars and the Act apply to funding agreements?

(a) A Tribe/Consortium shall apply cost principles under the applicable OMB circular, except as modified by:

(1) Any provision of law, including 25 U.S.C. 5325; or

(2) Any exemptions or exceptions granted by OMB.

(b) In any circumstances where the provisions of Federal statutes or this part differ from the provisions of 2 CFR part 200, the provisions of the Federal statutes or this part govern. This includes the provisions of Public Law 93–638, including 25 U.S.C. 5325 and 5365(c).

§ 1000.2130 How much time does the Federal Government have to make a claim against a Tribe/Consortium relating to any disallowance of costs, based on an audit?

Any claim by the Federal Government against a Tribe/Consortium relating to

the disallowance of costs for funds received under a funding agreement based on any audit under title IV (other than those relating to a criminal offense) shall be subject to the 365-day period set forth in 25 U.S.C. 5325(f), as prescribed by 25 U.S.C. 5365(c)(3).

§ 1000.2135 Does a Tribe/Consortium have additional ongoing requirements to maintain minimum standards for Tribe/Consortium management systems?

(a) Yes, for a Tribe/Consortium required to perform an annual audit under the Single Audit Act and subparts E and F of 2 CFR part 200, the Tribe/Consortium must maintain management systems that are determined to be adequate by an independent audit.

(b) For a Tribe/Consortium that is not required to perform an annual audit under the Single Audit Act, the financial management systems, including records documenting compliance with Federal statutes, regulations, and the terms and conditions of the funding agreement, must be sufficient to permit the preparation of reports required by general and program-specific terms and conditions; and the tracing of funds to a level of expenditures adequate to establish that such funds have been used according to the Federal statutes, regulations, and the requirements of the funding agreement.

(c) As prescribed by subparts E and F of 2 CFR part 200, every Tribe/Consortium must establish and maintain effective internal controls over funds included in a funding agreement that provide reasonable assurances that the Tribe/Consortium is managing the funds in compliance with Federal statutes, regulations, and the terms and conditions of the funding agreement.

§ 1000.2140 Are there any restrictions on how funds awarded to a Tribe/Consortium under a funding agreement may be spent?

Yes, funds awarded to a Tribe/Consortium under a funding agreement may be spent only for costs associated with PSFAs subject to the funding agreement.

§ 1000.2145 What standard applies to a Tribe's/Consortium's management of funds awarded under a funding agreement?

Funds awarded a Tribe/Consortium under a funding agreement, including advance payments, shall be managed by the Tribe/Consortium using the prudent investment standard, provided that the Secretary shall not be liable for any investment losses of funds managed by the Tribe/Consortium that are not otherwise guaranteed or insured by the Federal Government. The prudent investment standard requires the

exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation but in the context of the investment portfolio and as part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the Tribe/Consortium. In making and implementing investment decisions, the Tribe/Consortium has a duty to diversify the investment, unless, under the circumstances, it is prudent not to do so. In addition, the Tribe/Consortium must:

(a) Conform to fundamental fiduciary duties of loyalty and impartiality;

(b) Act with prudence in deciding whether and how to delegate authority and in the selection and supervision of agents; and

(c) Incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the Tribe/Consortium.

§ 1000.2150 How may interest or investment income that accrues on funds awarded under a funding agreement be used?

(a) Interest or income earned on investments or deposits of awards made under a funding agreement may be:

(1) Used for any governmental purpose approved by the Tribe/Consortium; or

(2) Used to provide expanded services under the funding agreement and to support some or all of the costs of investment services.

(b) The retention of interest or investment income under paragraph (a) of this section shall not diminish the amount of funds a Tribe/Consortium is entitled to receive under a funding agreement in the year the interest or income is earned or in a subsequent fiscal year.

§ 1000.2155 Can a Tribe/Consortium retain savings from programs?

Yes, notwithstanding any provision of an appropriations Act, the Tribe/Consortium may retain savings for each fiscal year during which a funding agreement is in effect. A Tribe/Consortium must use any savings that it realizes under a funding agreement, including a construction contract:

(a) To provide additional services or benefits under the funding agreement; or

(b) As carryover; and

(c) For purposes of this subpart only, programs administered by BIA using appropriations made to other Federal agencies, such as the U.S. Department of Transportation, will be treated in accordance with paragraph (b) of this section.

§ 1000.2160 Can a Tribe/Consortium carry over funds not spent during the term of the funding agreement?

(a) Yes. Notwithstanding any provision of an appropriations Act, all funds paid to a Tribe/Consortium in accordance with a compact or funding agreement shall remain available until expended.

(b) If a Tribe/Consortium elects to carry over funding from one year to the next, the carryover shall not diminish the amount of funds the Tribe/Consortium is entitled to receive under a funding agreement in that fiscal year or any subsequent fiscal year.

(c) A Tribe/Consortium may elect to carry over funding from one year to the next without any additional justification or document necessary for expenditure.

§ 1000.2165 After a non-BIA funding agreement has been executed and the funds transferred to a Tribe/Consortium, can a bureau request the return of unexpended funds?

The non-BIA bureau may request the return of unexpended funds already transferred to a Tribe/Consortium only under the following circumstances:

(a) Retrocession;

(b) Reassumption;

(c) Construction, when there are special legal requirements; or

(d) As otherwise provided for in the funding agreement.

§ 1000.2170 How can a person or group appeal a decision or contest an action related to a program operated by a Tribe/Consortium under a funding agreement?

(a) *BIA Programs.* A person or group who is aggrieved by an action of a Tribe/Consortium with respect to programs that are provided by the Tribe/Consortium under a funding agreement must follow Tribal administrative procedures.

(b) *Non-BIA Programs.* Procedures will vary depending on the program. Aggrieved parties should initially contact the local program administrator (the Indian program contact). Thereafter, appeals will follow the relevant bureau's appeal procedures.

§ 1000.2175 Must Tribes/Consortia comply with the Secretarial approval requirements of 25 U.S.C. 81; 82a; and 476 regarding professional and attorney contracts?

No, for the period that an agreement entered into under this part is in effect, the provisions of 25 U.S.C. 81, 82a, and 476, do not apply to attorney and other professional contracts by participating Tribes/Consortia.

§ 1000.2180 Are funds awarded under a funding agreement non-Federal funds for the purpose of meeting matching or cost participation requirements?

(a) Yes, in accordance with 25 U.S.C. 5363(j), all funds provided under funding agreements shall be treated as non-Federal funds for purposes of meeting matching requirements under any other Federal law.

(b) Alternatively, a Tribe/Consortium may elect under 25 U.S.C. 5363(l) to incorporate 25 U.S.C. 5325(j) in their funding agreement for the purpose of meeting matching or cost participating requirements under other Federal and non-Federal programs.

§ 1000.2185 Does Indian preference apply to services, activities, programs, and functions performed under a funding agreement?

Yes, in accordance with section 25 U.S.C. 5307(b) and (c), as amended, Tribal law governs Indian preference in employment in contracting and subcontracting in performance of a funding agreement.

§ 1000.2190 Do the wage and labor standards in the Davis-Bacon Act apply to Tribes and Tribal Consortia?

No, wage and labor standards of the Davis-Bacon Act, 40 U.S.C. 3141 through 3144, 3146 and 3147, do not apply to employees of Tribes and Tribal Consortia. Davis-Bacon wage and labor standards do apply to all other laborers and mechanics employed by contractors and subcontractors of a Tribe/Consortium in the construction, alteration, and repair (including painting or redecorating) of buildings or other facilities in connection with a funding agreement.

§ 1000.2195 Can a Tribe/Consortium use Federal supply sources in the performance of a funding agreement?

Yes. A Tribe/Consortium and its employees may use Federal supply sources (including lodging, airline, interagency motor pool vehicles, and other means of transportation) or other Federal resources (including supplies, services and resources available to the Secretary under any procurement contracts in which the Department is eligible to participate), to the same extent as if the Tribe/Consortium were a Federal agency. While implementation of this provision is the responsibility of the General Services Administration, the Department shall assist the Tribes/Consortia to resolve any barriers to full implementation that may arise to the fullest extent possible.

§ 1000.2200 Does the Prompt Payment Act (31 U.S.C. 3901) apply to a BIA funding Agreement?

Yes. The Prompt Payment Act (31 U.S.C. 3901) applies to a BIA funding agreement.

§ 1000.2205 Does the Prompt Payment Act (31 U.S.C. 3901) apply to a non-BIA program funding agreement?

Yes, unless restricted by a funding agreement, the Prompt Payment Act shall apply to a non-BIA funding agreement.

§ 1000.2210 Is a Tribe/Consortium obligated to continue performance under a compact or funding agreement if the Secretary does not transfer sufficient funds?

A Tribe/Consortium shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds transferred under a compact or funding agreement. If at any time the Tribe/Consortium has reason to believe that the total amount provided for a specific activity under a compact or funding agreement is insufficient, the Tribe/Consortium shall provide reasonable notice of such insufficiency to the Secretary. If, after notice, the Secretary does not increase the amount of funds transferred under the funding agreement, the Tribe/Consortium may suspend performance of the activity until such time as additional funds are transferred. Nothing in 25 U.S.C. 5368(l) reduces any programs, services, or funds of, or provided to, another Tribe/Consortium.

Subpart R—Appeals**§ 1000.2301 What is the purpose of this subpart?**

This subpart prescribes the process Tribes/Consortia may use to resolve disputes with the Department arising before or after execution of a funding agreement or compact and certain other disputes related to self-governance.

§ 1000.2305 How must disputes be handled?

(a) The Department encourages its bureaus to seek all means of dispute resolution before the Tribe/Consortium files a formal appeal(s).

(b) Disputes shall be addressed through government-to-government discourse. This discourse must be respectful of government-to-government relationships and relevant Federal–Tribal agreements, treaties, judicial decisions, and policies pertaining to Indian Tribes, including, but not limited to, such applicable principles described in subpart I.

(c) All disputes arising under this rule, including, but not limited to, disputes related to decisions described in § 1000.2345, may use non-binding informal alternative dispute resolution, such as an informal conference or assistance of the Department's Office of Collaborative Action and Dispute Resolution (CADR), at the option of the Tribe/Consortium. The Tribe/Consortium may ask for this alternative dispute resolution any time before the issuance of an initial decision of a formal appeal. The appeals timetable will be suspended while alternative dispute resolution is pending.

§ 1000.2310 Does a Tribe/Consortium have any options besides an appeal?

Yes, the Tribe/Consortium may request a non-binding alternative dispute resolution process—without the need for a formal appeal. Or, the Tribe/Consortium may, in lieu of filing an administrative appeal under this subpart, file an action in an appropriate Federal court under 25 U.S.C. 5331, or any other applicable law.

§ 1000.2315 What is the Secretary's burden of proof for appeals in this subpart?

As required by sections 25 U.S.C. 5366(d) and 5375, in any administrative action, appeal, or civil action for judicial review of any decision made by the Secretary under this title, the Secretary shall have the burden of proof:

- (a) To demonstrate by a preponderance of the evidence the validity of the grounds for a reassumption under 25 U.S.C. 5366(b);
- (b) To clearly demonstrate the validity of the grounds for rejecting a final offer made under 25 U.S.C. 5366(c); and
- (c) Except as provided in 25 U.S.C. 5366(d), to demonstrate by a preponderance of the evidence the validity of the grounds for a decision made and the consistency of the decision with the requirements and policies of the Act.

Informal Conference**§ 1000.2320 How does a Tribe/Consortium request an informal conference?**

The Tribe/Consortium shall file its request for an informal conference with the office of the person whose decision it is appealing, within 30 days of the day it receives the decision.

(a) The Tribe/Consortium may either hand-deliver the request for an informal conference to that person's office, email the request, or mail it by certified mail, return receipt requested.

(b) If the Tribe/Consortium mails the request, it will be considered filed on the date the Tribe/Consortium mailed it by certified mail. If the Tribe/

Consortium emails the request, it will be presumed received on the next business day following transmission from the Tribe/Consortium.

(c) The document should be clearly identified as "Request for Informal Conference".

§ 1000.2325 How is an informal conference held?

For all purposes relating to these informal conference procedures, the parties are the designated representatives of the Tribe/Consortium and the bureau.

(a) The informal conference shall be held within 30 days of the date the request was received, unless the parties agree on another date.

(b) If possible, at the option of the Tribe/Consortium, the informal conference will be held at the Tribe's/Consortium's office. If the meeting cannot be held at the Tribe's/Consortium's office, the parties must agree on an alternative meeting place or forum, including but not limited to telephonic or virtual meeting forums. If the alternative meeting place is more than fifty miles from the Tribe's/Consortium's office, the Secretary must arrange to pay transportation costs and per diem for incidental expenses to allow for adequate representation of the Tribe/Consortium.

(c) The informal conference shall be conducted by a designated representative of the Secretary.

(d) Only the parties may make presentations at the informal conference.

(e) The informal conference is not a hearing on the record. Nothing said during an informal conference may be used by either party in litigation.

§ 1000.2330 What happens after the informal conference?

(a) Within 10 business days of the informal conference, the person who conducted the informal conference shall prepare and mail to the Tribe/Consortium a brief summary of the informal conference. The summary must include any agreements reached or changes from the initial position of the bureau or the Tribe/Consortium.

(b) Every summary of an informal conference must contain the following language:

Within 30 days of the receipt of the summary from the informal conference, you may file an appeal of the initial decision of the Department of the Interior agency in accordance with subpart R of 25 CFR part 1000. Alternatively, you may file an action in Federal court pursuant to 25 U.S.C. 5331.

(c) If in its judgment no agreement was reached, the Tribe/Consortium may choose to appeal the initial decision, as modified by any changes made as a result of the informal conference, under this subpart.

Post-Award Disputes

§ 1000.2335 How may a Tribe/Consortium appeal a decision made after the funding agreement or compact or an amendment to a funding agreement or compact has been signed?

With the exception of certain decisions concerning immediate reassumption (*see* §§ 1000.2405 through 1000.2430), the Tribe/Consortium may appeal post-award administrative decisions to the Civilian Board of Contract Appeals (CBCA).

§ 1000.2340 What statutes and regulations govern resolution of disputes concerning signed funding agreements or compacts (and any signed amendments) that are appealed to the CBCA?

25 U.S.C. 5331 and the regulations at 25 CFR 900.216 through 900.230 apply to disputes concerning signed funding agreements and compacts (and any signed amendments), that are appealed to the CBCA, except that any references to the U.S. Department of Health and Human Services are inapplicable. For purposes of such appeals:

(a) The terms “contract” and “self-determination contract” mean compacts and funding agreements entered into under the Act; and

(b) The term “Tribe” means “Tribe/Consortium”.

Pre-Award Disputes

§ 1000.2345 What decisions may a Tribe/Consortium appeal under §§ 1000.2345 through 1000.2395?

Decisions that a Tribe/Consortium may appeal include, but are not limited to:

(a) A decision to reject a final offer, or a portion thereof, under 25 U.S.C. 5366(c);

(b) A decision to reject a proposed amendment to a compact or funding agreement, or a portion thereof, under 25 U.S.C. 5366(c);

(c) A decision that provisions in a retained funding agreement and/or compact are directly contrary to any express provision of the Act;

(d) A decision to reassume a compact or funding agreement, in whole or in part, under 25 U.S.C. 5366(b), except for immediate reassumptions under 25 U.S.C. 5366(b)(3);

(e) A decision to reject a final construction project proposal, or a portion thereof, under 25 U.S.C. 5367(g) and subpart K of this part; and

(f) For construction project agreements carried out under 25 U.S.C. 5367, a decision to reject project planning documents, design documents, or proposed amendments submitted by a Tribe/Consortium under 25 U.S.C. 5367(h)(1) and subpart K of this part.

§ 1000.2350 What decisions may not be appealed under §§ 1000.2345 through 1000.2395?

Decisions that may not be appealed under §§ 1000.2345 through 1000.2395 shall be limited to:

(a) Disputes arising under the terms of a compact, funding agreement, or construction project agreement that has been awarded;

(b) Disputes arising from immediate reassumptions under 25 U.S.C. 5366(b)(3) and § 1000.1750 which are covered under §§ 1000.2405 through 1000.2430;

(c) Decisions relating to planning and negotiation grants (subparts C and D of this part) and certain discretionary grants not awarded under title IV (25 CFR part 2);

(d) Decisions regarding requests for waivers of regulations (subpart J of this part);

(e) Decisions regarding construction (subpart K of this part) addressed in § 1000.1455; and

(f) Decisions under any other statute, such as the Freedom of Information Act and the Privacy Act (*see* 43 CFR part 2).

§ 1000.2351 To Whom may a Tribe/Consortia appeal a decision under § 1000.2345?

(a) *Filing an appeal.* A Tribe/Consortium may elect to file a dispute under § 1000.2345 with either the bureau head/Assistant Secretary or IBIA in accordance with this subpart. However, the Tribe/Consortium may not avail itself to both paths for the same dispute.

(b) *Bureau head/Assistant Secretary appeal.* Unless the initial decision being appealed is one that was made by the bureau head (those appeals are forwarded to the appropriate Assistant Secretary—*see* § 1000.2360(c), of this subpart), the bureau head will decide initial appeals relating to these pre-award matters, that include but are not limited to disputes regarding:

(1) Eligibility to participate in self-governance;

(2) Decisions declining to provide requested information as addressed in subpart H;

(3) Allocations of program funds when a dispute arises between a Consortium and a withdrawing Tribe; and

(4) Inherently Federal functions and associated funding.

(c) *IBIA.* The Tribe/Consortium may choose to forego the administrative appeal through the bureau or the Assistant Secretary, as described in paragraph (b) of this section, and instead appeal directly to IBIA.

§ 1000.2355 How does a Tribe/Consortium know where and when to file an appeal?

Every decision in any of the areas listed in § 1000.2345 must contain information which shall tell the Tribe/Consortium where and when to file the Tribe's/Consortium's appeal. Each decision shall include the following statement:

Within 30 days of the receipt of this decision, you may request non-binding informal alternative dispute resolution, such as an informal conference under § 1000.2320, or file an appeal of the initial decision of the Department in accordance with subpart R of this part. Alternatively, you may file an action in Federal court pursuant to 25 U.S.C. 5331.

§ 1000.2357 Which officials is the appropriate bureau head or Assistant Secretary for purposes of subpart R?

(a) Table 1 to this paragraph (a) indicates the appropriate bureau head, for purposes of subpart R, to whom a Tribe/Consortium may file its initial request for appeal when exercising its appeal rights to the bureau head/Assistant Secretary under § 1000.2351 for any BIA program:

TABLE 1 TO PARAGRAPH (a)

Bureau whose initial decision is being appealed	Appropriate bureau head
BIA	Director, BIA.
BIE	Director, BIE.
BTFA	Director, BTFA.
The Office of the Assistant Secretary—Indian Affairs or OSG.	The Assistant Secretary for Indian Affairs.

(b) The appropriate Assistant Secretary for any BIA Program, for purposes of § 1000.2370, shall be the Assistant Secretary for Indian Affairs.

(c) If a Tribe/Consortium elects to exercise its appeal rights to the bureau head/Assistant Secretary under § 1000.2351 for any non-BIA Programs then:

(1) The appropriate bureau head, for purposes of this subpart R, shall be the director of the appropriate bureau which issued the initial adverse decision, including the commissioner of the Bureau of Reclamation.

(2) The appropriate Assistant Secretary, for purposes of this subpart R, shall be the Assistant Secretary who

oversees the appropriate non-BIA bureau which issued the initial adverse decision.

Appeals to Bureau Head/Assistant Secretary

§ 1000.2360 When and how must a Tribe/Consortium appeal an adverse pre-award decision to the bureau head/Assistant Secretary?

(a) If a Tribe/Consortium wishes to exercise its appeal rights to the bureau head/Assistant Secretary under § 1000.2351, it must make a written request for review to the appropriate bureau head within 30 days of receiving the initial adverse decision or the conclusion of any non-binding informal alternative dispute resolution process. In addition, the Tribe/Consortium may request the opportunity to have a meeting with appropriate bureau personnel in an effort to clarify the matter under dispute before a formal decision by the bureau head.

(b) The written request for review should include a statement describing its reasons for a review, with any supporting documentation, or indicate that such a statement or documentation will be submitted within 30 days. A copy of the request must also be sent to the Director of the OSG.

(c) If the initial decision was made by the bureau head, any appeal shall be directed to the appropriate Assistant Secretary. If a Tribe does not request a review within 30 days of receipt of the decision, the initial decision will be final for the Department.

§ 1000.2365 When must the bureau head (or appropriate Assistant Secretary) issue a final decision in the pre-award appeal?

Within 30 days of receiving the request for review and the statement of reasons described in § 1000.2360, the bureau head or, where applicable, the appropriate Assistant Secretary must:

- (a) Issue a written final decision stating the reasons for the decision; and
- (b) Send the decision to the Tribe/Consortium.

§ 1000.2370 When and how will the Assistant Secretary respond to an appeal by a Tribe/Consortium?

The appropriate Assistant Secretary will decide an appeal of any initial decision made by a bureau head (*see* § 1000.2360). If the Tribe/Consortium has appealed the bureau's initial adverse decision of the bureau to the bureau head and the bureau head's decision on initial appeal is contrary to the Tribe's/Consortium's request for relief, or the bureau head fails to make a decision within 30 days of receipt by the bureau of the Tribe's/Consortium's

initial request for review and any accompanying statement and documentation, the Tribe's/Consortium's appeal will be sent automatically to the appropriate Assistant Secretary for decision. The Assistant Secretary must either concur with the bureau head's decision or issue a separate decision within 60 days of receipt by the bureau of the Tribe's/Consortium's initial request for review and any accompanying statement and documentation. The decision of the Assistant Secretary is final for the Department.

Appeals to IBIA

§ 1000.2375 When and how must a Tribe/Consortium appeal an adverse pre-award decision to the IBIA?

(a) If a Tribe/Consortium wishes to exercise its appeal rights to the IBIA under § 1000.2351, it must file a notice of appeal to the IBIA within 30 days of receiving the initial decision or the conclusion of any non-binding informal alternative dispute resolution process.

(b) The Tribe/Consortium may either hand-deliver the notice of appeal to the IBIA, or mail it by certified mail, return receipt requested. If the Tribe/Consortium mails the Notice of Appeal it will be considered filed on the date the Tribe/Consortium mailed it by certified mail. The Tribe/Consortium should mail the notice of appeal to: Interior Board of Indian Appeals, Office of Hearings and Appeals, U.S. Department of the Interior, 801 N Quincy Street, Suite 300, Arlington, VA 22203.

(c) The Notice of Appeal must include:

- (1) A statement describing the Tribe's/Consortium's reasons for a review (including why the Tribe/Consortium thinks the initial decision is wrong and briefly identify the issues involved in the appeal);
- (2) Any supporting documentation;
- (3) If the Tribe/Consortium's Notice of Appeal does not include the items in paragraphs (c)(1) and (2) of this section, an indication that such a statement or documentation will be submitted within 30 days; and
- (4) A statement whether the Tribe/Consortium wants a hearing on the record, or whether the Tribe/Consortium wants to waive its right to a hearing.

(d) The Tribe/Consortium must serve a copy of the notice of appeal upon the official whose decision it is appealing. A copy of the notice of appeal must also be sent to the Director of the OSG. The Tribe/Consortium must certify to the IBIA that it has done so.

(e) The authorized representative of the Secretary will be considered a party to all appeals filed with the IBIA under the Act.

§ 1000.2380 What happens after a Tribe/Consortium files an appeal?

(a) Within 5 days of receiving the Tribe's/Consortium's notice of appeal, the IBIA will decide whether the appeal falls under § 1000.2345. If so, the Tribe/Consortium is entitled to a hearing.

(b) If the IBIA cannot make that decision based on the information included in the notice of appeal, the IBIA may ask for additional statements from the Tribe/Consortium, or from the appropriate Federal agency. If the IBIA asks for more statements, it will make its decision within 5 days of receiving those statements.

(c) If the IBIA decides that the Tribe/Consortium is not entitled to a hearing or if the Tribe/Consortium has waived its right to a hearing on the record, the IBIA will dismiss the appeal and inform the Tribe/Consortium that it is not entitled to a hearing or has waived its right to a hearing.

§ 1000.2385 What procedures apply to Interior Board of Indian Appeals (IBIA) proceedings?

The IBIA may use the procedures set forth in 43 CFR 4.22 through 4.27 as a guide.

§ 1000.2386 What regulations govern resolution of disputes that are appealed to the IBIA?

To the extent not inconsistent with this subpart, the regulations at §§ 900.159 through 900.169 of this title apply to disputes that are appealed to the IBIA, except that any references to the U.S. Department of Health and Human Services are inapplicable. For purposes of such appeals:

- (a) The terms "contract" and "self-determination contract" mean compacts and funding agreements entered into under the Act; and
- (b) The term "Tribe" means "Tribe/Consortium."

§ 1000.2390 Will an appeal adversely affect the Tribe's/Consortium's rights in other compact, funding negotiations, or construction project agreement?

No, a pending appeal will not adversely affect or prevent the negotiation or award of another compact, funding agreement, or construction project agreement.

§ 1000.2395 Will the decision on appeal be available for the public to review?

Yes, the Secretary shall publish all final decisions from the Administrative Law Judge (ALJs) and IBIA under this

subpart. Decisions can be found on the Department's website.

Appeals of an Immediate Reassumption of a Self-Governance Program

§ 1000.2405 What happens in the case of an immediate reassumption under 25 U.S.C. 5366(b)?

If the Secretary immediately reassumes a program under § 1000.1750, the Secretary must comply with §§ 1000.2410 through 1000.2430.

§ 1000.2410 Will there be a hearing?

Yes, unless the Tribe/Consortium waives its right to a hearing in writing. The Deputy Director of the Office of Hearings and Appeals must appoint an ALJ to hold a hearing.

(a) The hearing must be held within 10 days of the date of the notice referred to in § 1000.1750 unless the Tribe/Consortium agrees to a later date.

(b) If possible, the hearing will be held at the office of the Tribe/Consortium. The parties may agree to an alternative meeting place or forum, including but not limited to telephonic or virtual meeting forums. If the hearing is held more than 50 miles from the office of the Tribe/Consortium, the Secretary must arrange to pay transportation costs and per diem for incidental expenses. This will allow for adequate representation of the Tribe/Consortium.

§ 1000.2415 What happens after the hearing?

(a) Within 30 days after the end of the hearing or any post-hearing briefing schedule established by the ALJ, the ALJ must send all parties a recommended decision by certified mail, return receipt requested. The recommended decision shall contain the ALJ's findings of fact and conclusions of law on all the issues. The recommended decision must also state that the Tribe/Consortium has the right to object to the recommended decision.

(b) The recommended decision must contain the following statement:

Within 15 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the IBIA under 25 CFR 1000.2420. An appeal to the IBIA under shall be filed at the following address: Interior Board of Indian Appeals, Office of Hearings and Appeals, U.S. Department of the Interior, 801 N Quincy Street, Suite 300, Arlington, VA 22203. You shall serve copies of your notice of appeal on the Secretary of the Interior, and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies. If neither party files an objection to the

recommended decision within 15 days, the recommended decision will become final.

§ 1000.2420 Is the recommended decision always final?

No, any party to the appeal may file precise and specific written objections to the recommended decision, or any other comments, within 15 days of receiving the recommended decision. The objecting party must serve a copy of its objections on the other party. The recommended decision will become final 15 days after the Tribe/Consortium receives the ALJ's recommended decision, unless a written statement of objection is filed with the IBIA during the 15-day period. If no party files a written statement of objections within 15 days, the recommended decision will become final.

§ 1000.2425 If a Tribe/Consortium objects to the recommended decision, what action will the IBIA take?

(a) The IBIA has 15 days from the date the Secretary receives timely written objections to modify, adopt, or reverse the recommended decision. If the IBIA does not modify or reverse the recommended decision during that time, the recommended decision automatically becomes final.

(b) When reviewing the recommended decision, the IBIA may consider and decide all issues properly raised by any party to the appeal, based on the record.

(c) The decision of the IBIA must:

- (1) Be in writing;
- (2) Specify the findings of fact or conclusions of law that are modified or reversed;
- (3) Give reasons for the decision, based on the record; and
- (4) State that the decision is final for the Department.

§ 1000.2430 Will an immediate reassumption appeal adversely affect the Tribe's/Consortium's rights in other self-governance negotiations?

No, a pending appeal will not adversely affect or prevent the negotiation or award of another compact, funding agreement, or construction project agreement.

Equal Access to Justice Act

§ 1000.2435 Does the Equal Access to Justice Act (EAJA) apply to appeals under this subpart?

Yes. EAJA claims against the Department will be heard under 48 CFR 6101.30, 6101.31 (CBCA) and 43 CFR 4.602, 4.604 through 4.628 (Department) and under the Equal Access to Justice Act, 5 U.S.C. 504 and 28 U.S.C. 2412.

Subparts S—Conflicts of Interest

§ 1000.2501 Is a Tribe/Consortium required to have policies in place to address conflicts of interest?

Yes.

(a) A Tribe/Consortium participating in self-governance must ensure that internal measures are in place to address, pursuant to Tribal law and procedures, conflicts of interest in the administration of programs carried out under a compact and funding agreement.

(b) The Tribe/Consortium and the Secretary may agree that using the Tribe's/Consortium's own written code of ethics satisfies the objectives of the personal conflicts and organizational conflicts provisions of this subpart, in whole or in part.

(c) When the Secretary and the Tribe/Consortium agree to use the Tribe's/Consortium's written codes or measures, the funding agreement will reflect that and the agreed-upon provisions shall be followed, rather than the related provisions of this subpart.

§ 1000.2505 What is an organizational conflict of interest?

(a) An organizational conflict of interest arises when, in the administration of programs performed under a compact or funding agreement subject to this part, there is a direct conflict between the financial interests of the Tribe/Consortium and:

- (1) The financial interests of beneficial owners of Indian trust resources;
- (2) The financial interests of the United States relating to trust resources, trust acquisitions, or lands conveyed or to be conveyed under the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.*; or
- (3) An express statutory obligation of the United States to third parties. This section only applies if the conflict was not addressed when the funding agreement was first negotiated.

(b) This section only applies where the financial interests of the Tribe/Consortium are significant enough to impair the Tribe's/Consortium's objectivity in carrying out the funding agreement, or a portion of the funding agreement.

(c) This section only applies if the conflict was not addressed when the funding agreement was first negotiated. When a Tribe/Consortium becomes aware of an organizational conflict of interest, the Tribe/Consortium must

§ 1000.2510 What must a Tribe/Consortium do if an organizational conflict of interest arises under a funding agreement?

This section only applies if the conflict was not addressed when the funding agreement was first negotiated. When a Tribe/Consortium becomes aware of an organizational conflict of interest, the Tribe/Consortium must

immediately disclose the conflict to the Secretary.

§ 1000.2515 When must a Tribe/Consortium regulate its employees or subcontractors to avoid a personal conflict of interest?

A Tribe/Consortium must maintain written standards of conduct, pursuant to Tribal law and procedures, to govern officers, employees, and agents (including subcontractors) engaged in functions related to the management of trust assets performed under a compact and funding agreement subject to this part.

§ 1000.2520 What types of personal conflicts of interest involving Tribal officers, employees, or subcontractors would have to be regulated by a Tribe/Consortium?

The Tribe/Consortium must ensure that internal measures are in place that specify that no officer, employee, or agent (including a subcontractor) of the Tribe/Consortium reviews a trust transaction in which that person has a financial or employment interest that conflicts with that of the trust beneficiary, whether the beneficiary is the Tribe/Consortium or an allottee. Interests arising from membership in, or employment by, a Tribe/Consortium or rights to share in a Tribal claim need not be regulated.

§ 1000.2525 What personal conflicts of interest must the standards of conduct regulate?

The personal conflicts of interest standards, established pursuant to Tribal law and procedures, must:

- (a) Prohibit an officer, employee, or agent (including a subcontractor) from participating in the review, analysis, or inspection of trust transactions involving an entity in which such persons have a direct financial interest or an employment relationship;
- (b) Prohibit such officers, employees, or agents from accepting any gratuity, favor, or anything of more than nominal value, from a party (other than the Tribe/Consortium) with an interest the trust transactions under review; and
- (c) Provide for sanctions or remedies for violation of the standards.

Subpart T—Tribal Consultation Process

§ 1000.2601 What is the purpose of this subpart?

- (a) This subpart describes the process for engaging in consultations related to self-governance with Tribes/Consortia.
- (b) The Tribal Consultation Process for self-governance matters described in this subpart is intended to apply to consultations commencing after the

effective date of this rule and supersedes previous self-governance consultation processes used by the Secretary.

§ 1000.2605 When does the Secretary consult with Tribes and Consortia on matters related to self-governance?

On matters related to self-governance, the Secretary shall consult:

- (a) To determine which programs are eligible for negotiation to be included in a funding agreement at the request of a participating Tribe/Consortium;
- (b) To establish programmatic targets to encourage the Department's bureaus to ensure that an appropriate portion of non-BIA programs are available to be included in funding agreements;
- (c) On any Secretarial Action with Tribal Implications, provided that the Secretary incorporate input and requests from Tribes and Consortia on topics for consultation.

§ 1000.2610 What principles should guide consultations with Tribes and Consortia?

To the extent practical and not prohibited by law, consultations with self-governance Tribes/Consortia should satisfy the following principles:

- (a) Consultation recognizes Tribal sovereignty and the Nation-to-Nation relationship between the United States and Tribes and Consortia and acknowledges that the United States holds treaty and trust responsibilities to Tribes and Consortia.
- (b) Consultation is a two-way Nation-to-Nation exchange of information and dialogue between official representatives of the United States and Tribes and Consortia.
- (c) Consultation session methods may include, but are not limited to, in-person meetings, video conferences, teleconferences, and correspondence to discuss a specific issue, and must identify the session as consultation in advance of the scheduled meeting.
- (d) Consultation should include both the elected or appointed official of the Tribe, acting in the official capacity as the leader of the Tribe or Consortia, or designee of the elected or appointed representative, and the Departmental official with authority to decide on the proposed Departmental Action with Tribal Implications, or designee.
- (e) The Secretary shall make good faith efforts to invite Tribes and Consortia to consult early in the planning process and throughout the decision-making process and engage in robust, interactive, pre-decisional, informative, and transparent consultation when planning actions with Tribal implications.
- (f) The Secretary should give meaningful consideration to information

obtained during consultation with Tribes and Consortia.

(g) The Secretary should strive for consensus with Tribes and Consortia through consultation or a mutually desired outcome. It is the policy of the Department to seek consensus with Tribes and Consortia.

(h) Consultation will ensure that applicable information is readily available to Tribes and Consortia.

(i) Consultation will ensure that officials from Tribes and Consortia and Federal officials have adequate time to communicate.

(j) Consultation will ensure that Tribes and Consortia are advised as to how their input influenced the Department's decision-making.

§ 1000.2615 What notice must the Secretary provide to Tribes and Consortia of an upcoming consultation?

(a) The Secretary shall issue a notice of consultation which includes:

- (1) Sufficient information on the topic to be discussed, in an accessible language and format, and context for the consultation topic, to facilitate meaningful consultation;
- (2) Identification of a timeline of the process and possible outcomes for Departmental action under consideration;
- (3) The date, time, and location of the consultation;
- (4) If consulting virtually or by telephone, links to join or register in advance;
- (5) An explanation of any time constraints known to the Department at that time;
- (6) Deadlines for Tribes and Consortia to submit written comments on the topic; and
- (7) The names and contact information for Departmental staff who can provide additional information on the consultation.

(b) The Secretary shall provide notice of at least 30 days to Tribes and Consortia of any planned consultation sessions.

(c) The Secretary shall distribute such notice under this section to each Tribe/Consortium through:

- (1) Email to a point of contact for each Tribe and Consortium; and
- (2) Posting the notice on the website for the Department and/or OSG.

(d) The Secretary should, to the greatest extent practical, provide appropriate, available information on the subject of consultation including, where consistent with applicable law, a proposed agenda, framing paper, and other relevant documents to assist in the consultation process.

§ 1000.2620 Is the Secretary required to allow written comments by Tribes and Consortia following a consultation?

Yes. The Secretary shall allow for a written comment period following the consultation of at least 30 days, unless otherwise directed by law.

§ 1000.2625 What record must the Secretary maintain following a consultation with Tribes and Consortia?

(a) The Secretary shall maintain a record of a consultation with Tribes or Consortia that includes:

(1) A summary of Tribal or Consortia input received;

(2) A general explanation of how Tribes or Consortia input influenced or was incorporated into the agency action; and

(3) If relevant, the general reasoning for why suggestions from Tribes or

Consortia were not incorporated into the agency action or why consensus could not be attained.

(b) The Secretary shall timely disclose the outcome of a consultation and decisions made as a result of the consultation.

(c) The record of consultation does not waive any privilege or other exception to disclosure pursuant to the Freedom of Information Act or its implementing regulations.

§ 1000.2630 How must the Secretary handle confidential or sensitive information provided by Tribes and Consortia during a consultation?

Prior to a consultation, the Secretary shall inform Tribes and Consortia of those Federal laws, including the Freedom of Information Act, that may

require disclosure of information provided by the self-governance Tribe/Consortium during a consultation. To the extent permitted by applicable law, the Secretary shall ensure that such information designated as confidential or sensitive by a Tribe or Consortium is not publicly disclosed. The Department should obtain advance informed consent from Tribes/Consortia for the use of confidential or sensitive information provided, and should inform Tribal representatives that certain Federal laws, including the Freedom of Information Act, may require disclosure of such information.

Bryan Newland,

Assistant Secretary—Indian Affairs.

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